Gillis Delaney Lawyers

GD NEWS / OCTOBER 2018

IN THIS EDITION

Royal Commission Completes Public Hearings into the Insurance Industry

On 21 September 2018 the Royal Commission into misconduct in the banking, superannuation and financial services industry concluded 10 days of public hearings into the insurance industry.

Commissioner Hayne heard evidence of case studies involving the conduct of insurers and a trustee grouped into the following categories:

- Life insurance;
- Travel & motor insurance;
- Home insurance (natural disaster claims).

Evidence was given by policy holders and representatives of the following financial institutions:

- Clearview Life Assurance Limited
- Freedom Insurance Group
- Commonwealth Bank of Australia / CommInsure
- TAL
- Retail Employees Superannuation Trust
- AMP
- Allianz
- IAG/Swann
- Youi
- AAI.

On 21 September 2018 Senior Counsel assisting the Commission made closing submissions in which the Commissioner was invited to make findings against each insurer and trustee the subject of the public hearings.

The following is a summary of some of the findings which Senior Counsel assisting the Commission contended were open to the Commissioner:

- breaches of the prohibition on the hawking of financial products contained in the Corporations Act, s 992A;

Editors:

David Newey

Amanda Bond

GILLIS DELANEY LAWYERS
LEVEL 40, ANZ TOWER
161 CASTLEREAGH STREET
SYDNEY NSW 2000
AUSTRALIA
T: + 61 2 9394 1144
F: + 61 2 9394 1100
www.gdlaw.com.au

- breaches of the prohibition on unconscionable conduct contained in the ASIC Act, ss 12CA and 12CAB by pressuring individuals to purchase policies;
- breaches of the prohibition on misleading and deceptive conduct contained in the ASIC Act, s 12DA;
- breaches of the duty of utmost good faith pursuant to the Insurance Contracts Act, s 13;
- contraventions of the obligation in the Corporations Act, s 912A(1)(a) to do all things necessary to ensure the financial services covered by the financial services licence were provided efficiently, honestly and fairly;
- failed to ensure representatives were adequately trained to provide the financial services covered by the financial services licence in contravention of the Corporations Act, s 912A(1)(f);
- failed to take reasonable steps to ensure representatives complied with the financial services laws in contravention of the Corporations Act, s 912A(1)(ca);
- failed to have in place adequate arrangements for the management of conflicts of interest in contravention of the Corporations Act, s 912A(1)(aa);
- engaging in conduct that fell below community standards and expectations.
- breaches of the Corporations Act, s 963E in respect of variable component of sales agent's remuneration;
- breaches of the Corporations Act, s 963 in respect of non monetary benefits provided to representatives;
- engaging in misconduct by contravening Clause 7.2 of the Financial Ombudsman's Service ("FOS") Terms of Reference;
- failing to accord procedural fairness to policy holders prior to avoiding their policies;
- communicating with policy holders in a way that was inappropriate, bullying, threatening and misleading;
- failing to communicate in a sensitive and empathetic way which recognised the difficult circumstances policy holders faced;
- failing to have adequate systems in place to avoid serious administrative errors such as erroneous notifications of policy cancellation for non payment of premiums.
- failing to perform duties and exercise powers in the best interests of the beneficiaries as required by the Superannuation Industry (Supervision) Act, s 52C by continuing to deduct insurance premiums where a person was no longer covered by insurance;
- contravening the Superannuation Industry (Supervision) Act, s 52(7)(d) by failing to do everything that was reasonable to pursue an insurance claim for the benefit of a beneficiary;
- engaging in misconduct by breaching the Superannuation Industry (Supervision) Act, ss 29E(1)(a) and 101(1)(c).
- breaches of the Superannuation Industry (Supervision) Act, ss 52(2)(b) and (c) by authorising the deduction of premiums from members' accounts where those premiums were calculated on a statistically inappropriate basis;
- breaches of the Corporations Act, s 912A and the Superannuation Industry (Supervision) Act, ss 29VC and 52(2)(b) by continuing to deduct insurance premiums from deceased's member's accounts;
- breaches of obligations under the Corporations Act, s 912D(1B) and the Superannuation Industry (Supervision) Act, s 29JA(1) by failing to notify APRA and ASIC of continued deductions of premiums from deceased member accounts;
- breaches of the Corporations Act, s 912A(1)(a) and the Superannuation Industry (Supervision) Act, ss 52(2)(b) and (c) by failing to ensure it had adequate systems in place to cease deducting premiums from deceased member accounts;
- contravening obligations under the Corporations Act, s 912D by failing to report misleading and deceptive conduct to ASIC;
- failing to comply with the requirements set out in Prudential Standard CPS 220 to have in place a designated compliance function which assists senior management in effectively managing compliance risks;
- failing to be frank and open in dealings with ASIC after reporting misleading and deceptive content to ASIC as a significant breach;
- seeking to manipulate the content of an independent report commissioned for the purpose of satisfying CPS 220;
- having inadequate processes for monitoring the content of a website and the websites of other companies distributing insurance products;
- having an inappropriate culture which failed to consider risk and compliance as a priority and which adopted a defensive attitude when challenged about its practices.
- breaches of the National Credit Code, s 145 by authorising payments to authorised representatives that may have exceeded the 20% cap on commissions imposed under that section;

- breaches of obligations under the General Insurance Code of Practice, Clause 7.2 requiring an insurer to handle claims in an honest, fair and transparent manner;
- breaches of obligations under the General Insurance Code of Practice, Clause 9.2 by failing to respond to a catastrophe in an efficient, professional and practical way and in a compassionate manner;
- breaches of obligations under the General Insurance Code of Practice, Clause 10.13 by failing to respond to a complaint in writing and by failing to tell the insured the decision in relation to the complaint or the reasons for that decision;
- inappropriately charging policy holders premiums for renewing policies in respect of property damage where the property was destroyed or no longer habitable;
- making a cash settlement of claims based on the lowest quote obtained to complete the scope of works;
- breaches of the General Insurance Code of Practice, Clause 7.13 by failing to keep an insured informed about the progress of their claim at least every 20 business days;
- breaches of the General Insurance Code of Practice, Clause 10.5 by failing to make information available about an insured's right to make an internal complaint and about its processes for handling such complaints.

The Commissioner invited each of the above financial institutions to provide written submissions in response by 1 October 2018.

The Commission also published on its website certain policy questions arising from the Public Hearings into the insurance industry that will be considered by Commissioner Hayne in his final report.

The Commissioner invited written submissions to be made in response to those policy questions by 25 October 2018.

The following is a summary of the pertinent policy questions that are likely to have a significant impact on the insurance industry:

Product Design

- Should accidental death and accidental injury policies continue to be sold?
- Should the *Life Insurance Code of Practice* (re updating medical definitions) extend to include products other than on-sale products?

Disclosure

- Is the current disclosure regime for financial products adequately serving the interests of consumers?
- Is the standard cover regime achieving its purpose?
- Is there scope for insurers to make greater use of standardised definitions of key terms in insurance contracts?

Sales

- Should monetary and non-monetary benefits given in relation to both general and life insurance products remain exempt from the ban on conflicted remuneration?
- Should the direct sale of insurance via outbound telephone calls be banned? If not, is the current regulatory regime sufficient to avoid consumer detriment?

Add-On Insurance

- Should the sale of add-on insurance by motor dealers be prohibited?
- Would a deferred sales model also be appropriate for any other forms of insurance? If so, which ones?
- If not banned, should the payment of commissions for the sale of add-on insurance by motor dealers be limited or prohibited?

Claims Handling

- Should the obligations under the *Corporations Act*, s912A (insurer to act honestly, fairly and efficiently and other obligations dealing with conflicts) apply to all aspects of the provision of insurance including the handling and settlement of insurance claims?
- Should ASIC have jurisdiction in respect of the handling and settlement of insurance claims?

Life Insurance

- Should life insurers be prevented from denying claims based on the existence of a pre-existing condition unrelated to the condition forming the basis of the claim?
- Should life insurers who seek out medical information be limited to seeking information relevant to the claimed condition?
- Should life insurers be prevented from engaging in surveillance of an insured who has a diagnosed mental health condition or who is making a claim based on such a condition?

General Insurance

- Should the *General Insurance Code of Practice* be amended to require insurers, who opt for a cash settlement, to act fairly and ensure the policyholder is indemnified against the loss insured?

Insurance in Superannuation

- Should universal coverage requirements, key definitions and key exclusions be prescribed for group life policies?
- Should group life policies offered to MySuper members be permitted to use a definition of "total and permanent incapacity" that derogates from the definition of "permanent incapacity" in regulation 1.03C of the *Superannuation Industry (Supervision) Regulations 1994* (Cth)?
- Should RSE Licensees be prohibited from engaging an associated entity as the fund's group life insurer? Or, should they be subjected to additional requirements to demonstrate such an engagement is in the best interests of beneficiaries?
- Are the terms of the *Insurance in Superannuation Voluntary Code of Practice* sufficient to protect the interests of fund members?

Scope of the Insurance Contracts Act

- Should unfair contract terms protections be applied insurance contracts?
- Does the duty of utmost good faith in the *Insurance Contracts Act*, s13 apply to the conduct of an insurer when interacting with an external dispute resolution body?
- Have the 2013 amendments to the *Insurance Contracts Act*, s29 resulted in an avoidance regime unfairly weighted in favour of insurers? What if any reform is needed?
- Should the duty of disclosure in the *Insurance Contracts Act*, s21 be maintained or would its purpose be better served by introducing a duty to take reasonable care not to make a misrepresentation to an insurer, as is the case in the UK?

Regulation

- Should the *Life Insurance Code of Practice* and the *General Insurance Code of Practice* apply to all insurers in respect of the relevant categories of business?
- Should a failure to comply with these codes constitute a failure to comply with the obligations under the *Corporations Act*, s912A or the *Insurance Contracts Act*?
- Should infringement notices be maintained or would their purpose be better served by increasing the number of penalty units in the *ASIC Act*, s12GXC?

Compliance and Breach Reporting

- Should ASIC and APRA do more to ensure financial services entities have adequate compliance systems?
- Should there be greater consequences for financial services entities that fail to design, maintain and resource their compliance systems in a way that prevents breaches of financial services laws and ensures such breaches are remedied in a timely fashion?
- Should the financial services laws and the regulators be more involved in shaping the culture of financial services entities?

These policy questions show the Royal Commission clearly intends to consider policy issues that go well beyond the evidence and case studies presented during the most recent module relating to the insurance industry.

Some of the above policy questions suggest there could be significant changes to the way the insurance industry operates, from the very nature of insurance products that may or may not be permissible (including product disclosure requirements) right through to claims handling and settlement and regulatory oversight affecting both the general and life insurance sectors.

The Commissioner's findings will be contained in a final report which is expected to be published by 1 February 2019.

Darren King
dwk@gdlaw.com.au

TPD Claims: when may a court intervene?

In past editions of GD News we have reported on several TPD Claims where a court has intervened to determine whether a claimant is entitled to a TPD benefit under a life insurance policy.

In *Newling v FSS Trustee Corporation (No 2)* the NSW Supreme Court recently applied the NSW Court of Appeal decision in *Hannover Life Re of Australasia Ltd v Jones* and clarified the bases on which a court may intervene.

The decision in *Newling* also considered the duties owed by a life insurer and the onus on a claimant to establish an entitlement to the TPD benefit.

Kim Newling, a former officer of the NSW Police Force, performed desk work after sustaining a back injury in 1997.

In 2011 Newling ceased work and in May 2012 she was discharged from the Force on medical grounds.

In April 2012 Newling lodged a TPD Claim as a member of the First State Superannuation Scheme for which FSS Trustee Corporation was the trustee ("FSS").

FSS had obtained a group life insurance policy with MetLife Insurance Limited ("MetLife") which provided cover to FSS members including a TPD benefit.

The relevant policy wording stated that MetLife was not required to pay the TPD benefit unless proof to its satisfaction had been presented that the claim was valid.

MetLife considered all of the evidence provided on behalf of Newling which included several medical reports.

In addition, MetLife obtained its own medical evidence from a psychiatrist, orthopaedic surgeon and vocational practitioners.

MetLife also obtained surveillance footage of Newling.

MetLife wrote to Newling's solicitors inviting them to make submissions to confirm why Newling was entitled to the TPD benefit.

MetLife provided a summary of the evidence with comments expressing some scepticism of various medical opinions or inconsistencies between Newling's stated disabilities and medical evidence.

Newling's solicitors responded to one of MetLife's letters stating the insurer was wrong to rely on the opinions of its own medico-legal experts rather than Newling's treating specialists.

In particular, Newling's treating psychiatrist had made comments being critical of some of MetLife's doctors that tended to stray beyond his expertise.

MetLife declined the claim.

Newling's solicitor asked MetLife to reconsider its decision but MetLife maintained its earlier position.

MetLife relied on the following:

- the surveillance footage contradicted Newling's claims that she was unable to walk and stand for extensive periods;
- MetLife was not obliged to accept everything Newling said.
- MetLife was entitled to be sceptical of the opinions of Newling's doctors.

Newling instituted proceedings at the NSW Supreme Court against FSS and MetLife but FSS took no active part in the proceedings.

The matter proceeded to hearing before Justice Palmer limited to separate questions concerning whether MetLife:

- Breached its duties to Newling;
- Formed an opinion that was not open to MetLife.

Palmer J found in favour of MetLife and dismissed Newling's claim.

His Honour identified two bases upon which a court may intervene.

First, the insurer's duty to act fairly and reasonably when making a decision may be characterised as a condition of the contract of insurance. Breach of this condition by an insurer renders the insurer's decision to be of no contractual effect.

This was the approach adopted by the NSW Court of Appeal in *Jones.*

However, his Honour raised a second basis where a court may intervene if there has been a breach by an insurer of its duty of good faith and fair dealing at general law.

His Honour described the difference in the following terms:

> *"The difference in analysis is not merely academic. If the first analysis is followed, and the conclusion is that the purported decision is of no contractual effect, then the parties are left in a position where there has been no decision in law.*
>
> *The court may then step in and decide the contractual issue for itself. But it may be open to question whether the court must do so in every case …*
>
> *If the alternative analysis is adopted based on an award of damages for breach of the insurer's duty, a different set of questions arise. At the second stage the Court is not concerned any more with the decision in fact made; rather the Court must determine what decision would have been made had there been no breach. This raises an issue of causation.*
>
> *If the Court finds that the decision breached the insurer's obligation of fairness and reasonableness, the Court must determine what the decision would have been had the insurer acted fairly and reasonably.*
>
> *If the Court finds that in that event the claim would have been allowed, then damages can be recovered for the value of the claim.*
>
> *If the Court is not satisfied that the breach made any difference, then the claim will fail."*

Parker J applied the earlier authority in *Jones* by considering whether an insurer acting reasonably would have made the same decision, not whether MetLife itself had acted reasonably.

The Court upheld MetLife's contention that it was entitled to be sceptical of the opinions of Newling's doctors one of whom went beyond his expertise.

Further, MetLife was entitled to rely upon the opinion of reputable medical practitioners and was not obliged to accept the opinions of Newling's treating specialists over MetLife's doctors.

The relevant question, according to his Honour, was whether it was reasonably open to MetLife to proceed as it did by obtaining its own independent expert opinion, which his Honour held it was.

This decision provides a very useful analysis of the way in which a TPD Claim may be framed and the basis upon which the Court may intervene.

It also highlights the difficulties for a claimant who seeks to establish a life insurer has breached its duty of good faith and fair dealing when the onus rests on the claimant to prove to the insurer's satisfaction they are entitled to the TPD benefit.

Darren King
dwk@gdlaw.com.au

Can commercial transactions be heard in the District Court?

In New South Wales proceedings can be commenced in the Local, District or Supreme Courts (leaving aside the Tribunals) depending on the damages and type of relief sought.

The jurisdiction of the District Court is set out in Section 44 of the *District Court Act* 1973 which provides:

> *"(1) Subject to this Act, the Court has jurisdiction to hear and dispose of the following actions:*
>
> *(a) any action of a kind:*
>
> *(i) which, if brought in the Supreme Court, would be assigned to the Common Law Division of that Court, and*
>
> *(ii) in which the amount (if any) claimed does not exceed the Court's jurisdictional limit, whether on a balance of account after an admitted set off or otherwise, other than an action referred to in paragraph (d) or (e)."*

There have been a number of decisions dealing with the issue as to whether or not the District Court has jurisdiction to hear matters arising out of "commercial transaction".

On 7 September 2017 Parker J handed down the decision of *NTF Group Pty Limited v PA Putney Finance Australia Pty Limited*. In that decision proceedings were transferred from the Local Court to the Supreme Court where a cross claim was filed invoking the Australian Consumer Law and therefore raising the question as to whether the Local Court had jurisdiction to deal with the matter.

Parker J noted:

> *"Section 44(1)(a)(i) was introduced in its current form into the DCA with effect from 2 February 1998. In Forsyth v Deputy Commissioner of Taxation (2007) the High Court rejected the view the provision operated in an ambulatory way so that the question whether a particular action would have been allocated to the Common Law Division is to be answered by reference to the provisions governing assignment in force at the time the claim is made. Instead, the High Court held that the District Court's jurisdiction depends upon whether the action would have been assigned to the Common Law Division according to the assignment rules which existed as at 2 February 1998.*
>
> *The Supreme Court Act 1970 as at 2 February 1998 provided for the assignment of the business of the Court into a number of divisions, including common law, equity and commercial divisions ... Although the claim was a simple contractual claim in debt, it appears that the proceedings would not have been assigned to the Common Law Division. The principal claim in the proceedings is between two corporate entities and, on the face of it, the goods in question were leased for business purposes. Accordingly, the proceedings fall within the description of proceedings "arising out of commercial transactions" ... and would have been assigned to the Commercial Division.*
>
> *Accordingly, the District Court would not have had jurisdiction. This is (as it seems to me) a surprising and unwelcome result. I see no alternative to it given the decision in Forsyth and the wording of the rules at the relevant time."*

That decision was subsequently followed by Harrison J in *Sapphire Suite Pty Limited v Bellini Lounge Pty Limited* (2018) in a judgment handed down on 5 September 2018. That case dealt with a situation where the plaintiff filed a Summons in the Supreme Court seeking an order that District Court proceedings be transferred to the Supreme Court on the basis there was a question as to whether or not the District Court had the jurisdiction to hear and determine the action. The proceedings related to a claim against the second and third defendants as guarantors of the obligations of the first defendant as the lessee of premises from the plaintiff.

The issue that arose in that case was whether the proceedings against the guarantor of the liabilities of a lessee to a lessor arises out of a commercial transaction and if so, whether the District Court has jurisdiction to hear the matter as it is one that would have at the relevant time been assigned to a division other than the Common Law Division. His Honour Justice Harrison was of the view the proceedings should be transferred from the District Court to the Supreme Court.

More recently, in *Commonwealth Bank of Australia v QBE Insurance (Australia) Limited* (September 2018) an application for transfer by the Commonwealth Bank of Australia from the District Court to the Supreme Court was successful. The proceedings involved construction of an exclusion clause in an insurance

contract and a dispute as to whether the insurer, QBE Insurance (Australia) Limited, should have paid out under an insurance policy in favour of the person with whom the Commonwealth Bank had entered into a loan agreement.

N Adams J stated:

> *"I agree with the observations made by Harrison J at [13] of Sapphire Suite (approving the conclusion of Parker J in NTF Group) that it is a "surprising and unwelcome result that the District Court would not have jurisdiction to hear a matter such as the present matter. However, as both of their Honours have observed, as a simple matter of statutory construction, it seems to be the only course to take. Parker J did express some concern about this, as did Harrison J. I echo the comments made by Rein J in Nova 96.9 Pty Limited v Natvia Pty Limited ... (2018) ...that Parliament may well need to give consideration as to whether there is a legitimate intention that the District Court not have jurisdiction in matters of this nature. The circumstances are, anecdotally at least, that such matters have been conducted in the District Court from time to time until now."*

We understand there may be legislation in train dealing with this issue.

In the meantime parties with proceedings on foot in the District Court will need to give careful consideration as to whether that Court has the jurisdiction to hear such a dispute.

Amanda Bond
asb@gdlaw.com.au

CONSTRUCTION ROUNDUP

The high price of not properly documenting a project

We often see cases before the courts where the parties have failed to properly document their transaction or project, and the lack of clear documentation has inevitably led to misunderstandings and a significant dispute arising. In such cases, the parties end up spending more on legal fees in litigation than if they had consulted a lawyer in the first place to prepare their documentation.

This was illustrated in the recent case of *Europlex Pty Limited v. Unique Living Australia Pty Limited* [2018] NSWSC 1291.

Mr Saif Hayek was the director of Unique Living, which in 2014 had purchased some land at Terrigal, NSW. Mr Radoslav Minarovic was the director of Europlex (a building company) and was also Mr Hayek's friend. They agreed to develop the Terrigal property to construct 15 units and 5 townhouses.

The agreement between Unique Living and Europlex was recorded in an email from Mr Hayek to Mr Minarovic sent on 8 September 2014. The terms of the agreement according to that email were that after deducting all costs of the construction work Unique Living would receive 70% of the profits and Europlex 30%; however, if the budget for the construction work exceeded $5 million then the excess would be deducted from Europlex's share.

Europlex commenced the building work in January 2015, and in July of that year the parties executed a formal contract in the form of AS4902-2000. This document provided that Europlex would carry out the building work for $5 million including GST, and the date for practical completion was to be 1 August 2016, failing which Europlex would pay Unique Living liquidated damages of $2,500 per day.

By May 2017, the work had still not reached practical completion, and Europlex ceased work on the site in about June 2017. On 2 August 2017 Unique Living terminated the building contract, and it later engaged another contractor to complete the work. As at the date of the court hearing, the development had still not been completed.

During the course of the works, Europlex had been paid approximately $7.85 million for its work on the site. Europlex commenced proceedings in court seeking declaratory relief as to the entitlement of Europlex to the profit that would be made from the development. However, since the work was not complete when the matter was heard by the court, it was accepted by Europlex that it would be premature to determine what that profit would be. However, the court still needed to address the other claims made by both parties.

One of the tasks before the court was to determine whether the formal written building contract governed the parties' rights or was (as contended by Europlex) a "sham".

It was noted by Stevenson J that the conduct of the parties during the course of the project showed that they accepted that the formal contract governed their relationship. For example, Europlex submitted payment claims with supporting statements sworn by Mr Minarovic which concerned the moneys payable to Europlex "under the Building Contract", and its (then) solicitors confirmed that Europlex was progressing the works "in accordance with the Contract". For its part, prior to terminating the contract, Unique Living's solicitors served a show cause notice that was stated to be given pursuant to clause 39 of the contract.

Further, there was no actual inconsistency between the email and the formal contract.

Accordingly, Stevenson J held that the formal written contract governed the parties' rights and entitlements.

Stevenson J then noted that for a document to be a sham there must an intention to deceive: *Lewis v. Condon* (2013) 85 NSWLR 99. Thus, even if a contract is entered into for an improper purpose, it will not be considered a sham unless "intentional deception as to the effect of a document" is also made out.

A further "contract" had been executed by the parties on 5 September 2016 with respect to the construction of the townhouses at the Terrigal site for a cost of $1.25 million. It was submitted by Europlex's counsel that this document had been executed for the purposes of obtaining home warranty insurance and it purported to record the parties' contractual arrangements when it fact it did not, and consequently this showed that both written contracts were a "sham".

However, Stevenson J held that there was no suggestion that the amount of the consideration in the document had been falsely calculated to deceive the home warranty insurer, and in the circumstances it seemed likely that the document was merely intended to be supplementary to the parties' main contract. Accordingly, there was no intention to deceive that would lead to a finding that the document was a "sham".

Unique Living had cross-claimed against Europlex claiming certain entitlements under the contract. In the absence of any submissions by Europlex on these claims, the court held in favour of Unique Living.

However, Unique Living had also sought damages for alleged misleading and deceptive conduct on the part of Mr Minarovic and his co-director, Mr Roman Cerny, when those gentlemen had discussed with Mr Hayek the anticipated completion date, the estimated total construction costs and the likely returns from the project. Mr Hayek claimed that these "representations" caused him to invest more money in the project and also to agree to a discounted sale price to a lender, both to his detriment.

Stevenson J looked carefully at each of the alleged representations which Unique Living claimed were misleading, and held either that the representation was merely a statement of fact, or Unique Living had not relied on it, or there was insufficient evidence that the representation was misleading.

Importantly, his Honour also noted that when Mr Minarovic and Mr Cerny had made certain statements to Mr Hayek, the latter gentlemen had accepted that Mr Minarovic and Mr Cerny had been speaking in their capacity as directors of Europlex and not in a personal capacity. Therefore, any misleading and deceptive conduct arising from these statements would have been on the part of Europlex, and not the man personally. For this reason, Unique Living's claims against Mr Minarovic and Mr Cerny failed.

In this case, the parties would have been well advised to have executed a formal contract prior to commencing the work, and to have ensured that that contract expressly stated that it superseded all previous communications and negotiations about the project.

Further, the parties should have made clear (and in writing) the basis on which Mr Hayek provided further funding for the project, including the parties' ongoing rights and entitlements if the updated (but still estimated) dates and costs were not met.

The costs of involving a lawyer in this process would likely have been merely a few thousand dollars; by comparison, the legal costs of the litigation would have been hundreds of thousands of dollars.

At Gillis Delaney Lawyers we have expert construction lawyers who can provide cost-effective assistance with documenting transactions and projects to avoid the uncertainties and miscommunications of the type that led to the parties' dispute in this case.

Linda Holland
lmh@gdlaw.com.au

A payment schedule served out of time cannot be later relied upon

The *Building and Construction Industry Security of Payment Act 1999* (NSW) prescribes very strict timeframes for the service of payment claims and payment schedules, in order to facilitate its ultimate purpose of ensuring that progress payments are made to the subcontractors and suppliers of construction projects.

Section 14 of the Act provides that if a payment claim is made under the processes of the Act then the respondent has a period of 10 business days within which it may serve a payment schedule setting out how much of the claim it intends to pay, and the reasons for any deduction or shortfall.

Section 15(2) of the Act provides that if a respondent does not serve a valid payment schedule and does not pay the claimed amount, then the claimant has two alternative rights: either it can recover the amount claimed in court as a debt due, or it can make an application for adjudication of its claim.

If the claimant chooses the latter option, then section 17(2) requires the claimant to formally notify the respondent of its intention to submit the claim to adjudication, and the respondent is allowed an additional period of five business days within which it may serve a payment schedule in response to the claim.

A question that arose recently is whether the respondent is entitled to rely on a "payment schedule" it had initially served too late for that schedule to be valid under section 14, in response to a later notice served under section 17(2).

In *Forte Sydney Construction Pty Limited v. Lin Betty Building Group Pty Limited* [2018] NSWSC 1429, Forte was the head contractor in a residential development project at Ryde. Lin Betty was engaged by Forte to perform Hebel block and Gyprock works on the project.

On 25 May 2018, Lin Betty served a payment claim on Forte. Pursuant to section 14 of the Act Forte was required to serve any payment schedule by 8 June 2018. However Forte did not serve a payment schedule until 15 June 2018. Accordingly, at that time the payment schedule was not a valid response to the claim for the purposes of the Act. Forte also did not pay Lin Betty the full amount claimed.

On 17 July 2018 Lin Betty served a notice under section 17(2) that it intended to apply for adjudication of its payment claim. Accordingly, Forte was provided with a further opportunity to serve a payment schedule by 24 July 2018; however it failed to do so.

Lin Betty proceeded with its application for adjudication and Mr Callum Campbell was appointed as adjudicator. Mr Campbell took the approach that Forte had not served any valid payment schedule under either section 14 or section 17 and therefore pursuant to section 20(2A) of the Act it was not entitled to lodge any adjudication response. Accordingly, Mr Callum proceeded with making his determination that Lin Betty was entitled to an amount of $314,463, and this determination was formally issued before the expiry of the period for Forte to lodge an adjudication response (had it been entitled to do so).

Forte commenced proceedings in the Supreme Court of NSW seeking an order that the adjudicator's determination was void, on the grounds that the adjudicator had denied natural justice to Forte by failing to consider its payment schedule served on 15 June 2018 and also by issuing a determination without giving the opportunity to Forte to lodge an adjudication response. Forte also claimed that the adjudicator had simply adopted Lin Betty's claim and had not satisfied himself that Lin Betty was in fact entitled to the amount it had claimed.

In the hearing before McDougall J, senior counsel for Forte submitted that there was nothing in the Act that rendered the 15 June 2018 payment schedule as invalid, and as at the time of the service of Lin Betty's section 17(2) notice that payment schedule stood as a payment schedule that had been served in response to the payment claim. This approach had been discussed with approval by Hodgson JA (with whom the other members of the Court of Appeal had relevantly agreed) in *Falgat Constructions Pty Limited v. Equity Australia Corporation Pty Limited* (2007) 23 BCL 292.

However, that analysis was not consistent with the earlier decision of Einstein J in *Taylor Projects Group Pty Limited v. Brick Dept Pty Limited* [2005] NSWSC 439. In that case Einstein J had stated:

> "*The holding is that s 17(2)(b) merely provides a respondent with an (additional) opportunity to provide a payment schedule when it has failed to do so in accordance with s 14 and to do so after the claimant has given notice of its intention to apply for adjudication. The respondent may ignore the opportunity [in which case it loses the opportunity to lodge an adjudication response – s 20(2A)] or it can provide a payment schedule. If it chooses to provide a payment schedule then it might choose to provide one identical to that which it has previously provided or it might choose to provide a different payment schedule. However the Act is not to be construed to require the claimant or the adjudicator to guess whether a respondent relies on a payment schedule for the purposes of s 17(2)(b) when it has not been provided in accordance with that section.*" [emphasis in original]

Accordingly, Einstein J had held that a payment schedule in that case had not been provided within the times authorised by either section 14 or section 17 of the Act.

In the present case, McDougall J noted that Hodgson JA had clearly drawn no conclusion on the matter in *Falgat*, and Einstein J's reasons in *Taylor Projects* were squarely on point but had not been brought to the attention of the Court of Appeal.

Senior counsel for Lin Betty submitted that Einstein J's reasoning was consistent with McDougall J's own analysis in *Chase Oyster Bar Pty Limited v. Hamo Industries Pty Limited* (2010) 78 NSWLR 393.

McDougall J did not agree that his observations in *Chase Oyster Bar* could be given the significance contended by Lin Betty's senior counsel, but his Honour acknowledged that the structure and language of the Act supported the construction that the giving of a notice under section 17 "effectively triggers" an opportunity for the respondent to dispute its liability for the statutory debt that would otherwise arise by the operation of section 14.

McDougall J stated:

> "*The language of section 17(2)(b) is significant. The opportunity to provide a payment schedule that is given is one to provide it 'within 5 business days after receiving the claimant's notice'. Those words suggest strongly that the opportunity starts upon receipt of the s 17(2)(a) notice and lapses at the end of five business days thereafter. … [T]hose words are consistent with the opportunity being one that exists for a closed period … rather than merely providing for a deadline, or further deadline, for the provision of a payment schedule* ..."

It followed that the payment schedule served on 15 June 2018 was not a valid payment schedule for the purposes of section 17, and the adjudicator was not required to consider it when making his determination.

It also followed that Forte had therefore not been entitled to lodge an adjudication response and thus the adjudicator had not denied it natural justice by issuing his determination at the time that he had done so.

McDougall J then turned to Forte's third ground for challenging the adjudicator's determination: namely that the adjudicator had failed to perform his statutory function to value Lin Betty's claim.

In his brief reasons, the adjudicator had observed that Lin Betty had provided evidence that it had provided labour and materials for the works claimed, and the payment claim contained a clear description of the works claimed by referencing the amount of work completed and claimed, the works that were undertaken, a description of the works claimed and the amounts outstanding.

He also noted that he had been provided with copies of correspondence between the parties evidencing that the works had been progressing on the project sites.

He also stated that he was satisfied based on the materials before him that Forte had improperly withheld payment from Lin Betty.

Therefore, the adjudicator determined that Lin Betty had evidently undertaken the works that were the subject of its payment claim, that the value claimed had been calculated in accordance with the construction contract, and that payment for those works had been withheld.

McDougall J noted that it is well settled that an adjudicator must still consider the merits of the claimant's payment claim even if the respondent has provided no payment schedule or adjudication response.

His Honour stated:

> "*Putting the matter shortly, an adjudicator cannot simply rubber stamp an adjudication application (and payment claim) only because there are no grounds of opposition properly put forward*."

However, the adjudicator is also not required to invent and deal with arguments that may have been advanced by the respondent had it responded to the claim.

McDougall J held that in the present case the inference properly available from the reasons given by the adjudicator was that he had considered the material submitted in support of the payment claim, and that the material satisfied him that the claim had been made good.

Accordingly, his Honour held that the third ground of Forte's challenge to the adjudicator's determination also failed, and thus Lin Betty was entitled to be paid the amount determined.

This case illustrates the importance of ensuring that persons engaged on construction projects are fully aware of the strict time limitations of the Act, and that systems are put in place to ensure that those time periods are complied with.

If Forte had served a payment schedule within the prescribed period after receiving the initial payment claim, or had even re-served the 15 June 2018 payment claim in response to the section 17 notice, then it would have been entitled to lodge a response in the adjudication application and the adjudicator's determination may have been different.

If a respondent to a payment claim is unsure of whether (or when) they need to serve a response to the claim, then it is very important that they seek advice from an expert construction lawyer on the matter.

Linda Holland
lmh@gdlaw.com.au

EMPLOYMENT ROUNDUP

Tightening the screws on labour hire?

In last month's *GD News*, we looked at the real risk – confirmed by the Full Federal Court – that "casual" employees of labour hire firms may accrue leave and other entitlements as if they were full time workers.

Now, the Fair Work Commission has highlighted another potential risk to the favoured structure of labour hire operations. It has found that a labour hire worker who was excluded by the host from its site was unfairly dismissed because, effectively, the employer firm failed to properly determine whether the exclusion was valid – *Star v WorkPac Pty Limited [2018] FWC 4991*.

The facts giving rise to the claim are typical of circumstances encountered daily in the labour hire industry. WorkPac is a labour hire business that provides labour to its clients in various industries, including the mining industry. Ms Star was employed by WorkPac as a Machinery Operator at the Goonyella Riverside Mine on a casual basis from October 2013.

The Goonyella Riverside Mine is operated by BHP Billiton Mitsubishi Alliance (BMA) and is located approximately 30 kilometres south of the town of Moranbah.

As is usual, the Services Contract under which WorkPac provides labour to BMA included a clause as follows:

> *"The contractor must, in performing the services…*
>
> *(b) be aware of and comply with and ensure that the Contractor's personnel are aware of and comply with:*

…

(iii) all lawful Directions and orders given by the Company or the Company's Representative or any person authorised by law or the Site Standards and Procedures to give Directions to the Contractor."

The evidence was that a new employee who "signs on" with WorkPac is issued with a registration pack consisting of a number of documents.

As a part of this process, Ms Star signed a standard "Casual or Maximum Term Employee Terms and Conditions of Employment" document. That document provides that it applies to all assignments with any member of the WorkPac group of companies. The Terms and Conditions Document also provides:

*"**3. Location***

This assignment applies for the engagement of the employee with any of WorkPac's clients. Location of the client's site and information for each separate assignment will be advised to the employee via the Notice of Offer of Casual or Maximum Term Employment.

These terms and conditions are to be read in conjunction with WorkPac's notice of offer of Casual or Maximum Term Employment."

…

4. Duration of agreement

…

4.2 The terms and conditions in this document apply to all assignments undertaken by the employee on behalf of WorkPac. The parties will not execute a new terms and conditions document for each separate assignment.

5. Casual or maximum term employment assignments with WorkPac

5.1 Employment with WorkPac is on an assignment-by-assignment basis, with each assignment representing a discrete period of employment on a Casual or Maximum Term hourly basis.

…

5.3 The employee may accept or reject any offer of an assignment.

...

5.5 On completion of an assignment, whether satisfactory or otherwise, WorkPac is under no obligation to offer any other assignment/s.

5.6 WorkPac or the client may vary the assignment period by the giving of one (1) hours notice.

5. 7 During the period of any assignment, the employee is under the care and supervision of WorkPac's clients.

…

5.11 Casual and Maximum Term employees will serve a 6 month minimum qualifying period.

*5.12 A **casual assignment** with WorkPac may be terminated at any time by the giving of one (1) hours notice.*

*5.13 **Termination of a Maximum Term Assignment** will be in accordance with the Relevant Industrial Instrument."*

Ms Star was given a letter headed "NOTICE OF OFFER OF CASUAL EMPLOYMENT – FLAT RATE" which specified the length of the assignment as six months. She subsequently commenced work at Goonyella, and worked a regular roster of full time hours, comprising fourteen days on and fourteen days off. This was rostered in advance and was a regular pattern of work, with the worker having an expectation of ongoing employment.

Some 4 years later, Ms Star received a letter from WorkPac in the following terms:

"Dear Kim

RE: Finalisation of Assignment

WorkPac writes to you in relation to your current casual assignment with BMA BHP BILLITON - GOONYELLA - COAL MINING.

Unfortunately BMA BHP BILLITON - GOONYELLA - COAL MINING has advised WorkPac under our commercial contract that they wish to demobilise your position. This means that effective 13th November 2017 your casual assignment has come to end.

As this termination is non-performance related, you are welcome to continue to liaise with our local offices to ascertain whether there are any other placements within your skill set…"

The first issue for the Commission was whether Ms Star was "dismissed" for the purposes of the Fair Work Act 2009 (Cth)

A person is dismissed if the person's employment is terminated on the employer's initiative. The analysis of whether there has been a termination at the initiative of the employer is conducted by reference to the termination of the employment relationship and not by reference to the termination of the contract of employment.

In circumstances where the employment relationship is not left voluntarily by the employee, the focus of the inquiry is whether an action on the part of the employer was the principal contributing factor which results directly or consequentially, in the termination of the employment.

In the present case, the terms and conditions document did not establish an employment relationship independent of employees being offered and accepting an assignment at a particular location or site. Rather it was a contract in the form of a framework agreement under which an employment relationship might be entered into for particular sites or locations, on either a

casual or a maximum term basis. Each assignment commenced a new employment relationship.

When the assignment ends, so does the employment relationship. The terms and conditions document does not guarantee that a further assignment will be offered creating a new employment relationship. Rather the terms and conditions document specifically provides that each assignment is a separate employment relationship.

The Commission accepted that in some cases the employment relationship between a labour hire company and its employees may continue in periods where the employee is not placed at a client company. This depends on the contractual arrangements and the factual matrix in which they operate. In the present case, the contractual arrangements between Ms Star and WorkPac did not establish that there was a subsisting employment relationship which existed independently from a particular assignment.

Ms Star was employed by WorkPac to work at a particular site and only at that site. Her offer of employment related only to one site and the terms on which employment was offered make clear that when the assignment ended so would the employment.

Accordingly, the Commission was satisfied Ms Star was dismissed at the initiative of WorkPac when her Goonyella Riverside assignment was brought to an end.

Having found that the employee was dismissed, the Commission then had to consider the factors set out in the Fair Work Act to determine whether the dismissal was unfair. Primary among these was whether there was a valid reason for the dismissal.

A valid reason for dismissal is one that is "sound, defensible or well founded" and not "capricious, fanciful, spiteful or prejudiced." The reason for dismissal must also be defensible or justifiable on an objective analysis of the relevant facts, and the validity is judged by reference to the Tribunal's assessment of the factual circumstances as to what the employee is capable of doing or has done.

Section 387(a) of the Act confines the consideration to whether there are valid reasons related to the capacity and conduct of the dismissed employee. As the employer is the moving or initiating party, the employer bears the onus of satisfying the Commission that there was a valid reason for dismissal related to the capacity or conduct of the employee.

In considering whether there was a valid reason for the dismissal of an employee the Commission is not confined to the reason given by the employer. It is necessary to identify the actual reason or reasons for the dismissal.

Here, WorkPac asserted that the reason for dismissal was that it had become apparent that the Company could not reassign Ms Star to another role. The Commission accepted that the contract in the present case requires that WorkPac comply with lawful directions and orders and that such a direction or order could include the removal of a particular employee from the Goonyella Riverside Mine site. However the contract also contained a provision setting out a process for dealing with circumstances where BMA is dissatisfied with the performance of the services by any of WorkPac's personnel. That contractual term provided that discussions may be held to give WorkPac a reasonable opportunity to remedy any issue which has led to dissatisfaction on the part of BMA.

The evidence established that the reason for BMA's directive that Ms Star be removed from the site was related to her conduct on one particular shift.

The Commission determined that it was more probable than not that the dismissal related to a conduct issue. Failure by WorkPac managers to seek clarification of the reason for the directive meant that WorkPac could not rebut the inference that the dismissal was related to her conduct. Consequently on the balance of probabilities the reason for Ms Star's dismissal related to her conduct, and this was not a valid reason.

In conclusion, the dismissal was found to be unfair. The Commission indicated that it would consider reinstatement as an appropriate remedy.

Labour hire businesses should take careful note of this decision, and ensure their contractual arrangements – with employees and with hosts – minimise their exposure to a very unwelcome outcome such as this case.

David Collinge
dec@gdlaw.com.au

Pecuniary penalties for employers that classify full time and part time staff as casuals

In last month's newsletter the decision of the Full Bench of the Federal Court of Australia in *WorkPac Pty Limited v Skene* [2018] FCAFC 131 was reviewed.

The Full Court held the term "casual employee" had no precise meaning and whether any particular employee was a casual employee depended upon an objective characterisation of the nature of the particular employment as a matter of fact and law having regard to all of the circumstances. The employer had been paying the employee casual loading and had classified him as a casual. However there was a demonstrated existence of a firm advanced commitment to continuing in indefinite work which demonstrated the existence of ongoing full time or part time employment rather than casual employment. This resulted in the employee being entitled to annual leave benefits under the NES and Enterprise Agreement.

The Full Court was also required to determine a challenge by the employer from the primary judge's decision not to impose a pecuniary penalty on the employer for its contravention of Section 44(1) of the FWA in failing to pay the employee his untaken paid leave. Section 44(1) of the FWA provides that an employer must not contravene a provision of the NES.

The Full Court found the error of the employer in treating the employee as a casual was not only material – but significant. The employee had taken advice from its national employer relations manager as to the status of the employee's position. In other words, the employer had taken appropriate advice and had closely considered the legal implications of its conduct and such conduct was sufficiently excusable so as not to warrant a penalty.

The Full Court added although the employer's contravention was made unknowingly, such unknowing contravention will diminish the objective seriousness of the contravention however ignorance of the law is not ordinarily excusable. The Full Court remitted the matter back to the primary judge on a number of issues including the determination as to whether pecuniary penalties were to be imposed.

Section 546(1) of the FWA provides that a Court may on application order a person to pay a pecuniary penalty the Court considers is appropriate if the Court is satisfied a person has contravened a civil remedy provision.

The Act does not give any explicit guidance about the circumstances in which a penalty under a civil remedy provision will be appropriate nor does it suggest any criteria which might guide the Court as between imposing the maximum or near maximum penalty or the lower end amount. As such a Court has a broad discretion.

One of the main functions of a civil penalty is to act as a deterrent to employers and other employers from such conduct. The Full Court considered the primary judge erred in the exercise of his discretion not to impose a civil penalty. The error in the classification of the employee as a casual and as such denying him benefits under an Enterprise Agreement and the NES was a material and significant error.

The Full Bench found that in declining to impose a pecuniary penalty, the primary judge erred in the exercise of his discretion and remitted the proceedings to the Federal Circuit Court of Australia to determine the appropriate pecuniary penalty.

The consequences for an employer that classifies an employee as a casual where as a matter of fact there is a firm advanced commitment to continuing indefinite employment are that the employee will be found to be a part time or full time employee rather than a casual s not a casual and entitled to the statutory entitlements payable such as personal leave and annual holiday pay and failing to make those payments can result in the imposition of a pecuniary penalty in addition to any obligation to pay the statutory benefits due to part time/fulltime employees.

Michael Gillis
mjg@gdlaw.com.au

Are Periods of Casual Work Included in Redundancy Calculations

An employee's entitlement to redundancy pay turns on their period of service with an employer and whilst casual employees are not entitled to redundancy pay, the Fair Work Commission in *AMWU v Donau Pty Limited* determined the period of casual service may count as continuous service for the calculation of a redundancy payment. However that will not always be the case.

Section 22 of the *Fair Work Act (FWA)* prescribes the meaning of an employee's period of service with an employer and the calculation of an employee's continuous service by identifying periods that do not count as service.

Where an employee is made redundant he or she will be entitled to redundancy pay either under a common law agreement, an enterprise agreement or at least the NES. The amount of redundancy pay is calculated depending on an employee's period of continuous service with an employer.

The *Fair Work Act (FWA)* provides in Section 123 that a casual employee does not have any entitlement to redundancy pay.

The decision of the Full Bench of the Fair Work Commission in *AMWU v Donau Pty Limited* determined that Section 22 of the *Fair Work Act* did not contain any words that excluded a period of regular and systematic casual employment from the definition of continuous service for the purpose of redundancy payments. As such, the majority of the Full Bench found that a period of continuous casual service counted as service for the purpose of calculation of redundancy pay under the applicable Enterprise Agreement.

However the Full Bench of FWC recently considered and distinguished the decision of *AMWU v Donau Pty Limited* in *Unilever Australia Trading Limited v AMWU*.

The employees in question were initially employed on a seasonal and casual basis by Unilever. There was little or no interruption between arrangements. In mid 2009, they were offered and accepted permanent employment with Unilever. When they started with Unilever as permanent employees they received a letter from Unilever stating their prior continuous permanent service with Unilever would be recognised for all service related entitlements. The employees were made redundant in May 2017. The AMWU

contended on behalf of its members that their periods of casual and seasonal employment should count as service for the purpose of calculating their entitlement to redundancy pay.

The Enterprise Agreement stated in clause 2.6 that an employee would be entitled to redundancy pay provided they had a least 12 months continuous service. However in clause 2.7 of the Agreement, redundancy pay was calculated at "4 weeks' pay per year of service" – not continuous service.

The primary judge found that casual employees rendered service, albeit for the period of the casual or seasonal employment.

However the Agreement provided that the redundancy clause did not apply to casual or seasonal employees. The Full Bench held that this provision operated to exclude any prior casual service from redundancy calculations under the Unilever Enterprise Agreement.

The Commission confirmed *AMWU v Donau* turned on its own facts and should not be understood as establishing any principle about the application of [the NES definition of service and continuous service to casual employment, or the approach to calculating service in enterprise agreements.

Whether or not casual service and seasonal work will be counted towards the calculation of redundancy pay will ultimately depend on the terms of the applicable industrial instrument.

Enterprise agreements can exclude periods of casual employment from the count used in redundancy calculations however the issue must be addressed in the agreement otherwise the consequences of the decision in *AMWU v Donau* is likely to apply and periods of casual employment will count.

Michael Gillis
mjg@gdlaw.com.au

WORKERS COMPENSATION ROUNDUP

Changes to NSW Workers Compensation – the 2018 Bill

On 19 September 2018 the Workers Compensation Legislation Amendment Bill 2018 was introduced into the Legislative Council. The purpose of the proposed legislation is to simplify the current dispute resolution process and rectify anomalies in the current legislation.

So what are the main changes in the Bill?

Amendments Relating to Dispute Resolution

The proposed Schedule 1 to the Bill seeks to amend the process for review of work capacity decisions. Currently, the system in place involves an initial internal review of a decision by the insurer, followed by merit review by SIRA and procedural review by the Workers Compensation Independent Review Officer (WIRO).

The changes to the work capacity decision review process simplify what is currently a three step process. Under the new scheme that is proposed, if a claimant is not satisfied with the decision, a request can still be made to the insurer for a review of the original work capacity decision. However, a claimant will now be able to commence proceedings in the Workers Compensation Commission which currently has no jurisdiction in relation to such disputes.

The proposed Schedule 1.2 provides that a referral to the Commission of a dispute about a work capacity decision will operate to stay the decision, but only if the referral was made prior to the expiry of the period which an insurer is required to give notice of the decision.

Section 80 of the proposed legislation provides that where weekly payments are to be discontinued or reduced, an insurer must provide a minimum of 2 weeks notice where a claimant has been in receipt of weekly payments for a continuous period of less than a year and 6 weeks where a claimant has been in receipt of weekly payments for a continuous period of a year work or more. The stay is so as to provide temporary protection to claimants so their current weekly payments will continue whilst a review is being undertaken. However, a stay of a work capacity decision does not extend the required period of notice for either discontinuation or reduction of weekly benefits.

The Bill provides that any work capacity decision made prior to its commencement must be concluded under the existing provisions. The effect of this is that work capacity reviews currently in process can be concluded. There will be a transitional period for reviews to be completed and that period can be adjusted by regulation.

The proposed section 78 in Schedule 1 also provides that an insurer can give a single notice of decisions made by the insurer. Currently, when an insurer makes a liability decision and a work capacity decision, there are separate notice requirements and two documents must be completed. This will no longer be the case.

Amendments Relating to Medical Assessments for Permanent Impairment

The proposed amendment removes the current Section 65(3) from the 1987 Act. That Section requires all permanent impairment disputes to be referred to an approved medical specialist prior to the award of permanent impairment by the Workers Compensation Commission. The new Bill proposes that Arbitrators will have power to make determinations in relation to permanent impairment. It is likely that

Regulations will be passed that will better define when this is to occur. Determination by an Arbitrator will be deemed to be a binding assessment for the purposes of one assessment under the legislation.

Amendments Relating to Pre-Injury Average Weekly Earnings

Pre-injury average weekly earnings are the weekly average of the gross pre-injury earnings received by a claimant within a period of 52 weeks prior to the injury in the employment in which they were engaged at the time of the injury. The current method of calculation is complex. Definitions include all earnings of a worker such as overtime, shift and other allowances and loading. The new method of calculation is intended to be simpler.

The proposed Schedule 3 to the 1987 Act also provides that an insurer can accept an agreement between a claimant and an employer in relation to the claimant's PIAWE. The new provisions apply to all new injuries on commencement of the amendments.

Amendments to Motor Accidents Scheme

On 1 December 2017 the *Motor Accidents Injuries Act* 2017 came into effect. That legislation limits the award of damages in a motor accidents claim so as not to include medical expenses. Non economic loss can only be recovered if a threshold is met. Under the current provisions of the *Workers Compensation Act* 1987 including section 151A and section 151Z a claimant is required to pay back all compensation paid by the worker's compensation insurer including medical, hospital, rehabilitation and care expenses. The proposed amendments provide that a claimant who recovers damages under the 2017 CTP legislation will only reimburse the worker's compensation insurer in relation to weekly payments. Lump sum compensation will only need to be repaid if damages are obtained for non economic loss in the motor accidents claim. It will not be necessary for a claimant to repay compensation for medical, hospital, rehabilitation and care.

The Second Reading Speech of the bill has proceeded in the Legislative Council and the debate has been adjourned.

Amanda Bond
asb@gdlaw.com.au

The same assessment for the same date of injury – no more compensation

What happens when an injured worker receives lump sum compensation in respect of 6% whole person impairment of the lumbar spine and five years later he is again assessed at 6% whole person impairment but in respect of more than one body part? If the assessment of whole person impairment is the same but additional body parts are found to be impaired, is the worker entitled to further lump sum compensation for those additional body parts?

This issue was considered by the Workers Compensation Commission decision in *Ilic v 2/11 Leonard Ave Pty Limited (In Liquidation)*.

The worker was employed as a handyman and injured his lumbar spine during the course of his employment on 12 August 2009 pulling a wheelbarrow from a truck. Liability for the injury was accepted and a Complying Agreement in respect of injury to the lumbar spine was entered into on 30 May 2012. The agreement recorded 6% whole person impairment in respect of the lumbar spine based on a report of Dr Giblin dated 20 December 2011.

On 10 November 2017 the worker made a further claim for lump sum compensation. He claimed that he sustained consequential injuries to his right shoulder, right hip and right knee due to the prolonged use of a walking stick which he used because of his lumbar spine injury. The worker sought lump sum compensation pursuant to Section 66 of the 1987 Act in respect of 16% whole person impairment comprised of a further 5% whole person impairment of the lumbar spine, 4% of the right upper extremity and 6% of the right lower extremity.

The dispute proceeded to the Workers Compensation Commission and the worker was assessed by an Approved Medical Specialist. The Commission issued a Medical Assessment Certificate on 5 March 2018 certifying the worker as having sustained a 6% whole person impairment, the same as the prior assessment. The assessment was comprised of 2% in respect of the lumbar spine, 4% in respect of the right lower extremity and 0% in respect of the right upper extremity.

The question therefore arose as to whether the worker was entitled to recover further lump sum compensation, given that the assessment of whole person impairment was identical but involved different body parts.

The Arbitrator at first instance determined there was no additional entitlement to lump sum compensation pursuant to Section 66 as the overall percentage of impairment remained unchanged.

The worker appealed.

On appeal the worker argued the Arbitrator did not take into account that the earlier Complying Agreement was only in relation to the lumbar spine. The right lower extremity was a further condition which warranted a separate assessment and an award of compensation and therefore the arbitrator should have awarded the worker a further 4% whole person impairment.

The employer argued that the Medical Assessment Certificate was presumed to be correct and binding. Credit was to be given for the percentage of permanent impairment previously paid and therefore there was no further entitlement to lump sum compensation. The employer also argued the worker's whole person impairment was not greater than 10% and therefore he had no entitlement to compensation pursuant to Section 66 of the 1987 Act.

President Keating in his decision noted that the 10 November 2017 claim was the one further lump sum compensation claim that may be made pursuant to Clause 11(1) and (2) of Schedule 8 to the 2016 regulations. Contrary to the employer's submission, in a claim for further lump sum compensation it does not matter that the degree of permanent impairment is not greater than 10% as provided by Section 66(1) of the 1987 Act.

In determining the remaining grounds of appeal, President Keating referred to Section 66A(3) which states:

"*(3) The Commission may award compensation additional to the compensation payable under (the agreement) if it is established that:*

(a) the agreed degree of permanent impairment is manifestly too low; or
(b) the worker has been induced to enter into the agreement as a result of fraud or misrepresentation; or
(c) since the agreement was entered into, there has been an increase in the degree of permanent impairment beyond that was agreed."

President Keating found it did not matter that the Complying Agreement was only in relation to the impairment of the lumbar spine, nor that the Medical Assessment Certificate concerned different body parts. The worker was not entitled to be awarded additional compensation for a further 4% for the right lower extremity simply because that involved a further body part that was not subject to the Complying Agreement. The overall impairment concerned the same injury. The subject of the referral to the Approved Medical Specialist was the degree of whole person impairment as a result of a work injury on a specific date and all impairments arising from the same injury are assessed together.

As the worker was unable to establish an increase in the degree of permanent impairment since the Complying Agreement was entered into, he did not satisfy Section 66A(3)(c) and therefore no additional compensation was payable.

The decision is a clear reminder that injured workers have an entitlement to make one further claim if they receive lump sum compensation prior to 19 June 2012. That additional claim does not have to meet the threshold of 10% whole person impairment. However, no further compensation will be payable if there is no increase in the overall assessment of whole person impairment regardless of an increase in whole person impairment in relation to particular body parts.

Naomi Tancred
ndt@gdlaw.com.au