# GD News

Gillis Delaney Lawyers

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

## Unfair Dismissal Laws

Unfair dismissal laws are scheduled for an earlier than expected change following a recent announcement by Julia Gillard concerning workplace relations reforms. The changes to unfair dismissal laws will come into force on 1 July 2009.

Under WorkChoices unfair dismissal laws did not apply to business with less than 100 employees however times are about to change and unfair dismissal laws are likely to apply to all businesses, subject to some modification for small businesses.

Currently employees of businesses with more than 100 employees can bring an unfair dismissal claim and the factors that are taken into account include:

- whether there was a valid reason for the dismissal such as the employee's capacity or conduct (including its effect on the safety and welfare of other employees);
- whether the employee was notified of the reason and given the opportunity to respond;
- if the dismissal related to unsatisfactory performance by the employee, whether the employee had been warned before the dismissal;
- the degree to which the size of the employer's undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination;
- the degree to which the absence of dedicated human resource management specialists or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination.

If a dismissal is unfair the Australian Industrial Relations Commission can order the reinstatement of the worker or the payment of compensation to the worker.

Employees that are excluded from federal unfair dismissal laws currently include:

- employees employed for less than six months
- seasonal workers
- employees engaged under a contract of employment for a specified period or a specified task
- employees serving a probationary period determined in advance
- casual employees engaged for a short period
- trainees engaged under a traineeship or an approved traineeship for a specific period
- employees earning $101,300 or above.

With concerns that unfair dismissal laws were to be extended to all employers small business raised concerns and in response to those concerns the Government has developed a Small Business Fair Dismissal Code, a simple and short six paragraph fair dismissal code for small business.. If a small business complies with the Code the employee dismissed cannot make an unfair dismissal claim.

The Fair Dismissal Code will only apply from 1 July 2009 to business employers with fewer than 15 employees. Each full-time, part-time and long term casual employee will count as one employee. A long term casual employee is one who has been employed on a regular and


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systematic basis for at least 12 months. Small business employees will not be entitled to make a claim for unfair dismissal in the first 12 months following their engagement (there is a 6 moth qualifying period for current unfair dismissal rights). Effectively, once they have passed the 12 month period they will be viewed as tried and tested and deserving of protection from unfair treatment. To dismiss someone fairly after 12 months the small business employer will have to comply with the Fair Dismissal Code.

The Fair Dismissal Code will simply require the employer to:

- Give the employee a warning why he or she is at risk of being dismissed based on a valid reason that relates to the employee's conduct or capacity to do the job;
- Provide a reasonable opportunity for the employee to improve his or her performance;
- actually warn the employee that they risk being dismissed if there is no improvement.

In a press release the Minister noted that: "There is no requirement for 'three strikes and you're out'". It is desirable but not necessary for a warning to be in writing."

Compensation for unfair dismissal will be capped at six months pay. All disputes will be overseen by Fair Work Australia using a fast and informal process and legal representation will be allowed only in exceptional circumstances.

Employees who have been dismissed because of a business downturn or their position is no longer needed will not be entitled to bring a claim for unfair dismissal. However, their redundancy needs to be genuine.

The Fair Dismissal Code specifies that for summary dismissal it is fair for an employer to dismiss an employee without notice or warning when the employee believes on reasonable grounds that the employee's conduct is sufficient and serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it will be sufficient, but not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.

The Fair Dismissal Code provides that in discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.

To provide guidance to small business employers the Fair Dismissal Code contains a checklist that can be used when dealing with the dismissal of an employee. It will not be necessary to complete the checklist however use of the checklist is sure to be seen as a good business practice.

A small business employer may be required to provide evidence of compliance with the Fair Dismissal Code if the employee makes a claim for unfair dismissal to Fair Work Australia. Evidence may include a completed checklist, copies of written warnings, a statement of termination or a signed witness statement.

The checklist contains a list of questions. In particular where an employee is dismissed because of the employee's unsatisfactory conduct, performance or capacity to do the job, the checklist identifies the following questions which must be answered:

- Did you clearly warn the employee (either verbally or in writing) that the employee was not doing the job properly and would have to improve his or her conduct or performance, or otherwise be dismissed?
- Did you provide the employee with a reasonable amount of time to improve his or her performance or conduct? If yes, how much time was given?
- Did you offer to provide the employee with any training or opportunity to develop his or her skills?
- Did the employee subsequently improve his or her performance or conduct?
- Before you dismissed the employee, did you tell the employee the reason for the dismissal and give him or her an opportunity to respond?
- Did you keep any records of warning(s) made to the employee or of discussions on how his or her conduct or performance could be improved? Please attach any supporting documentation.

Clearly from the tone of these questions the concept of fairness will still apply to the dismissal of small business employees and no doubt there will be claims brought by dismissed employees who contend that the employer did not comply with the Fair Dismissal Code despite an employers view that they did.

Businesses will no doubt ready themselves for the pending changes to unfair dismissal laws. The Fair Dismissal Code will be there for small business but other businesses need to look towards a regime where unfair dismissal claims become a significant factor when considering the proposed termination of an employee.

**Learner Drivers Owe The Same Duty Of Care As An Experienced Driver**

The High Court has recently determined that a 16 year old driver without even a learner's permit owes the same duty of care to the passengers, including the passenger supervising his driving, as an experienced driver (*Imbree v McNeilly*).

Paul Imbree commenced proceedings in the Supreme Court of NSW against Jessie McNeilly and Qantas Airways Ltd who were the owner of the vehicle that McNeilly was driving. Imbree had an interest in four wheel drive trips around Australia and had taken several such trips to Queensland and the Northern Territory. On this particular trip Imbree was accompanied by two of his sons, an adult friend and McNeilly who was a friend of one of his sons. Imbree was aware that McNeilly had previously driven a four wheel drive vehicle that was owned by his grandparents but also knew that McNeilly did not even have a learner's permit.

One of Imbree's sons and McNeilly took the wheel a couple of times without incident, once during the course of the journey to the Northern Territory, and once in the Simpson desert. When the accident occurred Imbree was in the front passenger seat. Imbree and McNeilly saw a piece of tyre debris on the road and instead of driving over the debris McNeilly steered the vehicle to the right. Imbree yelled at McNeilly to brake but instead when the vehicle was on the far right hand side of the road McNeilly turned sharply to the left and accelerated. This caused the vehicle to roll over, as a consequence of which Imbree sustained severe spinal injuries that rendered him tetraplegic.

At trial in the Supreme Court Justice Dunford found in favour of Imbree finding that McNeilly had "behaved with carelessness over and above what could be attributed merely to inexperience" and awarded Imbree damages of more than $9.5 million, although there was a deduction of 30% for contributory negligence.

McNeilly and Qantas appealed. The NSW Court of Appeal followed the earlier decision of *Cook v Cook* which established that "actions which are fairly seen as the result of (a learner driver's) inexperience and lack of qualification rather than as having been caused by superimposed or independent carelessness did not, of themselves, constitute a breach of the duty of care" which the learner driver owed to a licensed driver who was supervising the learner. The majority found in favour of Imbree as the majority found that McNeilly's actions were careless rather than just inexperienced but two thirds of Imbree's damages were deducted for Imbree's contributory negligence as the instructor of McNeilly.

Imbree obtained special leave to appeal to the High Court. The issue for the High Court was whether or not the decision of Cook should be overturned and whether a driver such as McNeilly without a license owes the same duty of care as a licensed driver.

The High Court determined that McNeilly owed the same duty as any other driver to take reasonable care to his passengers, including Imbree who was supervising his driving. There should not be a different duty of care if a passenger is the driving supervisor. If there was a failure to undertake reasonable supervision then this would go to contributory negligence.

30% of Imbree's damages were deducted as a consequence of Imbree's contributory negligence, but it was still a significant win for Imbree who now receives 70% of his damages.

So remember, next time you are in the car with a learner, they owe you the same duty of care as an experienced driver.

**Liability to Persons Engaged in Criminal Activity**

Is it fair that a person that is injured whilst engaged in an illegal enterprise is entitled to compensation? When a perpetrator of a crime is injured whilst fleeing the scene can they recover compensation. In the NSW Civil Liability Act 2002 impacts on the rights of an individual to make a damages claim if they are injured at the time of or following the commission of a serious offence.

The NSW Court of Appeal has recently delivered a judgment in *Presidential Security Services of Australia Pty Limited - v - Clinton Brilley* which examines these provisions which restrict the rights of persons involved in illegal enterprise to bring personal injury claims and the restrictions have their limitations..

Section 54 of the *Civil Liability Act* provides:

> *"(1) The Court is not to award damages in respect of liability to which this Part applies if the Court is satisfied that:*
> *(a) The death of, or the injury or damage to, the person that is the subject of the proceedings occurred at the time of, or following, conduct of that person that, on the balance of probabilities, constitutes a serious offence, and*
> *(b) That conduct contributed materially to the death, injury or damage or to the risk, injury or damage.*
>
> *(2). This section does not apply to an award of damages against a defendant if the conduct of the defendant that caused the death, injury or damage concerned constitutes an offence (whether or not a serious offence)."*

The legislation prescribes a serious offence as an offence punishable by imprisonment for six months or more.

Clinton Brilley at about 4.00 am one morning broke into and entered the Earlwood Bardwell Park Sports Club in the company of three others with the intent to steal cash from the Club's gambling room. At this time David Bingle, a security guard and the managing director and sole employee of Presidential Security Services of Australia Pty Limited ("Presidential") , was in the Club. Bingle was guarding the premises in the course of his employment and shortly after Brilley entered the Club Bingle fired a Magnum revolver at him and wounded him. Bingle then fired at the accomplices who fled. Bingle fired several shots. He did not know how many.

On a previous occasion Bingle was working as a security guard at the Club when he was confronted by thieves overpowered and disarmed, assaulted and a gun was held to his head.

The version of events provided by Brilley and Bingle differed and CCTV captured some of the incident and the recording demonstrated that Brilley's alleged version was not corroborated.

There was no dispute that Brilley was involved in a criminal act. The question was whether or not Section 54(2) was enlivened in the sense that it was argued that Bingle committed the offence of assault and his employer the company had also committed an offence.

The original trial judge found that Brilley was not deprived of his entitlement to make a claim. Presidential appealed.

The Court of Appeal considered the offence of assault occasioning actual bodily harm in the Crimes Act 1900 and noted that the act of common assault is an act which causes another person to apprehend immediate and unlawful violence without consent. In addition, it is necessary to demonstrate either intention or recklessness to prove an assault within the definition of the Crimes Act. The Crimes Act also contains a criminal law defence of self-defence in Section 418. Effectively, a person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.

Unfortunately in this case the Court of Appeal determined that the original trial judge's findings were insufficient to allow the Court of Appeal to determine whether or not the criminal law defence of self-defence had been made out by Bingle. It therefore determined it was necessary for a new trial to take place in the District Court and further evidence to be given by the parties.

Nevertheless, the Court noted that it was possible for a corporation to commit the criminal offence of an assault. Even where a criminal offence imposes a penalty of imprisonment only, the Criminal Procedures Act provides a mechanism to convert that penalty into a fine.

The Court of Appeal noted that there is authority for the proposition that a company can be attributed with intentions of a person for the purposes of criminal responsibility provided that person is acting in furtherance of the company's interests or at least not against them. There is also authority that the corporation is capable of committing the offence of manslaughter.

As Justice Allsop noted:

> *"In this context it can be concluded that unless a contrary intention appears, the provision of the Crimes Act to which I have referred contain offences that can be committed by a body corporate as well as by an individual. This contrary intention might appear from one or both of two related sources, either on the proper construction of the provision having regard to its text, context and history it can be seen as only intended to speak to the criminal responsibility of individuals, or the crime is one that intrinsically is not capable of being committed by a body corporate."*

Ultimately the Court determined that it was possible that an offence was committed by the company by virtue of Bingle's actions either as Bingle was the directing mind and will of the corporation or that he was performing duties in furtherance of the company's interests.

Justice Ipp, in his judgement noted that:

> *"Once it is accepted that Mr Bingle was the directing mind and embodiment of the defendant, his conduct and his state of mind were capable of being attributed to the defendant, provided of course that his relevant acts were performed on the defendant's behalf. I have mentioned that the defendant admitted in the pleadings that it was vicariously liable for the acts of Mr Bingle on the morning in question. I think inherent in that admission are the further admissions that Mr Bingle's acts were performed in the interest of the defendant, where its acts, and Mr Bingle performed those acts when acting as the directing mind and embodiment of the defendant."*

As the Court of Appeal noted that it is possible for the company to commit an assault within the meaning of the Crimes Act it will now be necessary for the District Court to consider whether or not the grounds of self-defence are made out. If those grounds of self-defence are not made out, then in this case Section 54(2) of the Civil Liability Act will result in Section 54 having no application to Brilley's claim and Brilley will not be exempted from bringing a claim for damages even though he was involved in a criminal activity.

As one can see, criminals still have rights even when they are injured when involved in the commission of a serious criminal offence.

## A Complicated Claim For Care

In NSW if you are injured and your damages are assessed under the *Civil Liability Act 2002* or *the Motor Accidents Compensation Act 1999* then subject to satisfying the thresholds specified in the legislation you are entitled to recover damages for domestic assistance. Even if you don't satisfy this threshold but can satisfy the Court that you have a need for commercial assistance in the future then the Court can award damages for commercial care in the future.

Of all the types of compensation that an injured person is entitled to, the claim for care is often the most difficult to combat. An occupational therapist can be engaged to attend the injured person's home and assess their needs, and, if there is more than one potential cause of the requirement for care, then medical evidence should be obtained to address this causation issue. An example of a particularly complicated claim for care where there was substantial medical evidence considered is the New South Wales Court of Appeal decision of *Kazubowski v McGuirk*.

Why was it so complicated? David McGuirk who had been injured in a motor vehicle accident at the age of 27 had suffered from cerebral palsy and an intellectual handicap since birth. As a consequence of the motor vehicle accident he sustained post traumatic stress disorder, depression, an aggravation of a pre-existing low back condition, fracture of the left ankle and bruising to then left side of the body. The main issue at trial was the chronicity of the PTSD and the diagnosis of major depression and how this would impact on McGuirk's requirement for assistance. But that was not the only complication. The assistance was provided by McGuirk's mother Mrs Burns who had difficulties of her own including poor health and major depression The Court of Appeal was called on to determine how much of the care in the future should be provided on a commercial basis? This was a significant issue given the difference in costing between gratuitous domestic assistance and commercial care.

Before the accident McGuirk was living in a separate house on the property and although his mother did his cooking, laundry and helped him with the cleaning he was able to use public transport by himself and went out one night a week to the club. There was no issue that in the seven months following the motor vehicle accident McGuirk was quite incapacitated and his mother had to do most things for him. But McGuirk developed significant changes in his personality and from February 2002 to February 2005 he spent significant periods of time away from home. On his return home he had difficulty using public transport and could no longer shop for himself.

The trial judge in the District Court allowed domestic assistance at the maximum of 40 hours per week for gratuitous assistance allowed by the legislation, apart from the period when McGuirk was not living at home. 7 hours and later 20 hours per week was allowed during this time period. The trial judge also awarded compensation for 10 years into the future at 40 hours per week for gratuitous care and after that 40 hours a week of commercial care for the balance of McGuirk's life.

The defendant appealed arguing that the allowance was excessive.

The Court of Appeal dismissed a challenge to this allowance and commented:

> *"It remained, given the disabling effect of David's psychiatric illness, that His Honour assessed a need for a significant level of care for the remainder of David's life arising from the condition. The estimate of `the number of hours reasonably required by reason of the psychiatric injury is necessarily imprecise. The finding that Mrs Burns, to date, has been providing 40 hours per week referable to the needs created by the accident, is not a finding that all of David's needs are met by that number of hours. It is a finding of the number of hours that Mrs Burns has devoted to care arising from David's psychiatric condition, in a context that includes her own ill health and the other demands placed on her."*

It did not matter that his mother provided McGuirk with assistance before the accident. The PTSD and depression caused by the accident had created a need for more than 40 hours per week assistance but the assistance was capped at 40 hours by the limit in the legislation.

And what about the second issue? McGuirk argued that his mother would not be able to provide assistance for another 10 years as had been allowed by the trial judge and so claimed compensation based on the cost of the provision of commercial care, a cost considerably higher than that allowed for gratuitous care. This argument was also rejected by the Court of Appeal. The Court of Appeal concluded that the trial judge had properly assessed the period of time that the mother could and would provide the care in the future. This was a medical issue as the mother did not claim that she would not provide the future care rather it was argued by McGuirk that she would be unable to provide the care due to her own medical condition.

All in all a complicated claim - what created the need for the assistance? For how many hours a week is care required? Should care be awarded on a domestic or commercial basis? These are common questions in a claim for domestic assistance but in this particular case even more difficult to answer than is usually the case.

## Significant Restrictions On The Recovery Of Costs In The Local Court

Litigation and debt recovery in the Local Court of NSW can prove to be an expensive exercise and recent changes will mean that lawyers and clients will need to think carefully before commencing proceedings to recover a debt as the costs that will be recoverable from a debtor will be restricted.

The Local Court has power to issue Practice Notes which are general directions made by the Court related to the running and conduct of matters. The Local Court has recently amended a Practice Note which now regulates the amount of costs that the Court will require the unsuccessful party in a dispute to pay.

The objective of the amendment to the Practice Note is to limit the maximum amount of costs that may be awarded for liquidated claims and introduce the concept of proportionality of costs in the sense that the legal costs incurred should not be disproportionate from the amount in dispute. A cap has been set on the amount of costs that will be awarded in specified types of claims.

The proceedings to which the caps on costs apply are either:

- where the amount claimed is less than $20,000.00; or
- where the claim has been transferred from Small Claims to the General Division.

This is in addition to the near absolute bar on recovery of costs in the Small Claims Division of the Local Court (claims under $10,000)

The effect of the amendment is that there are now limits placed on the amount of costs to be awarded. The maximum amount that may be awarded in respect of proceedings which fall into the above categories is:

- where the Plaintiff succeeds, 25% of the amount awarded by the Court in respect of the proceedings; and
- where the Defendant succeeds, 25% of the amount claimed by the Plaintiff.

This does not include general disbursements but does include Counsel's fees.

This limitation will apply unless the Court orders otherwise no matter when the proceedings were commenced or when the

Defence is filed.

The changes will have a significant impact on smaller scale construction matters and in particular, Trade Contractor claims.

Construction matters are virtually always difficult and involve far more detail when compared to other matters of similar quantum. Typically, they involve cross claims for defects, scope of work arguments and quite complex legal arguments. The size of the debt being disputed often bears no relationship to the complexity of the case, and hence the cost. From a legal point of view, there is often no difference between an argument over $2,000 or $200,000.

Costs in even a small construction claim can spiral and it is very likely they will be far more than 25% of the claim. The company chasing the money will be out of pocket as they will be charged the full amount of costs by their lawyers and only recover a maximum amount equivalent to 25% of the amount that was in dispute unless a specific order is made by the Court to distribute costs otherwise than in accordance with the Practice Note.

This practical effect of this amendment may be an increase in the number of building and construction litigation matters filed in the CTTT rather than the Local Court. The rules on costs in the CTTT are that each party generally pays it's own costs, however, the CTTT retains a discretion to order the unsuccessful party to pay costs, particularly where a reasonable offer has been made by the party making the claim and that offer is rejected.

This ability to award costs is also relevant to small disputes where the value of the dispute is less than $25,000.00. In effect, the Tribunal has the discretion to award costs if the Tribunal is satisfied that there are circumstances that warrant the awarding of costs and no such cap on costs exists.

In accordance with the Practice Note, the only way to ensure that the award of costs in the Local Court is not limited is to make an application to the Court not later than two weeks prior to the first review date for the matter seeking a variation of the Rule. Therefore it is imperative that when proceedings are commenced in the Local Court a Notice of Motion be filed as soon as possible after commencement of the proceedings in order to seek that variation and thus allow costs to be awarded to either party based on the merit and success of that parties claim.

Unfortunately, a Notice of Motion such as this just adds more cost to the running of a claim in the Local Court and adds to the differential a small debtor or Trade Contractor might pay even if successful. Presumably the theory is to force smaller debtors to early compromise of their claim rather than face a broadening differential between the costs paid and recovered as a matter proceeds towards a hearing.

The choices for a smaller construction debtor in the Local Court are clear:

- Run a cut down version of your case and hope for the best.
- Add costs to your matter by filing a Motion for exemption from the standing rule (often likely to be rejected by the Court)
- Run a properly prepared case and face a significant costs shortfall even if successful

In effect, the new approach will force Trade Contractors to consider a compromise of the debt to achieve a quick resolution without litigation as a comparison between the legal costs to be spent pursing a claim compared to the amount of costs that can be recovered will demonstrate that proceedings may not be commercially justifiable. This could be a very difficult pill to swallow for a Trade Contractor who relies heavily on cashflow and full recovery for works performed and is forced to pursue litigation by a recalcitrant Principle or head contractor.

It is difficult to see why a successful claimant, regardless of the jurisdiction or the size of the debt, should not recover its full costs on a reasonable party/party basis, as in the case in all other jurisdictions and claims above $20,000 in the Local Court. Discrimination by size of the debt does not seem to accord with the principal of a fairness and equality. But the rules of the game are clear.

## Cost Plus Contracts - A Sub-Contractor's Association With The Builder Is Relevant

A recent decision of the NSW Court of Appeal highlights some of the problems that a builder may face working under a cost plus contract when they engage a sub-contractor and have an association with that contractor such that the persons who have a financial interest in the builder also have a financial interest in the sub-contractor.

In *Bellevarde Constructions Pty Limited("Bellevarde") - v - CPC Energy Pty Limited("CPC")*, the Court of Appeal was called on to consider a dispute between a builder and a developer over charges under a cost plus building contract. The proceedings arose from the fact that unbeknownst to CPC, Bellevarde had entered into a sub-contract arrangement with Cutcross Pty Limited ("Cutcross"), a company related to Bellevarde, so that any profits made by Cutcross were to the benefit of the same persons who had financial interests in Bellevarde. Cutcross performed the functions of a labour hire company but it was not at arms length from Bellevarde. It incurred costs in recruiting labour which were passed on by way of an invoice to Bellevarde for the costs it incurred and a profit mark up.

In the course of administration of the relevant contracts, various certificates had been issued pursuant to which CPC made progress payments. The builder's margin had been applied to the invoices of Cutcross when the progress claims were made.

CPC commenced proceedings against Bellevarde alleging that it had committed the tort of deceit and had engaged in misleading and deceptive conduct under the Trade Practices Act. CPC sought repayment of the amount that it had paid upon each certificate in excess of what had been contemplated by the contract. Effectively, CPC sought to eliminate the margin applied by Cutcross in its invoices.

The cost plus contract provided that Bellevarde were entitled to charge for the actual wages or other remuneration paid to its workmen plus a specified percentage for on-costs as well as the cost of all authorised sub-contracts and prime cost items.

The matter was referred to referees that made findings that Cutcross was not a genuine sub-contractor falling within the terms of the contract and the mark-up in the Cutcross invoice was not a cost of an authorised sub-contractor.

The Court of Appeal confirmed that where the tort of deceit and the statutory cause of misleading and deceptive conduct had been made out, a proper way to assess the damages was to work out the difference between the amount Cutcross charged Bellevarde for day labour and the amount Cutcross paid for the labour.

Effectively the referees had accepted that CPC were misled as they were not informed of the association between Cutcross and Bellevarde and as a result had paid too much. At the end of the day CPC were entitled to recover the overpayment that was the difference between what Cutcross paid for its labour and what it actually charged Bellevarde.

The Court of Appeal noted:

> *"The relevant comparison is between what actually happened and what would have happened in the absence of the misrepresentations. That is how damages were computed. In our opinion, it was open, indeed correct, for the referees to do so. There was no reason to proceed on the basis of the evidence that Cutcross' charges were reasonable. This evidence was not pertinent in the light of the finding of fact that CPC would never have made the payments insofar as they consisted of the Cutcross profit. Bellevarde adduced no evidence that, if CPC had refused to make that part of the payment, they would or could have received more. Builders need to ensure that where there is a relationship in place with an associated company that supplies services to the builder, that relationship is fully disclosed to the principal and there is a clear agreement on the way in which the principal will be charged for the services of the associated entity."*

Bellevarde in this case argued to no avail that the costs that would have been incurred if a different sub-contractor had been used would have been similar to those which were charged by Cutcross. As the referees in the case noted, and was accepted by the Court of Appeal:

> *"If Bellevarde had employed an arms-length sub-contractor, or engaged the same sub-contractor, as had been engaged through Cutcross, there could have been no complaint. It was Cutcross' interposition which added to the costs, and Mr Fielding's (employee of Bellevarde) failure, notwithstanding his assertion that he hid nothing, to disclose, consistently with his hiding nothing, that by that strategy the capped profit margin under the Contract was increased. Even though the charges may have been 'much the same', with which we do not necessarily agree, if Bellevarde had sub-contracted with the workers, CPC would have been paying to have the work carried out conformably with the Contract and not by making the uplift payments adding to the contractually stipulated capped profit margin."*

Builders need to ensure that their relationships with sub-contractors are disclosed to their principals and where a builder profits from the engagement of the sub-contractor, that the principal is well aware of the arrangements and agrees to the manner of invoicing otherwise disputes can and will arise. The principal will usually need to approve the engagement of the subcontractor

and therefore must be appraised of any relationship the sub contractor has with the builder before any approval of the engagement. To do otherwise can result in a damages claim and expensive litigation.

**OH&S Roundup - Multiple Fines For Fatality**

Dewcape Pty Limited and a manager employed by the company Andrew Ishak, were recently fined $75,000.00 and $15,000.00 respectively for a breach of the Occupational Health & Safety Act following a fatality when a worker was electrocuted when a truck mounted concrete placing boom came into close proximity to power lines. The boom either touched the power lines or came sufficiently close to allow electrical arcing and thus electrocuting an employee standing close to the boom.

Chillita, an employee of Mr Pump Pty Limited was licensed to drive the concrete placing boom trucks and had been an operator for 5 years. Chillita, with a linesman labourer, were sent to a site to set up the truck. Mr Pump had a safe work method statement and risk assessment for the operation of the concrete placing boom and there were three separate references to the risks presented by power lines and nominated safe working distances.

Ishak, who was employed by Dewcape but had engaged Mr Pump for the concrete operations, did not require Mr Pump or Chillita to provide him with a copy of the safe work method statement.

Ishak had arranged for a clear area for the truck to be parked which would have open space but Chillita objected as he could not properly deploy the truck stabilisers because the area had been backfilled. Subsequently the truck was placed on a driveway which was in close proximity to trees and a power pole.

The Court noted:

> *"Dewcape's reliance upon sub-contractors to perform work on the work site does not avoid its obligations to ensure safe working on its site and to ensure its subcontractors conform to the safe work practices required."*

Ishak was aware of the requirements for the minimum safe working distances from power lines. He did not realise that the truck was in breach of that distance and it was Chillita who ultimately determined where to place the truck.

It was noted that Ishak, although he was not a director, was the manger on site and had taken responsibility for the company when his father who was the director was ill.

Mr Pump had previously been fined $75,000.00 for its involvement in the incident and Chillita had been fined $300.00 for his personal involvement as an employee of Mr Pump. Ultimately Dewcape was convicted and fined $75,000.00 and Ishak was fined $15,000.00.

**Section 74 Notices And NSW Workers Compensation**

One of the key features of the workers compensation scheme in NSW is the requirement that an insurers/scheme agent must provide a worker with a written statement detailing the reasons for the rejection of a claim. This is commonly known as a Section 74 Notice.

Generally, if issues are not raised in a Section 74 Notice or evidence is not attached to the Section 74 Notice, an insurer will be precluded from raising those issues or relying on the evidence that has not been provided. However, a recent decision of Deputy President Snell in the Workers Compensation Commission has highlighted that there may be room for scheme agents/insurers to rely on documents and a late Section 74 Notice.

Section 289A of the *Workplace Injury Management and Workers Compensation Act* (the "Act") provides that a dispute cannot be referred for determination by the Commission unless it concerns only matters previously notified as disputed. The section also provides that a matter is taken to have been previously notified as disputed if it was notified in a Notice of Dispute under the Act after a claim was made or a claim was reviewed or it concerns matters raised in writing between the parties before the dispute is referred to the Registrar for determination by the Commission concerning an offer of settlement of a claim for lump sum compensation. However, the section also provides the Commission may hear or otherwise deal with a matter subsequently arising out of a dispute in relation to an unnotified matter if the Commission is of the opinion that it is in the interests of justice to do so.

In an Appeal in the *Office of the Public Guardian - v - Manning*, the Deputy President of the WCC was called on to consider an appeal from an Arbitrator's decision that rejected an application to admit late documents including a Section 74 Notice. The dispute related to the death of Manning's late husband and a claim for death benefits and weekly payments for dependants.

The late Mr Manning passed away on 14 December 2003 after being diagnosed with a pulmonary embolism after contracting meningococcal disease. Meningococcal meningitis was a significant condition contributing to the death. On 16 January 2005 Mrs Manning completed a claim form addressed to the late Mr Manning's two employers, the NSW Ombudsman and the Office of the Public Guardian. The Treasury Managed Fund was the insurer for both employers. Mrs Manning alleged that her husband contracted meningococcal disease and subsequently died as a result of contact with customers and/or staff and or contact with persons travelling to and from home and work via City Rail.

The Treasury Managed Fund wrote to Mrs Manning declining liability on behalf of the Office of the Ombudsman. The letter did not mention the Office of the Public Guardian. Mrs Manning commenced proceedings against both employers and those proceedings were discontinued. Subsequently Mrs Manning commenced proceedings again on 21 August 2007. The only document attached to the Reply declining liability was the TMF's letter declining liability on behalf of the NSW Ombudsman. The dispute proceeded to arbitration on 14 November 2007. At the arbitration an issue was raised as to whether or not the Office of the Public Guardian had ever given a Section 74 Notice. The matter was stood over for further arbitration on 6 February 2008, which date was varied to 28 February 2008. On 14 February 2008 TMF wrote to Mrs Manning declining her claim for death benefits as against the Office of the Public Guardian. The letter attached a Notice under Section 74. The Office of the Public Guardian's solicitors wrote to Mrs Manning's solicitors serving an Application to Admit Late Documents which included the Section 74 Notice. The matter ultimately proceeded to arbitration and the arbitrator ultimately refused leave to rely upon the Section 74 Notice which had been served only two weeks prior to the hearing.

The Deputy President noted that the Commission, when exercising its discretion under Section 289A, should take into account the following matters:

- the degree of difficulty or complexity to which the unnotified issues give rise;
- when the insurer notified that it wished to contest any unnotified issue/s;
- the degree to which the insurer has otherwise fulfilled tis statutory obligation to notify the worker of its decision disputing liability;
- any prejudice that may be occasioned to the worker,
- any other relevant matters arising from the particular circumstances of the case;
- a decision by an insurer to dispute a claim for compensation should not be made lightly or without proper and careful consideration of the factual and legal issues involved;
- any insurer seeking to dispute an unnotified matter is seeking to have a discretion exercised in its favour and, accordingly, must act promptly to bring the matter to the attention of the Commission and all other parties;
- any unreasonable or unexplained delay in giving notice of an unnotified matter will be relevant to the exercise of the discretion;
- in exercising its discretion the Commission may have regard to the merit and substance of the issue that is sought to be raised;
- in assessing prejudice to the worker it will be significant to consider when and in what circumstances the worker was first made aware of the unnotified issue that is sought to be raised;
- though it will be relevant to the exercise of the discretion to keep in mind that the Commission must act according to equity, good conscience and the substantial merits of the case, those matters will not be determinative, and
- the general conduct of the parties in the proceedings will also be relevant to the exercise of the discretion."

In Mrs Manning's claim the Deputy Commissioner noted:

> *"The matters for and against the granting of leave pursuant to Section 289A are fairly evenly balanced. The factors against this course relate predominantly to the appellant's (Office of the Public Guardian) tardiness in carrying out its statutory obligations and the somewhat unsatisfactory way it sought to explain such deficiencies. Whilst these matters are important, to refuse leave would mean the issues could not be dealt with on the merit. . . . On balance, considering those factors both for and against the granting of leave. . . I form the view the interests of justice require that I exercise my discretion pursuant to Section 289A to permit the dispute relating to previously unnotified matters to be dealt with."*

The Deputy President then went on to consider the issues raised in the Section 74 Notice and limited the issues that could be relied on which arose out of the Section 74 Notice and in particular refused to permit arguments in relation to Section 9A (that

employment was a substantial contributing factor) which was in the Section 74 Notice.

After reviewing the totality of the evidence after admitting that the Section 74 Notice (but excluding the section 9A issue), the claim for compensation was ultimately dismissed.

In this case, the failure to supply a Section 74 Notice did not prevent the employer from raising issues which had not been previously notified. The balancing exercise to exercise a discretion to admit documents will always be a fine one for the Commission and will turn on the facts in each case. However, it is clear that failure to raise the issues in a Section 74 Notice will not necessarily be fatal to a scheme agent/insurer and in some circumstances the Commission will consider issues in a dispute which have not been previously notified as required by the legislation.

**Workers Compensation Commission - How is it Travelling?**

Although the Workers Compensation Commission has now been in existence for over six years, the procedural amendments to the workers compensation legislation introduced in November 2006 have significantly changed the number of matters and how they are conducted in the Commission.

The recent publication of the statistics regarding the 2007 Commission year have revealed these changes. Prior to November 2006 all disputes involving permanent impairment were first referred to an Arbitrator. Now all disputes solely concerning a degree of permanent impairment must be assessed by an Approved Medical Specialist (AMS). This change has led to the inevitable decrease in the volume of work being referred to Arbitrators and an increase in the volume of complexity of administrative work undertaken by the Workers Compensation Commission staff.

Although the total number of applications registered with the Commission in 2007 was largely similar to 2006, the change in composition of those Applications is reflected in the statistics. For example, there has been a marked decrease in the number of Applications for the Assessment of costs from nearly 650 to just over 200. This can be directly attributed to the changes in the legal costs schedule introduced since the November 2006 amendments. In 2007 there was also a decline in the number of appeals from Arbitrators' decisions, from nearly 300 to just under 200. Similarly there has been a decrease in appeals against AMS decisions from over 1,200 to 600. The decrease in appeals is directly attributable to the November 2006 amendments which lowered the appeal costs available and the continuing poor success rate of appeals. For example, the success rate of an appeal from an AMS is less than 5%.

In contrast to the fall in the matters cited above, there has been an increase in a number of other applications in the Workers Compensation Commission. For example, common law workers compensation claims are on the rise. These are claims that involve the negligence of an employer and subject to compulsory mediation in the Workers Compensation Commission. In 2004 only 50 applications for mediation were registered with the Commission. This had increased to 415 applications in 2006. In line with the Commission's philosophy of alternative dispute resolution, around 80% of matters continue to be resolved through the Mediation process.

Another of the Commission's objectives has been to provide an expedited and timely resolution of matters. More than 50% of applications are resolved in 13 weeks or less with a further 35% of matters being finalised between 13 and 26 weeks. Only 2% of matters are in excess of 12 months and in all cases this was due to the matter being subject to a Medical and/or Arbitral appeal. This compares with the Compensation Court (prior to 2002), where matters were generally resolved in a timeframe of 52 weeks. The short timeframes demonstrated by the Commission are even more impressive when it is considered that around 20% of the matters proceed to final determination by an Arbitrator. This compares to the old Compensation Court system where less than 10% proceeded to final determination by a Judge. The more onerous requirements for up-front disclosure by parties of documentation and issues in dispute introduced in the November 2006 amendments have now resulted in a narrowing of issues by the time it is litigated in the Commission.

The statistics also reveal that at least some claims are now being resolved by way of Commutation settlement. The stringent guidelines imposed on insurers before they can resolve all ongoing liability by way of Commutation including 15% whole person impairment, exhaustion of rehabilitation options to the satisfaction of WorkCover have previously resulted in very few settlements being registered with the Commission By 2006 less than 150 commutation agreements had been registered in the 4 years of the Commission's operation. However in 2007 alone over 100 commutation agreements were registered. Given there are tens of thousands of long-term total workers compensation claims with no prospect of returning the worker to employment, it is refreshing to see a more pragmatic and practical approach being adopted in the Commutation approval process.

We can expect to see further streamlining of the procedures in the Commission in 2009. These include the increased reliance upon electronic filing and a move away from a large number of part time Arbitrators to a core of full time Arbitrators. This move should ensure a consistent determination of matters and a greater level of efficiency. Coupled with other foreshadowed changes to the Legislation with regards to permanent impairment and Commutation settlements, we have no doubt the Commission's statistics for the next 12 months will continue to reflect its dynamic nature.

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