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IN THIS EDITION

Certifiers & Occupancy Certificates. No duty of care owed to purchasers to prevent pure economic loss arising from defects in the property

Purchasing a house today can feel akin to entering a minefield. Contracts for the sale of residential property will usually contain a provision that the property is sold "as is" with no entitlement to make a claim for compensation for any hidden or latent defects in the property.

The quality of building work is often a concern for purchasers and pre-purchase building reports are obtained to assist in the identification of safety hazards, structural damage, minor defects, potential expenditure on repairs and routine property maintenance that may be required. However the inspection is a visual inspection and hidden or latent defects may not be detected. Access to parts of the dwelling may be restricted and the inspector may not have been able to inspect all building works. The inspection report will usually contain a disclaimer noting latent defects may not have been revealed by the inspection.

So what happens if there are hidden or latent defects that come to light after the property is purchased? Is there any recourse available against the builder or owner builder or the certifier that issued the occupation certificate? You might be surprised that the purchaser's rights are more limited than you would expect.

In NSW the *Home Building Act 1991* (the "HB Act").and the *Environmental Planning & Assessment Act* ("EPA Act") regulate residential building works carried out by licenced builders and owner builders. The HB Act provides that statutory warranties are implied into every contract to do residential building work that:

- the work will be performed with due care and skill
- the work will be in accordance with any plans and specifications set out in the contract
- all materials supplied will be suitable for the purpose for which they are to be used

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- materials will be new, unless otherwise specified
- the work will be done in accordance to, and will comply with, the Home Building Act 1989 or any other law
- the work will be done with due diligence and within the time stated in the contract, or otherwise in a reasonable time
- the work will result in a dwelling that is reasonably fit to live in.

The warranties benefit the homeowner and subsequent purchasers of the dwelling and are in effect for 6 years for major defects and 2 years for all other defects, commencing from the date when the work was completed. If building works are defective a claim can be pursued against the builder for a breach of the statutory warranties.

Further, the EPA Act prescribes a regime for the inspection and certification of building works and the issue of four types of certificates, being compliance certificates, construction certificates, occupation certificates and subdivision certificates. The first three of these types of certificates are issued by a consent authority which can be a local council or an accredited certifier. The compliance certificate includes a certificate to the effect that the specified building work or subdivision work has been completed as specified in the certificate and complies with specified plans and specifications. An occupation certificate authorises the use and occupation of a dwelling. A person is not entitled to occupy a dwelling unless an occupancy certificate has been issued. A principal certifying authority for building works is required to be satisfied that:

- there was a construction certificate issued;
- the principal contractor is the holder of an appropriate licence to carry out the work (including an owner who must have an owner builder's permit);
- the building work has been inspected by the principal certifying authority on such occasions as are prescribed by the Regulations;
- any pre-conditions required by the development consent or complying development have been satisfied.

For residential building works, the principal certifying authority must inspect the works:

- at the commencement of the building works;
- after excavation before and prior to the placement of, any footings; and
- prior to pouring any in-situ reinforced concrete building element; and
- prior to covering of the framework for any floor, wall, roof or other building element; and
- prior to covering and waterproofing in any wet areas, and
- prior to covering any stormwater drainage connections; and
- after the building work has been completed and prior to any occupation certificate being issued in relation to the building.

These inspections are known as critical stage inspections.

The principal certifying authority will conduct a final inspection and issue this certificate if satisfied that the building is suitable for occupation or use. A building must not be occupied or used without an occupation certificate.

When a residential dwelling is sold a non-excludable term is implied into relevant contracts for sale of the property stating that completion is not due until at least 14 days after the vendor provides the purchaser with an occupation certificate (or a copy thereof) for the building (or part of the building) to which the lot relates.

These measures provide purchasers of residential properties with comfort that building works have been inspected independently and the works have been completed and the dwelling can be occupied.

Whilst the purchaser usually buys the property "as is" and there is no contractual right to claim compensation from the vendor for defects in the property the purchaser will look to the builder and perhaps the certifier who issued the occupation certificate to compensate them for the costs that will be incurred to rectify the defects.

It is uncontroversial that a claim by a subsequent owner to recover the costs of repairing latent structural defects in a building is one for pure economic loss.

Whether or not a person owes a duty of care to protect a purchaser of property from pure economic loss turns on an analysis of the facts bearing on the relationship between the purchaser who suffers the loss and those who are said to be responsible for that loss. Relevant factors include:

- the foreseeability and nature of the harm;
- the degree and nature of control able to be exercised by a person to avoid harm;
- the degree of vulnerability of the person who suffers the loss;
- the ability of a person to protect themselves from a loss;
- the degree of reliance that a person has on another;
- any assumption of responsibility by a party;
- the nature and consequence of any actions taken or action that could be taken to avoid the harm;
- the existence of conflicting duties arising from principles of law or statute.

The High Court in *Brookfield Multiplex Limited v The Owners Corporation Strata Plan 61288* concluded that

a builder engaged by a developer did not owe a duty of care to prevent economic loss suffered by an owner's corporation arising from defects in the building.

It is said that claims for pure economic loss give rise to difficult questions about the imposition of a duty to prevent economic loss particularly where a person has the capacity to protect itself from harm through contractual rights.

Vulnerability and reliability are seen as the touchstones to a finding that a duty of care exists to prevent economic loss.

Whilst a purchaser of a dwelling may have a claim against a builder for a breach of a statutory warranty in relation to building work sometimes the limitation period to bring a claim has passed and other remedies must be considered such as negligence claims particularly where the certifier failed to carry out critical stage inspections properly.

But does a consent authority that has issued an occupancy certificate owe the purchaser a duty of care to prevent pure economic loss. The simple answer is no. The NSW Court of Appeal in *Ku-ring-gai Council v Chan* has recently determined that certifiers do not owe a duty of care to prevent pure economic loss suffered by subsequent purchasers of properties.

Mr Acres owned a property and undertook building work as an owner builder before listing the property for sale. Mr Acres had used engineers (MHE) to prepare structural drawings and to inspect his work from time to time at his request. Ku-ring-gai Council was the certifying authority for the building works. Ms Chan purchased the property from Mr Acres. The Council issued a Development Consent and Construction Certificate in early 2008 and was the principal certifying authority in accordance with the EPA Act.

Mr Acres' works consisted of a two level extension out the back of an existing house constructed on a concrete slab. Unfortunately there were structural defects in the works which included the lower level of the block work walls lacked sufficient vertical reinforcing bars and were not wholly filled with concrete and were not properly tied into the concrete slab and horizontal beams. This meant the block walls were not structurally adequate to support the weight of the overlying structure. Further, the roof beams and framing erected as part of the upper level were not adequately attached to the block work walls of that level. Mr Acres' building works proceeded between May 2008 and July 2009 when an Occupation Certificate was issued. Council's building surveyor inspected the building works on several occasions and his reports identified five inspections over the 12 month period including inspections of:

- a slab to rear lower ground;
- stormwater drainage;
- block walls;
- frame;
- all building works.

Mr Acres contended he spoke to the certifier during each inspection and actioned any suggestions or instructions provided by the certifier. The defects could have been detected if proper inspections had been carried out.

Ms Chan and Mr Cox decided to purchase Mr Acres' house. The contract for sale attached the Final Occupation Certificate issued by the Council. Ms Chan arranged for a building inspection of the property which comprised of visual inspection and identified a number of defects and the contract for sale was amended to require Mr Acres to rectify the defects the building inspector had identified. However the building inspector had no way of identifying the more significant structural defects. The contract for sale of the property also provided that Chan was purchasing the property subject to all "defects latent or patent" and in its present state and condition and repair. The building inspector's report also contained disclaimers confirming the inspection was limited in scope and it remained possible there were defects in areas the building inspector was unable to inspect.

Mr Acres' work was residential building work carried out by a home builder and the HB Act implied warranties in respect of building works. These warranties pass on to an immediate successor in title to an owner builder. Accordingly purchasers of properties such as Chan benefit from the statutory warranties.

Chan brought proceedings against Acres for breach of those statutory warranties and claimed the cost of rectifying the defects in the property. Chan also sued the Council claiming it was negligent in carrying out the critical stage inspections and that negligence contributed to Chan's economic loss. The Council denied that it owed any common law duty of care to subsequent owners of the property. It also denied there were any statutory duties of care that arose consequent to the EPA Act.

The trial judge was Justice McDougall who found in favour of Chan and concluded Mr Acres had breached the statutory warranties imposed under the HB Act and the Council owed Chan a duty of care and had breached that duty of care. Justice McDougall found that Chan relied on the Council to exercise care in issuing the Final Occupation Certificate and the Council knew of the likelihood of that reliance and it was taken to have assumed, in relation to prospective purchasers, the responsibility of certifying accurately. On that basis the trial judge concluded the Council in its capacity as a certifier owed the plaintiff a duty to use reasonable care in performing its critical stage inspections and in issuing the Final Occupation Certificate and that duty was co-extensive with the contractual and tortuous duty that the Council owed to

Mr Acres under its agreement with Mr Acres to undertake the EPA Act certification of the works. Justice McDougall also found the purchasers were unable to protect themselves as a consequence of the Council's want of care in issuing the certificate and accordingly were vulnerable and that together with their reliance on the Council there was enough to find there was a duty of care owed.

The trial judge found that had the Council undertaken its inspections with due care it would have become aware of all of the alleged defects except for a few minor defects. Accordingly the trial judge found the Council was liable to compensate Chan.

The Council subsequently appealed challenging the finding that it owed a duty of care.

The Court of Appeal noted the purchasers were protected by statutory warranties imposed by the HB Act and the claim against Mr Acres, the owner builder was successful. Further, Chan entered into a contract with Acres for the purchase of the property and could have negotiated terms that could have protected Chan from losses suffered from undetectable or latent defects.

Meagher JA in the leading judgment of the Court of Appeal noted that:

"Though not decisive on the issue of foreseeability, the existence of those statutory rights and the purchasers' ability to secure further contractual protection are significant to questions of reliance, assumption of responsibility and vulnerability".

The Court of Appeal noted that the focus of the inquiry when looking at reliance in this case required reflection on the statutory context on which an occupation certificate was issued.

Meagher JA noted:

"suitability of a building for occupation and use does not require that all building work which is the subject of the development consent has been carried out in accordance with the approved plans and specifications and in a proper and workmanlike manner. Whilst an occupancy certificate may certify that particular building work complies with the specified plans and specifications, the critical stage inspections are undertaken for a different purpose, namely to enable a certifying authority to be satisfied that an occupation certificate which authorises occupation and use may be issued.

The responsibility for ensuring the building work is undertaken in accordance with the conditions of consent is upon the owner or other person having the benefit of the work and the occupation certificate is directed to authorising the occupation and use of a completed building in accordance with its BCA classification and ensuring that the protections of the Home Building Act provides owners and subsequent purchasers are available if residential building work is involved. "

The Court of Appeal held that

"the occupation certificate does not certify the building work does not or is not likely to contain latent defects (whether structural or otherwise) or that the works comply with the relevant plans and specifications or the conditions of the development consent. Nor is it directed to the economic incidents of property ownership, as distinct from the occupation and use of the building by those entitled to do so or their invitees. That subject matter is necessarily narrower than the subject matter of the statutory warranties, which indemnify against non compliance or inadequacy in the building work."

The Court of Appeal noted the trial judge found the Council must have recognised the purchasers would be likely to suffer economic loss if contrary to the terms of the occupation certificate the property was not suitable for occupation as a dwelling.

The Court of Appeal did not agree and noted:

"The evidence in the case demonstrated no more than a general expectation that the Council had acted properly and reasonably in issuing its certificate"

The Court observed the contract for sale of the property included a provision that expressly acknowledged the occupation certificate might be wrong and the Court of Appeal concluded the evidence did not demonstrate there was reliance or assumption of responsibility or a combination of the two which exposed the purchasers to the consequences of the Council's want of care in issuing the occupation certificate sufficient to give rise to a duty of care.

Further, there was no immediate and irretrievable detriment suffered by Chan flowing from the fact of the careless issue of the certificate. Where the home owners had the benefit of statutory warranties from the owner builder, they were not vulnerable to any want of care on the part of the Council in issuing an occupation certificate."

McDougall JA noted:

"There was no reliance or assumption of responsibility such as would give rise to a duty owed by the Council to the purchasers to exercise reasonable care in the issue of the occupation certificate. In the absence of any such reliance, the purchasers were not vulnerable in the sense that they were exposed to, but not able to protect themselves from, the Council's want of reasonable care in issuing that certificate.

It follows that the Council was not subject to the duty of care found by the primary judge".

At the end of the day the Court of Appeal concluded the Council did not owe Chan a duty of care to prevent

harm in the form of pure economic loss. A failure on the part of the Council to properly carry out critical stage inspections was not enough for the Court to find the Council owed Chan a duty of care or that it breached any duty of care.

The case serves as a reminder that the statutory warranties imposed by the Home Building Act are designed to protect persons from losses caused by defective building works including persons that purchase properties from owner builders and the builder should be seen as the starting point for any claim for compensation for losses suffered. Further purchasers seek to include provisions in the contract for sale that provide rights of compensation in the event of the existence of latent defects. Finally as there are ways for purchasers to protect themselves from economic loss flowing from defective works the Courts will find that the Certifier is not liable to a subsequent purchaser for economic loss suffered consequent to latent defects in the property where the certifier failed to detect defective work during critical stage inspections and consequently issued an occupancy certificate.

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Labor Hire Licensing Coming Your Way

The Queensland Government has won the gold medal in the race to introduce a licensing regime to the labour hire industry. The Labour Hire Licensing Act 2017 was approved by Parliament on 12 September 2017 and is likely to commence in early 2018.

Under the new laws civil and criminal penalties will be imposed on businesses, owners and managers who supply labour without being licensed to do so. Penalties will apply to those who provide labour hire and those who use an unlicensed service provider.

In order to obtain a labour hire licence an organisation is required to pass a fit and proper person test which incorporates an analysis of the business' ability to comply with relevant laws and their financial viability.

The maximum penalties for those who thwart the licensing arrangements will be $126,044.60 or three years imprisonment for individuals and $365,700.00 for corporations.

Those who advertise labour hire services without a licence will face a maximum penalty of $24,380.00.

In August 2017 the South Australia Government introduced its licensing scheme with the Labour Hire Licensing Bill 2017 (which is yet to be passed by Parliament) which will create laws similar to those in the Queensland legislation. Like the Queensland Act, the South Australian Bill also makes it an offence to enter into "avoidance arrangements" for the purposes of avoiding obligations under the proposed legislation. However in South Australia a designated entity (union, agency of a state, territory or the Commonwealth) may object to an application for the grant of a licence to a labour hire provider. This right is different to the provision contained in the Queensland Act in that an objection can be made prior to a decision in relation to the granting of a licence, whereas under the Queensland legislation, certain third parties may apply to review a licensing decision that has already been made. Breaching the proposed South Australian laws could result in fines of up to $400,000 for companies and up to $140,000 and five years' jail for individuals.

The Victorian Government has announced it will also have a labour hire licensing regime up and running in the near future and legislation will be introduced to parliament before the end of 2017.

NSW currently seems to be out of step with the approach of other States to the regulation of the labour hire industry. The NSW Government does not appear to have licensing of labour hire providers on its legislative agenda whilst the NSW Opposition has labour hire practices firmly in sight and has announced that if elected it will introduce a licensing scheme for labour hire

There is a focus on labour hire practices in Australia and Queensland has led the charge to introduce a licensing regime for labour hire suppliers and in the not too distant future other States will follow.

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Council Activities – No Duty To Provide No Financial Resources Defence

Serving members of a community is not always easy and Local Councils do not have unlimited funds. A Council's mandate and statutory duties are legislated. However it is common for a Council to go beyond what it is obliged to do to help the community. If the Council assumes a responsibility for an activity and it is not obliged to undertake the activity it can lose the protection of the defences in the Civil Liability Act as was seen in *Five Star Medical Centre Pty Limited v Kempsey Shire Council*.

Five Star Medical Centre owned an aircraft and Kempsey Shire Council owned and operated the Kempsey Aerodrome. On 25 February 2014 the relevant aircraft collided with a kangaroo at the Kempsey Aerodrome runway whilst landing. No one was injured however the aircraft was damaged.

The cost of repair was agreed at $161,195.85.

Kangaroos had been identified as a problem at the aerodrome. In June 2005 the Civil Aviation Safety Authority ("CASA"), the statutory body that regulates safety of civil air operations in Australia, audited the Kempsey Aerodrome. The report prepared following that audit indicated kangaroos and wallabies were more likely to enter the aerodrome than horses and cattle. CASA issued a Request for Corrective Action for failing to prevent access of animals into the movement area and found the service inspection records for the aerodrome had many records of kangaroos being in the movement area.

In September 2005 the Council responded that is intended to warn pilots, indicating it would ensure that the "En Route Supplement Australia ("ERSA")" which provides information to pilots concerning aerodromes would note that a kangaroo hazard exists. Further, the Council noted at that stage the fencing did not sufficiently prevent kangaroos from entering the movement area and as a consequence, Council had sought quotes for electrification of the perimeter fencing and would request a budget for installation of that fencing.

On 22 March 2006 the aerodrome was registered with CASA.

In November 2009 the Royal Flying Doctor Service, who used the aerodrome from time to time, wrote to the Council indicating they had had a number of serious accidents throughout the country from kangaroo collisions on air strips and if the risk of animal collision was too high at Kempsey then the Royal Flying Doctor Service may have to consider not landing at Kempsey.

In January 2011 a local resident had also sent an email to the Council concerning kangaroos being on the runway when an Air Ambulance was taking off. A couple of months later, Troy Baker, who was employed by the Council, responded to the resident, Mr Palmer, indicating that Council would look into a number of measures including raising the existing fence, replacing the fence, culling the kangaroos, installing other devices and/or increasing the number of aerodrome safety inspections that took place. There was no doubt that Council was aware of the issues with the kangaroos.

Australian Commercial Fencing put in a tender for erection of a fence at the aerodrome on 29 March 2011. Peter Sullivan was also engaged by the Council to conduct annual safety inspections of the aerodrome and in his report of December 2011 he referred to the issue of the kangaroos.

In May 2012 an email was sent by Baker to Mr Scott, his supervisor, according to which Council employees had been called to clear kangaroos from the runway prior to either landing or take off. In that email there is reference to the fact a fence should be installed.

On 16 May 2013 the Federal Government announced funding under the Regional Development Australia Fund and Kempsey Council was allocated just over $374,000.

In August 2013 the Kempsey Aerodrome Wildlife Hazard Plan was created. However, there was a change of Government in September 2013 and the funding was withdrawn.

In January 2014 the kangaroos were reported as being at "dangerous levels".

On the day in question the aircraft travelled from Port Macquarie Airport to the Kempsey Aerodrome. There was an ERSA in place for Kempsey Aerodrome which identified the kangaroo hazard. When the pilot, Dr Henry Halterator, approached the runway he did not see any kangaroos. However, after the wheels touched the runway a kangaroo jumped onto grass next to the runway and Dr Halterator therefore braked suddenly and the aircraft swerved slightly. The kangaroo then jumped across the front of the aircraft. Prior to that date Dr Halterator had never seen a kangaroo at the aerodrome.

At the trial there was no issue as to the facts of the case, rather the issue was how the incident should be dealt with given the *Civil Liability Act 2002*.

The trial judge, Judge Russell, was of the opinion the collision between an aircraft and a kangaroo at the Kempsey Aerodrome, which would cause damage to the aircraft, was foreseeable. The evidence supported the fact the Council knew of the risk.

Five Star Medical Centre argued the Council had breached their duty of care in that they had failed to follow the requirements of the Wildlife Hazard Management Plan, failed to erect a partial fence and failed to erect a total fence.

In relation to the first contention, the trial judge noted that a Notice to Airmen should have been issued, indicating that kangaroos entering the aerodrome had increased to dangerous levels. Further, the Council failed to increase inspections of wildlife in January and February 2014 to daily inspections as the plan required.

In support of their defence of the claim Council relied on the provisions of Section 42 of the *Civil Liability Act 2002*. That section provides that the allocation of resources by a public authority cannot be challenged.

There is no doubt that erection of a fence would have significantly reduced the risk of a kangaroo being airside. However, in the trial judge's opinion, this defence was not open to the Council.

The trial judge noted the provision of an aerodrome is not a function required by Council pursuant to the *Local Government Act 1993*. The trial judge noted that even before the *Civil Liability Act 2002* came into effect there was a distinction between the function a Local

Authority assumed and those imposed upon them. In this particular case the Council was not obliged to operate the aerodrome and Section 42 had no operation. In any event, the trial judge was not satisfied there was insufficient funding to not build the kangaroo fence.

The trial judge concluded the Council was liable. In this case the Council provided a benefit for the community and was responsible for the aerodrome but it did not have the benefit of the defence found in the Civil Liability Act which provides:

"42 Principles concerning resources, responsibilities etc of public or other authorities.

The following principles apply in determining whether a public or other authority has a duty of care or has breached a duty of care in proceedings to which this Part applies:-

a) *the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions,*

b) *the general allocation of those resources by the authority is not open to challenge,*

c) *the functions required to be exercised by the authority are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate),*

d) *the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate".*

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CONSTRUCTION ROUNDUP

More pressure on owners corporations to act quickly to rectify defects

In our June 2016 newsletter we looked at the changes to the administration of strata schemes in NSW introduced by the *Strata Schemes Management Act 2015*. Many of these changes came into effect on the commencement of the Act in November 2016. However the regime which requires a defect bond to be provided by the developer of a strata building to provide funds to rectify defects was originally scheduled to commence on 1 July 2017 and has now been deferred until 1 January 2018. This means that the scheme will only apply to construction contracts signed (or where there is no contract and building work commences) from 1 January 2018. NSW Fair Trading will not require developers of new strata schemes to lodge defect bonds before 31 December 2017.

Developers will be required to lodge a bond with NSW Fair Trading equal to 2 per cent of the contract price for residential and mixed use high rise strata buildings. The bond can then be used to pay the costs of rectifying any defective building work identified in a final inspection report.

The scheme applies to building work to construct residential or partially-residential strata properties that do not require coverage under the Home Building Compensation Fund (those over three storeys in height).

Mandatory defect inspection reports are also part of the scheme.

According to Fair Trading NSW the commencement date has been delayed so that procedural and professional requirements supporting the scheme are in place before commencement including finalisation of:

- the standards and procedures relating to strata-specific building inspections
- new digital business processes to support bond lodgement and processing of the scheme.

The *Strata Schemes Management Act 2015* has replaced similar legislation that was enacted in 1996. Under the new Act, an owners corporation that was constituted under the old Act is taken to have been constituted under the new Act and is therefore subject to statutory duties set out in the new Act.

These duties (and actions) of the owners corporation become particularly relevant if it is discovered that the new building has defects. Under the new regime, an inspector (engaged by the developer by agreement of the Owners Corporation) inspects the building for defects on two occasions – firstly 12 to 18 months after completion of the building work and then between 21 months and 24 months after that completion date. Any defects that are identified can be rectified through the application of a bond previously provided by the developer. Importantly, by being involved in this inspection process, the Owners Corporation becomes aware of the existence of defects and the need for their rectification.

Under section 106 of the new Act, the Owners Corporation has certain specific duties to maintain and keep in good repair the common property of the building. These duties were also prescribed in the 1996 Act.

The potential impact of the new statutory duties is apparent from the recent case of *McElwaine v. The Owners – Strata Plan 75975* [2017] NSWCA 239 a case that consider a claim for compensation for defects brought against an owners corporation by a lot owner. A dispute arose between a lot owner and the owners corporation of an apartment building in Newcastle East as to whether the lot owner was entitled to damages as compensation for the owners corporation's failure to prevent water ingress into the lot owner's apartment.

The lot owner had commenced proceedings in the NSW Supreme Court claiming damages of around $860,000 in diminution of value of his unit on the basis that the continued water ingress and resultant mould made it unfit for habitation, as well as loss of rent and expenses. The Owners Corporation had submitted that as a consequence of the existence of the statutory regime providing for statutory duties to the lot owners it did not owe the lot owner a separate duty of care at common law.

The primary judge (Young AJ) had agreed and dismissed the proceedings, holding that under the 1996 Act a lot owner had no remedy against an owners corporation in common law nuisance for a breach of a statutory duty under the Act.

The lot owner appealed to the NSW Court of Appeal.

The Court of Appeal considered whether Parliament had intended that the statutory regime in the 1996 Act abrogated the rights of a lot owner or occupier to damages under common law. In particular, the Court noted that the regime under the 1996 Act provided for an adjudicator to have the power to make certain orders in relation to the exercise by the owners corporation of its statutory duties, but the adjudicator did not have the power to award damages. Basten JA commented that it would not have been in any degree improbable if Parliament had set out to establish a separate scheme for regulating losses suffered by lot owners as a result of the conduct of the owners corporation of strata lots, but it did not do so.

White JA noted that the primary judge had observed that the Court of Appeal had previously decided that a breach of an obligation under the statutory duties prescribed by the 1996 Act would not sound in damages, and the remedies for such a breach were confined to those specified by the Act. The primary judge had also taken into account that if common law claims by lot owners would have to be met by an owners corporation, then that would completely throw out of balance the scheme for ensuring that there is always sufficient funds available to meet the cost of keeping the building in good repair. In his Honour's view this told against a lot owner having a common law cause of action for a matter that would come within the statutory duties owed by the owner's corporation.

Notwithstanding the primary judge's view, White JA held (with the other members of the Court of Appeal agreeing) that an owners corporation, as legal owner of the common property, may owe a general duty of care or a general law duty not to create or to abate a nuisance, and not merely a statutory duty that can be enforced only through the mechanisms of the Act.

His Honour also noted that there was significant High Court authority that in circumstances where there are two alternative constructions of a statute, the construction that is consonant with the common law is to be preferred (citing *Balog v. Independent Commission Against Corruption*; *Berowra Holdings Pty Limited v. Gordon*, and others).

Accordingly, the Court of Appeal held that there was nothing in the 1996 Act that indicated a legislative intention to affect a lot owner's common law right to sue the owners corporation for negligence or nuisance in relation to its control and management of the common property, and the fact that neither the adjudicator nor the NSW Civil and Administrative Tribunal could make an order for the payment of damages indicated that Parliament did not intend that the scheme under the 1996 Act excluded a lot owners right to sue the owners corporation for negligence or nuisance in respect of its management or control of the common property.

Although it appeared that this specific issue had not been raised before the NSW Courts prior to this case, it seems that Parliament had the foresight to make its intentions clearer when drafting the replacement 2015 legislation, by adding the specific notation that section 106 (prescribing the statutory duties of owners corporations under the Act) does not affect any duty or right of the owners corporation under any other law.

With the current boom in the construction of apartment buildings, it is inevitable that there will also be significant defects to be addressed, including defects in the common property area that is within the responsibility of the owners corporation. Common defects in this regard affect the fabric of the building or cause water ingress.

McElwaine v. The Owners – Strata Plan 75975 [2017] NSWCA 239 confirms that the owners corporation is a target for claims for compensation for defects brought against an owners corporation by a lot owner. With the new legislation and the owners corporation role in the defect inspection process, the owners corporation will be put on notice that defect exist, and if that defect is not rectified so that the building remains in good repair it is inevitable that there will be a claim for compensation pursued against the owners corporation by a lot holder for any damage caused by the defect. A failure to act with appropriate timeliness may not only be a breach of the owners corporation's statutory duties in this regard, but may also lead to a claim that it has breached its common law duty of care owed to lot owners and occupiers. The new regime will present

challenges for professional indemnity insurers of owners corporations.

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EMPLOYMENT ROUNDUP

Franchisors Liable for Treatment of Employees by Franchisees

The Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 has been passed by the Federal Government and new legislation which will hold franchisors and holding companies responsible for contraventions of the *Fair Work Act 2009* by their franchisees and subsidiaries will come into play very shortly.

A franchisor who has a significant degree of influence or control over a franchisee's affairs will be liable for the franchisee's contravention of the Fair Work Act where the franchisor knows or ought reasonably to have known of the contravention and the franchisor has failed to take reasonable steps to prevent them. Similarly Holding companies will be liable for contraventions by subsidiaries.

The new legislation will amend the *Fair Work Act 2009*.

Franchisors will be obliged to take reasonable steps to prevent a contravention of the *Fair Work Act 2009* by franchisees in respect of the following Fair Work provisions:

- contravention of National Employment Standards (Section 44(1));
- contravention of Modern Awards (Section 45);
- contravention of Enterprise Agreements (Section 50);
- contravention of Workplace Determinations (Section 280);
- contravention of National Minimum Wage Orders (Section 293);
- contraventions of Equal Remuneration Orders (Section 305);
- contravention of the methods & frequency of payments requirements (Section 323);
- imposition of unreasonable requirements on employees to spend or pay amounts (Section 325(1));
- contravention of the obligations in relation to guaranteed annual earnings (Section 328);
- misrepresenting employment as an independent contracting arrangement (Section 357(1));
- dismissing an employee to engage an independent contractor (Section 358);
- misrepresentations to engage an individual as an independent contractor (Section 359);
- contravention of employer obligations in relation to employee records (Section 535);
- contravention of employer obligations in relation to payslips (Section 536).

A franchisor will be responsible for the franchisee's breach where the franchisor or an officer within the franchisor knew or could reasonably have been expected to have known the contravention by their franchisee entity would occur or at the time of the contravention by the franchisee the franchisor or an officer in the franchisor knew or could reasonably be expected to have known that a contravention by the franchisee was likely to occur.

Franchisors and holding companies will not contravene the Act if they have taken reasonable steps to prevent the relevant contravention by the franchisee and the Courts will look at the following factors when assessing whether reasonable steps have been taken:

- the size and resources of the franchise or holding company;
- the extent to which the franchisor had the ability to influence or control the conduct of the franchisee;
- any action taken towards ensuring the contravening franchisee had a reasonable knowledge and understanding of its requirements under the Fair Work Act 2009;
- the arrangements the franchisor has in place for assessing its franchisee's compliance with applicable Fair Work laws;
- the franchisor's arrangements for receiving and addressing possible complaints about alleged under payments and other alleged contraventions of the Fair Work Act 2009;
- the extent to which the franchisor's arrangements with the franchisee encourage or require the franchisee to comply with the *Fair Work Act 2009* and other workplace laws.

There is no requirement to proceed with a claim against the franchisee before looking to the franchisor and seeking a civil penalty order for a contravention of the *Fair Work Act 2009* however franchisors will be able to recover from their franchisees any payments they make to employees by virtue of their liability as a responsible franchisor.

The laws also introduce enhanced penalties for "serious contraventions" of the *Fair Work Act 2009*. Where a person knowingly contravenes a provision of the *Fair Work Act 2009* and the person's conduct constituting the contravention was part of a systematic pattern of conduct relating to one or more other

persons, there will be a "serious contravention" of civil remedy provisions under the Act.

In determining whether a person's conduct constitutes a systematic pattern of conduct the Court will have regard to the number of contraventions, the period over which the contraventions occurred, the number of persons affected and the person's response or failure to respond to any complaints made about contraventions.

The penalty for a "serious contravention" is ten times higher than for non serious contraventions, with the current maximum penalty for an individual being $126,000 and for corporations $630,000.

Franchisors and holding companies must be aware they can now be held liable for breaches of employment laws by franchisees and subsidiaries.

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Industrial Manslaughter in Queensland - 20 Years Imprisonment

The Queensland Government has broken ranks with other States and Territories in Australia in the management of work health and safety with the introduction of the Work Health & Safety and Other Legislation Amendment Bill 2017 and a proposed new offence of Industrial Manslaughter.

The creation of the offence of industrial manslaughter picks up on recommendations of the Best Practice Review of Work Health and Safety in Queensland and follows on the heels of the fatalities at Eagle Farm Racecourse and Dreamworld last year.

The proposed laws will provide for a maximum penalty of $10 million for a corporate offender and 20 years imprisonment for any individual who commits industrial manslaughter.

Businesses and "senior officers" will commit the crime of industrial manslaughter if:

- a worker dies, either in the course of carrying out work for the business or undertaking or because a worker is injured in the course of carrying out such work and later dies; and
- the conduct of the business or the senior officer causes the worker's death by substantially contributing to the death; and
- the business or senior officer is negligent about causing the death.

The Bill defines "senior officer" as "a person who is concerned with or takes part in the corporation's management, whether or not the person is a director or the person's position is given the name of executive officer".

Working directors, officers and business managers will be exposed to prosecution when there is a work fatality. Persons in management roles will soon be potential targets for prosecution where currently the definition of "officer" in existing work health and safety laws in Queensland is more limited.

It is of some concern that the only penalty for an individual who commits an offence is a term of imprisonment. That in itself is sure to encourage vigorous discussion at Board meetings if the proposed laws are passed.

Further the Bill does not define the term "negligence" and the level of negligence required to attract criminal sanctions is unclear. The terms "recklessness" and "gross negligence" have not been used which would suggest that more than a negligent act is required. It will be interesting to see how the Court will approach the analysis of a person's involvement in an offence and the quality of negligence required to attract criminal sanctions.

The Bill also makes it clear that where there is a fatality in Queensland, there will be no alternative to prosecution as the Regulator will not be allowed to accept enforceable undertakings for Category 1 offences (which require and element of recklessness) and Category 2 offences which result in a fatality.

The Bill was introduced to Parliament on 22 August and businesses and managers of businesses in Queensland need to be aware of the shifting sands and the possibility of a new criminal offence of industrial manslaughter.

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Can management action be bullying?

No surprise that the answer to this is – yes, management action can constitute bullying attracting intervention by the Fair Work Commission (*FWC*).

How, and in what circumstances, is this likely? A recent FWC decision provides important guidance – Stefan [2017] FWC 4677.

A full time worker made an application to the FWC under section 789FC of the *Fair Work Act 2009* (***the Act***) for an order to stop bullying conduct he alleges has taken, and may in the future take place, within his workplace. The workplace concerned was a mushroom farm located in South Australia.

The worker alleged that he has been subject to bullying conduct since November 2016 by the employer's General Manager and by its Managing Director and Chief Executive Officer.

The employer denied the allegations of bullying conduct. It asserted that some of the alleged conduct did not occur at all. It claimed other alleged conduct was not bullying as it constituted reasonable management action conducted in a reasonable manner.

In anti-bullying applications, the FWC must apply the statutory definition of bullying set out in sections 789FD(1) and (2) of the Act:

"(1) A worker is bullied at work if

(a) While the worker is at work in a constitutionally-covered business:

(i) an individual; or
(ii) a group of individuals;

repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and

(b) that behaviour creates a risk to health and safety.

(2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner."

Orders to stop bullying can only be made if bullying (as defined) has occurred and if "there is a risk that the worker will continue to be bullied at work by the individual or the group" (section 789FF(1)(b)(ii)).

The power to make a bullying order is discretionary. While the FWC may make any order it considers appropriate, it has no power to make an order requiring payment of a pecuniary amount. Any orders made must be preventative in nature, that is, forward looking; they must be designed to "prevent the worker from being bullied at work by the individual or the group".

The worker claimed that he had been bullied by way of both exclusionary conduct and by unreasonable disciplinary action by management. The central complaints about discipline were:

- He had been subject to a Performance Improvement Programme and warnings which are unmerited and part of an unfair disciplinary process;
- Investigations into his alleged conduct and his complaints against others had been unfair and not independently assessed.

The employer's response was that:

- the performance review process and warnings were the product of reasonable management action taken in a reasonable manner;
- investigations into the worker's conduct had been fairly conducted. His complaints against others had been investigated and found to be unsubstantiated;
- the worker continues to make false claims and insinuations against officers of the employer, which is of serious concern to the employer and damaging to the employment relationship.

The first principal claim regarding unreasonable management action covered conduct before the anti-bullying application.

In relation to a final written warning given prior to the proceedings, the worker said that the warning was unjustified. The worker was already on a Performance Improvement Programme but did not respond or participate effectively in that programme.

The employer said that the final written warning was justified because it concerned an issue of serious risk to production and to production systems caused by the worker's error. The warning was decided on only after he conducted an investigation of the matter. The worker was provided a full opportunity to explain his conduct and respond to the employer's concerns.

The FWC was satisfied that the final written warning was based on a genuine belief that the warnings were justified, and after due investigation. In the context of previous warnings and the Performance Improvement Programme, the warning was reasonable management action taken in a reasonable manner.

The second principal claim, related to conduct occurring whilst the anti-bullying application was on foot.

Critically, the FWC expressed the positions that *"A bullying application is no shield of immunity from an employee's contractual obligations and the employer's contractual rights to enforce those obligations."*

Self-evidently though, an employer facing a bullying application ought to be aware that their conduct and that of persons in the workplace dealing with the applicant are under independent scrutiny by the FWC at least during the life of the application and in respect of its subject matter.

The conduct in question concerned a letter in which the worker was informed that his employer considered he had been late to return to work on that day and that "this kind of poor timekeeping will not be accepted in the future" and "further transgressions may lead to disciplinary action."

The day in question was one on which the worker had participated (from his home) in a FWC telephone hearing. The letter said:

"Our research shows that it should have taken you 13-14 minutes to return to work. This means you would have returned approximately 30 minutes after the call ended, with the knowledge that other people were waiting for you to complete your work. However, you arrived back at work 45 minutes after the end of the call, 15 minutes later than anticipated."

On the evidence, the FWC was satisfied that the worker had a reason for being late. It considered the decision to issue a letter alleging poor timekeeping on 10 August to have been unreasonable management action, and symptomatic of a seriously deteriorating relationship, and as evidence that the worker's conduct was being minutely scrutinised.

Thus the giving of the letter constituted unreasonable management action.

It was not, however, repeated. Conduct is only bullying conduct under the Act if there is repeated unreasonable behaviour towards a worker which creates a risk to health and safety. For that reason the claim of bullying was not sustained.

Micro-management can be a tempting and natural human resources response to an underperforming employee. It needs to be carried out carefully, however, to avoid creating more problems than it solves.

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Sentencing considerations for work health and safety breaches

In recent weeks, there has been a spate of judgments handed down where sentences have been imposed by the courts in various Australian States for breaches of the work health and safety legislation. The offences have ranged from minor in nature to very serious, with workers being slightly hurt to suffering fatal injuries. In determining the appropriate sentence for breaches of the legislation, the courts are required to take a number of factors into account, including: the level of culpability of the accused; its level of contrition; individual and general deterrence; and the offender's likely prospects of rehabilitation. The application of these factors can lead to quite a variance in outcomes.

In *SafeWork v Macleay River Protein Pty Limited* [2017] NSWDC 204, the Court considered a prosecution where a young employee of an abattoir located near Kempsey in New South Wales died when the handbrake of a forklift failed and crushed the worker against a wall.

The employee, Mr Jason Noble, had parked the forklift on a slight incline in front of a wall (applying the handbrake) and had got out to reposition a bin on the forklift tines. The handbrake had released, and the forklift had moved forward and pinned Mr Noble to the wall.

The forklift had recently been serviced, but the braking system had not been disassembled and tested. The police examined the forklift after the incident and found that the vehicle's braking system, including the handbrake, operated correctly on level and inclined surfaces. However, a later examination by an expert found that found that the handbrake lever and notches in the lever were worn, allowing the handbrake to release with minimal pressure. The forklift's operating manual specified that the parking brake mechanism should be inspected every 12 months for ratchet wear and damage and that worn parts should be replaced.

Mr Noble had not held a high risk licence to operate a forklift and had not been supervised by a licensed forklift driver. In addition, a system in place at the abattoir to control the use of the forklifts by keeping the keys in the workshop had not been enforced, allowing general access to the vehicles. Further, there had been no system to deal with the risk of parking forklifts on inclined surfaces, such as requiring that the wheels be chocked. It was relevant that the abattoir owned the necessary chocks but these were not kept with the forklifts. Therefore, it would not have required any additional financial outlay by the company to have prevented Mr Noble's death from occurring.

After the incident the abattoir created and implemented new systems of safety for the operation of forklifts. These included new training measures in relation to the use of forklifts, requiring that handbrakes be fully applied and chocks placed under wheels, and prohibiting walking between a parked forklift and other structures.

The court noted that Macleay River Protein had pleaded guilty and had shown appropriate contrition for the offence. It had fully co-operated with SafeWork NSW and had actively worked with SafeWork NSW to improve its operating and safety systems. Prior to the incident, the company had had an unblemished work health and safety record with no serious accidents or injuries, and its actions in improving its systems since the incident showed that it had good prospects of rehabilitation.

The court held that the company's level of culpability was in the mid-range and out of a possible maximum fine of $1,500,000 a starting fine of $500,000 was appropriate. This was reduced by 25% to account for an early guilty plea, leading to a fine of $375,000 being imposed.

An interesting comparison is a case last year from South Australia in which a young migrant worker from Taiwan was severely injured at a meat processing plant (*Marie Boland v. Big Mars Pty Limited [2016] SAIRC 11*). The worker was present at the plant under a labour hire arrangement but had been given no safety training or formal induction by the labour hire company, Big Mars. The meat processing plant had given the worker a work instruction written in English (which the worker did not understand) and the worker had been told to interpret the document for himself in his own time.

The worker's tasks had included cleaning meat hooks in a sodium hydroxide (caustic soda) bath. The bath

had gates to prevent workers from falling in; the worker had left the gate open for better access to the hooks. Inevitably, he fell into the bath and was severely burnt. He was hospitalised for several months and underwent a number of skin grafts.

Both the meat processing plant and the labour hire company were prosecuted in relation to the incident.

The labour hire company admitted that it had no work health and safety policies in place, and it took no steps to deal with the obvious communication issues for employees who did not read or speak English or who worked alone at the abattoir.

The meat processing plant had provided the worker with poor information and very little training when he had started work at the abattoir, and its supervision of the worker had been sporadic.

The court held that the labour hire company had a duty to provide an appropriate safety induction in the worker's native language and to take all reasonable practicable steps to regularly monitor and review each workplace's safety standards. Big Mars was well placed to do this since it was very familiar with the abattoir and had about 40 employees working there.

However, Big Mars had "failed miserably to carry out any of its fundamental safety responsibilities".

The court also noted that no officer of Big Mars had attended the sentencing hearing and the company had made no statement of regret or contrition. They had not made any reparations to the injured worker and the only support offered to the injured man was by one visit to him in hospital.

As a consequence, the court held that there was little confidence that the labour hire company would comply with its work health and safety obligations in the future. Accordingly, individual deterrence was an important aspect for sentencing. However, the court also held that general deterrence for labour hire businesses was also an important sentencing consideration.

Taking these factors into account, the court declined to reduce the fine by 40% (which would otherwise have been allowable under South Australian legislation for a guilty plea). Instead, the court allowed a reduction of only 20%. After the application of that reduction, the court imposed a fine of $240,000, along with the prosecutor's costs and a victim of crimes levy.

These cases illustrate the importance placed by the courts on situations where a risk of injury or death can be easily avoided with a few simple positive steps, but a company has failed to do so. Sometimes this can be a mere oversight which the company is not aware of until a person is injured (or worse) but the company's actions to correct the oversight after such an incident then become extremely relevant to the severity of the sentence that will ultimately be imposed.

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WORKERS COMPENSATION ROUNDUP

How to apportion primary and secondary psychological injury in an impairment claim

The medical assessment of permanent impairment is not always an easy matter, particularly where there is a mixture of physical and psychological injuries.

The *Workers Compensation Act 1987* provides that no compensation is payable in respect of secondary psychological injury.

Section 65A of the 1987 Act provides:

> *"(1) No compensation is payable under this Division in respect of permanent impairment that results from a secondary psychological injury.*
>
> *(2) In assessing the degree of permanent impairment that results from a physical injury or primary psychological injury, no regard is to be had to any impairment or symptoms resulting from a secondary psychological injury.*
>
> *(3) No compensation is payable under this Division in respect of permanent impairment that results from a primary psychological injury unless the degree of permanent impairment resulting from the primary psychological injury is at least 15%."*

Secondary psychological injury is defined as *"psychological injury to the extent that it is arises as a consequence of, or secondary to, a physical injury".*

It is common to see physical injuries result in secondary psychological injuries. Sometimes an incident will cause injuries which include primary and secondary psychological injuries.

Permanent impairment assessments must differentiate between primary and secondary psychological injuries the impairment caused by the secondary psychological injury must be excluded from the calculation of a persons impairment. That will present challenges for the medical practitioner who must differentiate between any primary psychological injury and any secondary psychological injury.

An example of the difficulties which confront medical practitioners was seen in the recent decision of *Mercy Centre Lavington Limited v Kiely & Ors*.

The employer operated a residential care facility for people with intellectual disability and behavioural disorders. The worker commenced employment in March 2009 as a residential care coordinator. The worker was assaulted in April 2011 by a resident. The worker injured her right shoulder and neck and became distressed and anxious by the assault. After a

period of time off work she returned to work in a different role, finding that her work exacerbated her physical injuries and she was stressed and depressed about her physical injuries.

The worker's condition deteriorated, leading to periods of incapacity and in late 2012 she ceased work. Various medical and psychological investigations were undertaken and it was ascertained the worker had a history of depression and anxiety and insomnia which predated her injuries.

The worker was ultimately referred to an approved medical specialist ("AMS") for an assessment of whole person impairment arising out of her primary psychological injury attributable to the assault.

Dr White assessed the impairment and went about an apportionment of symptoms between the primary psychiatric condition and the secondary psychiatric condition, ultimately concluding the secondary psychiatric condition comprised 5% of an overall 17% whole person impairment. Accordingly Dr White determined the primary psychological injury had caused a 12% impairment.

The worker appealed that assessment to a Medical Appeal Panel which ultimately led to an amendment of the assessment primarily as the Medical Appeal Panel applied a 10% deduction to the overall impairment assessment, utilising Section 323 of the *Workplace Injury Management Act 1998* which sets out a regime for deduction of any proportion of the impairment that is due to any previous injury and where it is difficult or costly to determine the deduction, it is to be assumed for the purpose of avoiding disputation that the deduction is 10% of the impairment unless that assumption is at odds with the available evidence.

The employer challenged this approach and the matter proceeded to the Supreme Court for consideration.

The Supreme Court examined the approach of the Medical Appeal Panel and concluded the Panel fell into error in two ways.

Firstly, when the matter was referred to it, it undertook a reassessment of the secondary psychological injury impairment assessed by Dr White. The referral to the Panel did not put that assessment in issue. The Supreme Court therefore concluded the Panel erred when it reassessed the extent of the secondary psychological injury as that was not a matter in dispute.

The Supreme Court noted a further error in the assessment was the utilisation of Section 323 in the assessment of the secondary psychological injury.

Section 65 of the *Workers Compensation Act 1987* and Section 323 of the *Workplace Injury Management Act 1998* do not interact and the approach in Section 323 should not be used in the assessment of secondary psychological injuries.

It is always necessary to assess the extent of impairment caused by the secondary psychological injury and Section 323, which applies to previous injuries and permits a deemed deduction of 10% for previous injuries in circumstances where it would be difficult or costly to assess the impairment, cannot be used to avoid the need to properly assess the impairment.

The Supreme Court noted in this case there was ample evidence which would permit an assessment of impairment and even if Section 323 had applied it was not too difficult or costly assess the impairment caused by the secondary psychological injury.

In those circumstances the Supreme Court concluded the Medical Appeal Panel had fallen into error and the matter has been referred back to a new Medical Appeal Panel to determine the matter according to the law. That will involve determination of the impairment without reassessment of the extent of impairment caused by the secondary psychological injury as that was not a matter in dispute in the appeal to Medical Appeal Panel.

An Approved Medical Specialist needs to take care when assessing a mixture of primary and secondary psychological injuries to identify the impairment caused by each psychological condition and properly apportion responsibility for the impairments between the primary and secondary psychological injuries.

Whilst it may be difficult and costly to do so, it is incumbent on an AMS to properly apportion psychological impairments and in the event the matter proceeds to a Medical Appeal Panel it must follow the same approach.

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Consequential Injuries in Workers Compensation Claims

The benefits of the workers compensation legislation are available to workers who suffer personal injury arising out of or in the course of their employment. This includes disease injuries contracted by a worker in the course of employment or the aggravation, acceleration, exacerbation or deterioration of any disease. Section 9A of the *Workers Compensation Act* 1987 ("1987 Act") provides that no compensation is payable in respect of injuries other than disease injuries unless the employment concerned was a substantial contributing factor to the injury. In the case of a disease injury the worker's employment must be the main contributing factor.

Once a worker has established entitlement to compensation benefits as a result of an "injury" an

employer will also be liable for "consequential" conditions that result from the accepted injury. It is not necessary for the worker to prove that the consequential condition arose out of or in the course of the worker's employment. Likewise it is not necessary for the worker to establish employment was the significant or main contributing factor to the development of the consequential condition.

The approach to liability in claims for consequential conditions was outlined by the Court of Appeal in *Kooragang Cement Pty Limited v Bates* (1994) 35 NSWLR 452. In that case, the worker injured his back climbing up and down from his truck. He subsequently became depressed as a result of his ongoing incapacity and his fear that people might be watching him. His depression continued for several years until he received a letter from the insurer advising compensation payments would cease. He became severely depressed and worried he would have to sell his house to pay for treatment. Three months later the worker died of a heart attack.

Medical evidence indicated pre-existing myocardial disease was exacerbated by the depressive and anxiety situation in which the worker found himself as a result of the lengthy and protracted workers compensation situation. Medical evidence indicated the worker's sedentary lifestyle due to his back injury and unemployment also contributed to the heart attack.

At first instance a finding was made in the worker's favour that he suffered injury to his back in the course of his employment and as a result thereof he suffered myocardial infarction from the effects of which he died. The judge did not find the worker suffered a psychological injury or that the heart attack was a personal injury.

The employer appealed arguing the prolonged incapacity, immobility, sedentary lifestyle, increased obesity, stress and anxiety, depression and acute stress when compensation payments ceased were all "mere pre-disposing factors" that were not "causative in the relevant sense that it was not "causative in the relevant sense that it was not shown that the death 'resulted from' any of them, either individually or in conjunction".

In the Court of Appeal Kirby P stated that:

"f*rom the earliest days of compensation legislation, it has been recognised that causation is not always direct and immediate … it has been well recognised that an injury can set in train a series of events. If the chain is unbroken and provides a relevant causative explanation of the incapacity or death from which the claim comes, it will be open to the Compensation Court to award compensation under the Act*".

His Honour said that where causation is in issue in a worker's compensation claim each case must be determined on its own facts. He also said:

"*the mere proof that certain events occurred which predisposed the worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is the common sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation. In each case, the question whether the incapacity or death 'results from' the impugned work injury (or in the event of a disease, the relevant aggravation of the disease), is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinion*".

The Court held the facts went beyond mere predisposing circumstances and combined to make it "proper to reach the conclusion that the death of a worker resulted from his original injury and all of the consequences which it set in train". It did not find that the heart attack was a Section 4 injury but confirmed the trial judge's finding the heart attack resulted from the accepted back injury.

The so-called "Kooragang test" has been consistently applied in the Commission in dealing with questions of consequential conditions arising from accepted work injuries. The test was relied upon by President Judge Keating in the recent decision of *Inghams Enterprises Pty Ltd v Hickey* [2017] NSWWCCPD 36 to confirm the finding at first instance by an arbitrator that on the balance of probabilities disuse of the worker's right arm and shoulder consequent to the accepted work injury and subsequent surgical treatment that caused immobilisation of the worker's right arm, resulted in a consequential condition in the worker's right shoulder. This finding was made despite evidence of pre-existing complaints of right shoulder pain and investigation thereof, and evidence of a specific jarring injury to the right shoulder at work after the surgical treatment of the accepted right wrist problem.

In *Tiritabua v Bartter Enterprises Pty Limited* [2008] NSWWCCPD 145, Roche DP made it clear that Section 9A did not apply in circumstances in which it was alleged that symptoms in one part of the body resulted from an injury to another. There it was alleged the worker suffered right knee symptoms as a result of altered gait caused by a left knee injury which was work related. The Deputy President relying on *Kooragang* held that all the worker need establish was the right knee condition resulted from the accepted left knee injury.

In *Filippou v Northern Sydney Central Area Coast Health Services* [2009] NSWWCCPD 35, the worker claimed that as a result of surgery to the left shoulder she placed all of her weight on her right shoulder when attempting to get out of bed and thereby injured the right shoulder. The Commission held that the work related left shoulder injury was a direct cause of the right shoulder injury.

In *Vivaldo v Uniting Church of Australia* [2010] NSWWCCPD 41, the worker suffered injury to her knees and left index finger when she fell at work. She underwent a number of surgical procedures. Because her knee condition continued to deteriorate she started using a walking stick. Due to weakness of her knees she had to "lever" herself up from chairs. She alleged she developed symptoms in her shoulders as a consequence of that activity. The insurer disputed liability on the basis that medical evidence indicated there was no loss of use of her right shoulder and any loss of use of her left shoulder related solely to the aging process and an underlying degenerative condition. Medical evidence tendered on the worker's behalf supported she suffered a back problem as a result of abnormal gait and a shoulder problem as a result of having to use a walking stick to support herself as she got up from the chair.

Deputy President Roche accepted the evidence established the symptoms in the worker's shoulders resulted from the undisputed injury to her knees.

In *Krstevska v Fast & Fluid Management Australia Pty Limited* (2012) NSWWCCPD 60, Acting President Roche agreed the worker's evidence fell well short of what was required to establish a consequential loss claim. There was no evidence that the left shoulder condition resulted from the accepted injury to the right shoulder and there was a lack of evidence from the applicant about the use to which she put her left arm and shoulder because of her right shoulder symptoms. There was also no report from the general practitioner expressing an opinion.

Reference to these and other decisions highlight the relatively low threshold of material contribution which workers need to prove to succeed in claims for consequential conditions.

While it is necessary for a worker to establish a primary injury arose out of or in the course of employment and that employment was a substantial contributing factor to the injury, there is no similar requirement for consequential injuries. A worker need only establish that the consequential injury results from the primary injury.

In order to succeed in such claims the worker needs to provide a statement addressing the development of the alleged consequential condition with supportive medical evidence. Contemporaneous evidence from treating doctors should be supportive of the causal connection and reports from qualified doctors should conclude on the basis of the factual evidence presented by the worker, the consequential condition arose from the accepted injury. Whilst proof of a medical factor is not required on a scientific basis, there needs to be some medical evidence of a connection between an injury and a condition. It is then up to an arbitrator to assess the scientific evidence and the lay evidence in coming to a conclusion as to whether there is a connection.

Consequently, so long as the worker's factual and medical evidence supports some connection between the onset of symptoms of the consequential condition with treatment or impairment consequent to the primary injury, the secondary injury will almost invariably be found to result from the primary injury.

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Asthma Fatality Not Work Related and No Compensation Payable

Section 4(b)(ii) of the Workplace Injury Management Act, 1998 defines injury as the aggravation, acceleration, exacerbation or deterioration of any disease, where the employment was a contributing factor to the aggravation, acceleration, exacerbation or deterioration.

In a recent Workers Compensation Commission decision, the Commission considered whether a worker who had a fatal asthma attack on 15 April 2011 was related to their employment. The deceased had suffered asthma all her life. She was employed as a coordinator and she was required to organise drivers for clients receiving homecare services. On the occasion of her death one of the regular drivers was not available and the deceased was required to drive a number of clients from Brewarrina near Nyngan, New South Wales to Dubbo. On the return journey the deceased suffered a fatal asthma attack.

The deceased's Estate brought proceedings in the Workers Compensation Commission contending employment was a significant contributing factor to the injury as required by Section 9A of the 1987 Act and furthermore, employment aggravated, accelerated, exacerbated or deteriorated a pre-existing condition, namely asthma.

At first instance the Arbitrator determined the evidence did not establish employment was a substantial contributing factor to the injuries suffered.

The Arbitrator determined the deceased's asthma condition was not well controlled. He accepted the deceased was well educated in how to manage her condition and accepted a medical practitioner's opinion that having regard to the history of the condition a severe attack was likely to happen at any time. Due to her medical history and the chronic lifelong condition it was very likely the deceased could have a severe attack at any time, whether or not she was at work.

The deceased was predisposed to sudden severe asthma attacks of uncertain cause from her history of persistent asthma attacks spanning many decades.

The Arbitrator considered the nature of the work performed and the particular tasks of that work and the causal relationship to the asthma attack. The arbitrator determined the cause of the injury was a pre-existing medical condition which was not aggravated by employment. The evidence did not satisfy the requirements of Section 4(b)(ii) or Section 9A.

The deceased's estate challenged the decision and the matter was determined by a Deputy President. A submission was put on behalf of the Estate that due to the location of the asthma attack the deceased lost the opportunity to seek suitable treatment in Brewarrina, either at a surgery or a hospital and therefore did not have access to an inhaler, nebuliser or ventilator.

The deceased's Estate asserted she immediately recognised the seriousness of the attack and was unable to act and take appropriate action due to her location at the time. The basis of this assumption as to the deceased's assessment of the alleged seriousness of the asthma attack was unstated. The Arbitrator had determined it was unsupported by evidence and the Deputy President agreed.

The deceased appeared to have travelled some period of time before taking any action in relation to her deteriorating respiratory condition and she only stopped at the insistence of passengers, according to the evidence.

It was also determined that even if the deceased had access to a puffer, nebuliser or Ventolin it may not have assisted. The attack seemed to have been very severe, such that the only treatment with a realistic prospect of avoiding anoxia and cardiac arrest was immediate attention in a hospital Emergency ward.

The accepted evidence of a medical practitioner was that for the deceased to have had any chance of survival she needed to attend hospital within a very narrow window of opportunity. The evidence indicated the deceased's usual initial response to an asthma attack was to seek to treat the attack by other means apart from attending hospital. There was therefore no evidence to suggest she would have attended hospital on this occasion even if one was available. Her only attendances at hospital in the past were in relation to pneumonia and not acute asthma attacks.

It was undisputed that neither the driving nor the location of the bus when the episode commenced caused a severe asthma attack. The location of the deceased and what she was doing, driving the bus, at the time of death did not aggravate, accelerate, exacerbate or cause a deterioration of her pre-existing condition. The task itself and the location it was being performed were entirely irrelevant to the onset of the asthma attack.

The Deputy President determined on appeal the arbitrator did not make any error in law in finding the deceased had not suffered an injury within the meaning of Section 4.

Further the Arbitrator did not err in failing to find the deceased's employment was a contributing factor to the aggravation of the deceased's underlying asthma condition for the purpose of Section 4(b)(ii). The causal connection between the deceased's employment and the acute asthma attack was not real and of substance.

Accordingly the decision of the Arbitrator did not demonstrate any error of fact, law or discretion as is required by an appeal.

The tragic circumstances did not result from the workers employment.

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