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IN THIS EDITION

Insurance for Work Health Safety Fines Outlawed in NSW

The seal has been cracked and insurance for work health safety fines is sure to evaporate as a consequence of the introduction by the NSW Government of the Work Health and Safety Amendment (Review) Bill 2019. The Bill was tabled on 12 November 2019 and when passed will amend the Work Health Safety Act 2011 in NSW.

In March this year we speculated father time was fast approaching for insurance on work health and safety fines with the completion of the 2018 Commonwealth review into the Model WHS Laws and the release of the final report of Marie Boland who was appointed to carry out that review.

Safe Work Australia released the final report noting it was committed to ensuring the Model WHS Laws are as effective as possible to keep Australian workers healthy and safe.

In total the report made 34 recommendations one of which was that there should be a prohibition on access to insurance for payment of fines for breaches of work health and safety legislation. In addition, it was recommended that a new industrial manslaughter offence be introduced.

The review observed:

> *"Insurance policies which cover the fines of those found guilty of breaching the Model WHS Act have the potential to reduce compliance with the laws and undermine community confidence"*.

The report recommended that persons or organisations that are required to pay penalties under the Model WHS Laws be unable to recover that cost through insurance or indemnification.

WHS legislation in Australia is driven at a State level and for the recommended changes to be implemented across Australia, State and Territory regulators needed to adopt any new Model WHS Laws sanctioned by the Commonwealth.

NSW is the first batter stepping up to the plate.

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The Work Health and Safety Amendment (Review) Bill 2019 ("Bill") seeks to amend the Work Health and Safety Act 2011 and expedite implementation in New South Wales of 12 proposals based on the recommendations of the 2018 national review of the model Work Health and Safety Act, on which the current New South Wales Act is based.

In the second reading speech for the Bill, Mr Anderson the Minister for Better Regulation and Innovation observed:

> *"Amendments to the model Act will not be progressed until well into next year, but having regard to the critical issues identified by Ms Boland and the Senate I am of the view that New South Wales cannot afford to wait until a decision is made to amend the model Act to address these issues."*

First the issue of industrial manslaughter has been addressed.

A note will be inserted as part of the Work Health and Safety Act that sets out offences and penalties noting workplace deaths may be prosecuted as manslaughter under the Crimes Act 1900.

It has always been the case that a work-related death can be prosecuted as manslaughter by criminal negligence and under the Crimes Act a maximum penalty of 25 years' imprisonment applies. According to Mr Anderson, the availability of this offence to prosecute work-related deaths is not well known or well understood in the community.

Mr Anderson has observed:

> *"The insertion of the note will make it clear to employers, businesses, workers and the community more broadly that anyone who causes the death of a worker through negligence faces serious criminal sanction"*

No new offence will be created but the note is intended to direct the minds of those that manage WHS to the risk of a prosecution for manslaughter.

Next the proposed legislation will make prosecution of serious offences easier. The Government believes Category 1 prosecutions have been hampered because the fault element of the offence—recklessness—is too difficult to prove. To establish recklessness a prosecutor must establish actual knowledge of a risk and deliberate disregard for that risk.

That will change, with the new test for a Category 1 offence being whether there is "gross negligence or recklessness". There is no definition of what amounts to "gross negligence". SafeWork will be able to prosecute grossly negligent duty holders for a Category 1 offence where they expose persons to a risk of death or serious injury or illness. The maximum penalties for a Category 1 offence are imprisonment for up to five years and/or a fine of $346,500 for an individual and $3,463,000 for a corporation.

Further the proposed legislation incorporates a new offence relating to insurance or indemnity arrangements which cover work health and safety penalties. It will be an offence for a person to enter into, provide, or benefit from insurance or indemnity arrangements for liability for a monetary penalty for a work health and safety offence. If a company commits the new offence, its officers may also be liable.

The offence will cut both ways and apply to entities offering the insurance and or indemnity and those entering into an agreement to benefit from the insurance or indemnity. It will apply to insurers and businesses that take out insurance. It will apply to management liability and statutory fines insurance currently offered by insurers.

At the moment most policies of insurance that offer cover for WHS fines contain a provision that stipulates the cover is available to the extent permitted by law. In those circumstances the policies will not necessarily fall foul of the prohibition however the cover will not be permitted by the law of NSW and an insurer will not be able to pay a fine without committing an offence so that's the end of that for insurance for WHS fines in NSW. One bright light however is that it will still be permissible to insure legal and investigation costs incurred in the investigation of the commission of an offence and the defence costs of any prosecution.

Many businesses see insurance cover for WHS fines as a primary driver in their decision to arrange management liability insurance or statutory fines insurance and insurers are likely to be confronted by:

- a decline in interest in these insurance products;
- pressure to reduce premiums where a risk driver is removed during a policy term;
- a need to innovate to make these products attractive.

The prohibition on insurance will not be retrospective. It will not apply to insurance policies and indemnity agreements in place where the cover is for a liability for a monetary penalty for an incident that occurred after the commencement of the new legislation. It will apply to insurance policies in place preventing insurance or indemnity for penalties arising from incidents after the legislation commences.

Once the Bill is passed by Parliament the changes will commence on the Assent of the legislation.

NSW has stepped up to prohibit insurance cover for WHS fines and jumped out of the blocks without Commonwealth model legislation but remains committed to harmonised work health safety laws. Whilst some States may wait for the Commonwealth to amend its model WHS legislation it is likely some will follow NSW's lead.

Times are changing. Businesses in NSW need to take stock of risk management strategies and insurance arrangements for WHS fines whilst insurers are called to action to manage the change that a prohibition on insurance of WHS fines brings. Insurance brokers will also be impacted as businesses challenge the value of management liability and statutory fines insurance if WH&S fines cannot be insured.

But that's not all, in addition:

- indemnity arrangements designed to cover work health and safety penalties for directors will not be enforceable for fines attaching to incidents after the commencement of the legislation. Directors will be personally liable for Work Health and Safety fines. It will be an offence on the part of a director and a company to enter into indemnity arrangements to cover work health and safety penalties;
- contracting practises, particularly in the transport and construction industry will need to change as contracts that seek to shift responsibility for WH&S fines to a subcontracting party will fall foul of the prohibition on indemnity arrangements and entering into contracts with indemnity arrangements for WH&S fines will be an offence.

The take homes for NSW businesses are:

- moving forward businesses in NSW will not be permitted to enter into insurance arrangements that provide cover for WH&S fines;
- businesses in NSW that currently have insurance that provides cover for WH&S fines will not fall foul of the new prohibition however insurers will not pay WH&S fines for offences resulting from incidents occurring after the commencement of the legislation;
- corporations in NSW will not be permitted to enter into indemnity arrangements that provide cover for WH&S fines for directors;
- businesses in NSW will not be permitted to enter into contracts that shift responsibility for WH&S fines to subcontractors.

The impact of the proposed new laws is sure to be a hot topic for businesses in NSW in 2020, and probably all businesses in Australia as other States and Territories react to NSW's lead.

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Dual Insurance: Excess and Escape "Other Insurance" Clauses Reconsidered

In our May 2019 edition of GD News we reported on the NSW Supreme Court decision in *Allianz Insurance Australia Limited v Certain Underwriters at Lloyd's of London Subscribing to Policy Number B105809GCO0430* in which her Honour Justice Rees dismissed Allianz's claim for contribution from Lloyd's pursuant to dual insurance principles.

The issue involved whether dual insurance applied where one policy contained an "excess" other insurance clause and the other policy contained an "escape" other insurance clause.

An "excess" other insurance clause seeks to remove cover where there is other insurance such that the policy responds in excess of the other insurance. A clause of this nature is usually framed as follows:

> *"This policy is excess over and above any other valid and collectible insurance and shall not respond to any loss until such time as the limit of liability under such other primary and valid insurance has been totally exhausted."*

An "escape" other insurance clause seeks to carve out any liability where there is other insurance. Such a clause is commonly couched in the following terms:

> *"This policy does not cover liability which forms the subject of insurance by any other policy and this policy shall not be drawn into contribution with such other insurance."*

To recap the facts, a person was injured by a passing car whilst Baulderstone Hornibrook was building a road under contract for the RTA. The injured person was an employee of one of Baulderstone's subcontractors.

Baulderstone was insured as a third party beneficiary under two policies which covered the liability to pay damages to the injured person, one with Allianz and the other with Lloyd's. Each policy had "other insurance" clauses. One was an escape clause (Lloyd's) and the other was an excess of other insurance clause (Allianz).

RTA had taken out a contract of insurance with Allianz covering Baulderstone as required by a construction contract. That policy had an excess of other insurance provision. Baulderstone, a subsidiary of Bilfinger Berger Australia Pty Limited, held a public and products/contract works liability policy issued by Lloyd's. That policy contained an "other insurance" provision in the form of an escape clause.

Allianz indemnified Baulderstone in respect of a settlement of the injured person's claim. It then claimed equitable contribution from Lloyd's pursuant to dual insurance principles.

The NSW Supreme Court ordered the following question be determined separately and in advance of any other question in the proceedings:

> *"Whether, on the proper construction of both policies, the Lloyd's Underwriters would have been liable to indemnify Baulderstone in respect of the loss arising out of the injury to the injured person had Allianz not done so."*

This required the Court to apply the principles of dual insurance. Rees J confirmed this involved a two-step approach. According to her Honour:

"First the Courts construe the terms of each policy to determine whether there is, in fact, an overlap in coverage. This may reveal for example that the wording of one 'escape' clause is absolute whilst the other is not, with the result that the loss will be cast from the insurer with the absolute clause onto the other insurer."

According to Justice Rees, if it were possible to reconcile the two policies such that one escape clause is absolute whilst the other is not there will be no dual insurance.

However, her Honour also observed that if an examination of both "other insurance" clauses points to neither policy responding then the second step is as follows:

"Second, in the event that, on close examination, neither policy responds due to the existence of the other, then the Courts apply a specific rule of construction which treats the "other insurance" clauses as cancelling each other out such that both insurers are liable."

At first instance, Rees J concluded, on a proper reading of the policies, the escape clause in the Lloyd's policy was absolute with the effect that only the Allianz policy responded to the risk. The proceedings were therefore dismissed as there was no dual insurance.

Allianz appealed to the NSW Court of Appeal. In a majority decision, Meagher JA with whom Chief Justice Bathurst agreed (Macfarlan JA dissenting) allowed the appeal and made declarations that the Lloyd's policy responded to the loss such that the principles of dual insurance applied and Allianz was entitled to contribution.

Justice Meagher disagreed with Rees J's interpretation of the escape clause in the Lloyd's policy.

First, Meagher JA considered the following wording in the Lloyd's escape clause:

"…which forms the subject of insurance by any other policy…"

His Honour observed that Rees J seemed to have accepted the argument by Lloyd's that this excluded cover if the liability was the subject of another insurance policy irrespective of whether, having regard to the exclusions and conditions of that other policy, it actually provides an indemnity against that liability.

Justice Meagher rejected this proposition and held that the clear intention of the escape clause is to exclude cover where there is an obligation to indemnify under two or more insurance policies.

It should be noted at this juncture that the dissenting judge, Justice Macfarlan, agreed with Justice Meagher on this point but Bathurst CJ (the other majority judge), did not.

Rather, the Chief Justice observed:

"The clause looks to the existence of a policy which covers the claim rather than whether the insured can actually obtain indemnity under it."

Next, Justice Meagher considered the excess clause in the Allianz policy and concluded that, considered alone, the Allianz policy excludes an indemnity in respect of any liability insured under another policy by the conversion of the Allianz insurance to excess of loss cover due to the existence of the other policy.

At this stage of the inquiry, Meagher JA held that each policy would be liable as primary insurance but for the existence of the other. It followed the two "other insurance" clauses considered alone had the effect of cancelling each other out with the result that neither is effective and each policy responds.

Interpreted in this manner, Justice Meagher disagreed with Rees J that the escape clause in the Lloyd's policy was absolute. Chief Justice Bathurst agreed with Meagher JA that each "other insurance" clause cancelled each other out.

However, the Allianz policy also contained a "difference in conditions" clause ("DIC clause"). Lloyd's contended it was necessary to consider and apply this clause independently of the result that the other insurance clauses cancelled each other out.

The DIC clause under the Allianz policy was only enlivened if the Lloyd's policy *prima facie* provided primary cover to the insured but where the Lloyd's policy did not provide cover, either wholly or in part, for the liability that otherwise would be covered under the Allianz policy.

Meagher JA noted that the DIC clause only had work to do if the Lloyd's policy were to provide primary cover. However, this did not apply because of the effect of the "excess" clause under the Allianz policy and the "escape" clause under the Lloyd's policy having the effect of cancelling each other out such that both policies provided primary cover to the insured.

As such, Justice Meagher concluded the DIC clause under the Allianz policy had no application.

For slightly different reasons, Chief Justice Bathurst also considered the DIC clause had no application.

Macfarlan JA disagreed. His Honour held that the DIC clause did in fact apply.

First, his Honour considered the Lloyd's policy to be "Underlying Insurance" within the meaning of the DIC clause because it *prima facie* provided indemnity for the risk in question leaving aside any "other insurance" provision.

Second, as the Lloyd's policy did not, by reason of the escape clause, provide cover to Baulderstone, the DIC clause was enlivened to provide cover under the Allianz policy, where cover under the Lloyd's policy was excluded.

In that event, Justice Macfarlan concluded there was no dual insurance and ordered the appeal be dismissed. Critical to his Honour's analysis was that,

like the primary judge, Macfarlan JA treated the DIC clause independently of the construction of the "excess" versus the "escape" clause, whereas Bathurst CJ and Meagher JA did not.

Although the majority agreed on the outcome, the differing opinions and reasoning expressed by each of the three appeal justices (and the primary judge) leaves a somewhat unsatisfactory state of affairs with respect to the proper construction of excess and escape clauses, especially where there is also a DIC clause thrown into the mix.

Most other insurance clauses of the "excess" type will also provide a DIC clause. Yet the majority justices in this decision seem to be suggesting that a DIC clause will have no work to do where the other insurance policy contains an escape clause or if the competing excess and escape clauses cancel each other out.

One would not be surprised to see an application for special leave to the High Court being filed. Watch this space.

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Interest and Section 151Z

In New South Wales Section 151Z of the *Workers Compensation Act 1987* provides that a negligent tortfeasor is liable to indemnify an employer for payments made (with some complications).

In *Kwanchi Pty Limited v Kocisis*, the NSW Court of Appeal held that a workers compensation insurer is entitled to recover interest on payments made. The Supreme Court of NSW has recently considered the issue of whether Section 100 of the *Civil Procedure Act 2005* permits judgment for interest alone when primary judgment has been paid (*Workers Compensation Nominal Insurer v Allmen Engineering Project Pty Limited*).

On 10 March 2014 the worker, Tiek Gyu Kim, sustained catastrophic injuries during the course of his employment as a boilermaker. The worker was employed by a labour hire company, Desk Engineering Pty Limited, which was deregistered at the time of the accident. The worker was lent on hire to Allmen Engineering Projects and sent to work at premises in St Marys. The worker sustained a traumatic brain injury when he was attempting to turn a steel beam that weighed more than 500kg.

The worker commenced proceedings against Allmen in the Supreme Court of NSW in 2015. On 19 March 2018 the Workers Compensation Nominal Insurer sought recovery of payments made to, for and on behalf of the worker pursuant to Section 151Z(1)(d) of the *Workers Compensation Act 1987*. A few days later the Nominal Insurer agreed to accept $2,965,562.76 in settlement of the Section 151Z claim, an agreed reduction on compensation payments made and it was agreed that repayment would satisfy the worker's obligation to make repayments pursuant to Section 151Z(1)(b) of the *Workers Compensation Act 1987*.

At the time that agreement was reached payments totalled $3,465,562.76. The reduction was as a consequence of a 25% contribution to a work injury damages assessment and a further reduction of 10% for contributory negligence of the worker.

The settlement was ultimately approved by Justice Garling in the Supreme Court on 28 March 2018.

Although there had been an agreement reached in relation to payments made, the Statement of Claim of the Nominal Insurer seeking recovery remained on foot. The Nominal Insurer contended it was entitled to recover interest on payments made. This was disputed by Allmen Engineering.

The matter therefore proceeded to hearing in the Supreme Court before his Honour Justice Campbell.

Three issues were considered by His Honour including:

- whether the Nominal Insurer by entering into the recovery agreement with the worker's representative entitled Allmen Engineering to a plea of accord and satisfaction barring the Nominal Insurer's remaining claim for interest and costs;
- whether the Nominal Insurer was entitled to a judgment for interest only pursuant to Section 100 of the *Civil Procedure Act 2005* which provides the entitlement to interest;
- whether the Court's discretion in relation to an award of interest should be exercised so as to refuse the Nominal Insurer's claim.

His Honour Justice Campbell determined the agreement in relation to recovery had been entered into after proceedings had been properly commenced by the Nominal Insurer. Justice Campbell also agreed with the Nominal Insurer's argument in relation to payment of interest.

Finally, His Honour declined to exercise his discretion to refuse an award for interest. His Honour concluded:

> *"I'm not persuaded that the arguments put forward by Mr Perla are such as to justify depriving WCNI of its presumptive entitlement to compensatory interest under Section 100 CPA. As I have said, I am persuaded that the proceedings were properly commenced in circumstances where Allmen had failed to respond to WCNI's demands. There is nothing unjust in providing compensatory interest for the Statutory Workers Compensation Scheme being deprived of its money pending repayment of compensation paid to the worker by the tortfeasor as required by statute (Section 151Z(1)(d) WCA). For*

the same reason I decline to exercise my discretion to reduce the period during which interest runs."

The Nominal Insurer was therefore successful in recovering interest totalling $382,565.25. The early commencement of proceedings ensured the employer received the benefit of an award of interest on payments made.

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TPD Claims: Court Considers Life Insurer's Reasons for Declining a Claim to be Inadequate

Over the past 12 months we have reported on several decisions of the NSW Court of Appeal and Supreme Court in relation to claims for total and permanent disablement ("TPD") benefits under various life insurance policies.

The central theme in most of those decisions was whether the life insurer had breached its duty to act reasonably and fairly in considering the TPD claim.

Another issue which often arises is whether the life insurer's reasons for declining a TPD claim were adequate.

These themes were again considered recently by the NSW Court of Appeal in *MetLife Insurance Limited v MX*.

MX (whose name was suppressed by the Court due to his previous occupation as an undercover detective) worked for the NSW Police Force for 22 years which often involved dangerous and difficult situations that exposed him to many violent and traumatic events.

In September 2010 his general practitioner certified him unfit for work. He did not return to work after that date.

In January 2011 he was diagnosed by his treating psychiatrist, Dr Wilkins, as suffering from PTSD.

He was medically discharged from the Police Force in October 2011.

MX was a member of the First State Superannuation Scheme of which FSS Trustee Corporation was the trustee who took out a group life insurance policy with MetLife.

MX brought a TPD claim under the MetLife policy.

MetLife declined the claim in December 2014 which resulted in MX bringing Court proceedings at the NSW Supreme Court challenging the insurer's decision.

It was common ground that, if successful, MX was entitled to a TPD benefit under the policy in the sum of $634,371.

Before the matter proceeded to hearing at first instance, MX asked MetLife to reconsider its earlier decision to decline the claim. In support of that request MX relied upon the Affidavit evidence and additional medical evidence obtained during the proceedings.

In June 2017 MetLife again declined the claim.

Accordingly, when the matter was heard by Justice Slattery, MX challenged both the 2014 and 2017 decisions by MetLife to decline the TPD claim.

The hearing before Slattery J proceeded as a preliminary hearing to address the following separate questions which the Court had earlier ordered to be determined before any other issues in the proceedings:

- Whether, in refusing to accept the claim, MetLife acted in breach of its statutory and/or general law duties?
- Whether MetLife breached its duty to act reasonably in considering the claim made by MX.

Justice Slattery answered the separate questions affirmatively and declared MetLife's first and second decisions were void and of no effect.

MetLife sought leave to appeal to the NSW Court of Appeal from the judgment of Slattery J on the separate questions. Leave was required pursuant to Section 103 of the *Supreme Court Act 1970* (NSW) as the decision in the proceedings at first instance concerned a separate question.

The Court of Appeal had no hesitation in granting leave given the issues which arose for the Court's consideration. The appeal hearing proceeded concurrently with the application for leave.

However, by a unanimous decision (Gleeson JA, Meagher & Payne JJA agreeing) MetLife's appeal was dismissed.

Justice Gleeson wrote the leading judgment in which his Honour summarised several medical reports relied upon by MX and MetLife in the hearing before Slattery J.

Whilst it was common ground between the parties that MX suffered from PTSD as a result of his many years of work as an undercover Police Officer, there was a significant dispute about whether MX had satisfied MetLife he was unlikely to ever engage in any gainful profession, trade or occupation for which MX was reasonably qualified by reason of his education, training or experience ("ETE Clause").

In respect of its first decision, MetLife relied upon 67 minutes of surveillance footage it had obtained which depicted MX at a community club engaging in activities. According to the life insurer, this evidence appeared to suggest MX was working behind the bar and interacting with patrons without difficulty.

MetLife engaged its own psychiatrist, Associate Professor Kaplan, to review the surveillance footage. The professor stated there was no reason why MX could not return to full time work provided this excluded Police duties.

MX's treating psychiatrist, Dr Wilkins, also reviewed the surveillance footage and the accompanying report of the surveillance operative. Dr Wilkins was critical of the views expressed by Associate Professor Kaplan and concluded the surveillance footage was not inconsistent with Dr Wilkins' psychiatric condition. Dr Wilkins observed MX was in fact volunteering behind the bar on a single occasion which, according to the doctor, was hardly proof of his capacity to work.

Gleeson JA then considered MetLife's two decisions to decline the claim. His Honour first considered the insurer's second decision.

MetLife had relied upon its first decision and the supporting evidence at that time when considering its second decision, as well as the Affidavits and other medical evidence served in the proceedings before the matter proceeded to hearing before Justice Slattery.

In those Affidavits, MX confirmed he volunteered at the local community club because he felt it was a safe haven and that any activities he was seen in the surveillance footage to perform was on advice by Dr Wilkins to get him out of his house.

MetLife also relied upon vocational reports which suggested MX was capable of working at least 15 hours per week in some form of employment such as an insurance investigator, compliance officer, liaison officer, insurance consultant, general clerk or delivery driver.

Associate Professor Kaplan and some of the other psychiatrists whose reports were relied upon by MetLife agreed MX had some capacity for work not involving Police duties as per the vocational reports despite his Affidavit evidence to the contrary and the opinions of Dr Wilkins.

Gleeson JA considered that MetLife's reasons did not purport to weigh the significance of the difference between undertaking paid employment in the roles identified in the vocational reports and the nature and context of MX's activities at the club which included volunteer work.

Nor did MetLife's reasons address whether the Affidavit evidence of MX and others in any way undermined or affected the views expressed by the psychiatrists whose reports MetLife relied upon.

Accordingly, Justice Gleeson held there was no error by Slattery J in finding that MetLife's second decision was void and of no effect by reason of the life insurer's failure to act reasonably and fairly when considering MX's claim.

In relation to MetLife's first decision, Gleeson JA highlighted earlier decisions of the NSW Supreme Court that confirm a life insurer, when issuing its decision to decline a claim, must explain how it reached its decision so the insured person can be satisfied the decision itself was reached in the utmost good faith.

Justice Gleeson highlighted the following:

- MetLife's reasons did not address Dr Wilkins' opinion that the contents of the video surveillance was not inconsistent with the doctor's view that MX was incapable of undertaking gainful employment;
- Associate Professor Kaplan had indicated it would be helpful to learn Dr Wilkins' response to the surveillance videos but the insurer did not provide him with Dr Wilkins' supplementary report in which he commented upon the footage.

According to Justice Gleeson it was unreasonable for MetLife to reject Dr Wilkins' view of the surveillance evidence in circumstances where it had not sought comment of Associate Professor Kaplan on those views, which the professor had indicated would be of assistance to him in forming his opinion.

In these circumstances, the Court of Appeal held MetLife breached its duty to act reasonably and fairly in considering MX's claim and its first decision was also void and of no effect.

As no error had been demonstrated in the findings of Slattery J at first instance, MetLife's appeal to the Court of Appeal was unanimously dismissed.

This decision reinforces the need for life insurers to give careful consideration to any TPD claim, particularly when there is a divergence in medical opinions regarding psychiatric conditions.

The Court of Appeal has emphasised the need for life insurers to give sufficient reasons for declining a claim. In particular, why one set of medical evidence is preferred over another and, more importantly, whether the medical evidence has sufficiently addressed any apparent inconsistency between medical opinion and factual and historical information, especially if such evidence includes surveillance footage.

In doing so, the life insurer should address the totality of the evidence otherwise it could be seen to be ignoring parts of the evidence simply because it is does not support the insurer's decision. Reasons should be given by the life insurer to explain why that evidence is not preferred.

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CONSTRUCTION ROUNDUP

NSW Parliament's Recommendations For Building Reform

The NSW Government has released its first report into the regulation of building standards, building quality and building disputes. The report has been prepared by the Public Accountability Committee after several hearings and submissions into the building industry.

By forming the multi-party Committee to look into the issue of building quality, the NSW Government has sought to restore public confidence in the construction industry, particularly in circumstances of several high profile instances of significant defects in apartment buildings leading to evacuation of the occupiers of the apartments.

The Committee has made several recommendations for the reform of the construction industry. The key recommendations are set out below.

The expedition of legislation addressing the duties of certifier and building professionals

The Committee has severely criticised the fact that the *Building and Development Certifier Act 2018* has still not commenced and its regulations have not been drafted, despite the Bill having been passed by the NSW Parliament in October 2018. It has recommended that the implementation of the regulations in support of the Act be expedited to ensure that the Act is operational well in advance of its foreshadowed July 2020 commencement.

Similarly, the Committee has questioned why amendments to the *Environmental Planning and Assessment Act 1979* consolidating certification provisions for buildings and subdivisions have not yet commenced, despite being passed in November 2017, and they have recommended that these provisions commence as quickly as possible.

The provision of an urgent response to the issue of flammable cladding

The Committee has expressed its concern at the "disjointed and lacklustre" response from the NSW Government on the issue of flammable cladding and has recommended that urgent action be taken, including a financial support package to assist buildings to rectify and remove combustible cladding.

The establishment of a fully funded and resourced Building Commission

At the time of the Committee's hearings, the new Building Commissioner had just taken office. However, the Committee was alarmed to learn that the resources allocated to the Commissioner were minimal (four to five staff members) by comparison to the resources utilised by the Commissioners appointed by the Victorian and Queensland Governments (each with hundreds of allocated staff).

The Committee also expressed its view that the NSW Department of Fair Trading was not equipped to lead reforms of the industry.

Accordingly, the Committee has recommended that a Building Commission be established and that it be given broad powers and sufficient resourcing and funding to oversee and regulate the building and construction industry in New South Wales.

The Committee has also recommended the establishment of a statutory industry advisory committee to support the Building Commission, with its aims to include strengthening industry ties with government and building the strategic direction of the Building Commission.

The reform of statutory warranties and the strata bond scheme

The Committee discussed a number of submissions that had been made criticising the length of the statutory warranties provided by builders and developers under the *Home Building Act 1989*, as well as the often confusing definition of "major defect". The Committee accepted that, importantly, a defect that is not classed as "major" may have a significant effect on the occupiers of the building, and minor defects may not become apparent within the two year time limit for claiming under the warranties.

Further, the Committee noted that the short life of the warranties encouraged illegal phoenixing activity by builders, and thus allowed them to escape longer term accountability for their work.

The Committee also noted that while the statutory warranties do not apply to high rise apartment buildings due to the unsustainability of the insurance market to cover this extent of risk, the 2018 Shergold Weir report (discussed in our previous newsletters) recommended that the warranties be extended to include such buildings albeit with appropriate economic modelling.

Looking at the strata bond scheme, the Committee agreed that the current bond of 2% is manifestly inadequate to cover the cost of defects, particularly where the relevant defects can require the expenditure of several million dollars in rectification work.

The Committee also examined the role of insurance in the building industry, particularly the trend for insurers to specifically exclude coverage for combustible cladding and the recent significant increases in premiums for professional indemnity insurance policies.

The Committee has expressed its view that the problems in the residential building insurance market are a consequence of the fundamental failure of building standards, and the answer is to tackle both construction quality and insurance coverage as two parts of the one puzzle. In this regard, it has recommended the implementation of the recommendations in the Shergold Weir report and in the 2015 Lambert report and as those improvements flow into the industry systematically increasing the level of insurance coverage.

Accordingly, the Committee has recommended that the definition of "defect" in the Home Building Act be amended to provide more clarity for home owners, that the time period in which to claim under the warranties be extended to a minimum of seven years, and that the amount of the bond under the strata bond scheme be increased.

Further, it has recommended that mandatory

professional indemnity insurance be extended to all other practitioners in a building project, which in the Committee's view would increase the pool of policy holders and thereby drive down premiums.

Extending the licensing of building practitioners

Currently, certain participants in a construction project are not required to be licensed or to be subject to independent testing and supervision. For example, there is currently no mandatory requirement for an engineer to be registered in New South Wales, and electricians are not independently examined before being issued with licences. Similarly, there are no minimum qualifications for electrical fire protection. However, the aspects of the construction process worked on by these practitioners can have the greatest effect on the safety of the occupants of the building.

The Committee described the current system as "woefully inadequate", "piecemeal" and in some areas of the industry "non-existent" and recommended that licensing be overhauled, with the introduction of a requirement for the licensing of additional trades in the construction industry.

The consolidation of existing laws and regulation into a standalone Building Act

The Committee noted that currently the process and rights arising from a construction project are addressed in several independent pieces of legislation.

The Committee also expressed its disappointment that the NSW Government's response to issues identified in the industry has been merely to enact (but not commence) additional pieces of legislation. The Committee described the NSW Government's response to the crisis in the industry as "fragmented".

It has recommended that the existing laws and regulation be consolidated into a standalone Building Act, and that a single senior Building Minister be established with responsibility for building regulation in New South Wales as well as the Building Commission and the Building Commissioner.

The deferral and amendment of the *Design and Building Practitioners Bill 2019*

The recently released *Design and Building Practitioners Bill 2019* is intended to require that registered design practitioners declare the compliance of a building with applicable codes and legislation. It also imposes obligations and a statutory duty of care on those persons.

However, the Committee has noted that currently there is no insurance product that would provide the kind of professional indemnity insurance that would be required under the Bill.

Accordingly, the Committee has recommended that the Bill not proceed until concerns about its application and workability be addressed, and that amendments be made as necessary to address the concerns laid down in the report. However, the Committee has also recommended that the final implementation of the Bill and its regulations be brought forward to 31 March 2020.

The implementation of the remaining recommendations in the Shergold Weir and Lambert reports

The Committee criticised the fact that the NSW Government had not implemented several of the recommendations in the Shergold Weir and Lambert reports, describing this as a "missed opportunity" to rectify sooner the issues now identified in the industry.

Accordingly, the Committee has recommended that the NSW Government review its response to each of these reports, and consider the full implementation of the recommendations made in the reports.

The re-introduction of a clerk of works

The Committee looked at the role of a clerk of works in overseeing a project, noting that overseas jurisdictions continue to use this model. They have recommended that a clerk of works be re-introduced on projects of a significant scale as part of the NSW Government's response to the Lambert report.

The Committee's report addresses a multitude of issues that have arisen in the construction industry, leading to a severe lack of public confidence – particularly in newly constructed apartment buildings. Since thousands of apartment buildings are being built each year in New South Wales to provide much needed additional housing options in the State, the Committee has urged the NSW Government to implement its recommendations as a matter of urgency.

However, there are clearly several big picture issues that have not been addressed fully by the report.

For example, the imposition of a requirement to maintain professional indemnity insurance is unworkable in a market where insurers are unwilling to take on such a massive risk. This needs to be addressed as a matter of urgency.

Also, the reforms recommended to be made will not assist those who already face enormous bills to rectify severe defects or to replace combustible cladding. The failures of the current system will no doubt remain a legacy for years to come.

Interesting times lie ahead for the construction industry in NSW.

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The First Test For The NSW Government's Developer Bond Scheme

On 1 January 2018 the NSW Government's developer bond scheme came into effect under the *Strata Scheme Management Act 2015* (NSW). In an industry

where developers and builders wind up special purpose investment companies that undertake building works after the works are completed or have been wound up for other reasons such as insolvency prior to any defects in buildings being identified, the scheme was designed to ensure that a source of funds was set aside by way of a bond to cover the costs of defect rectification early in the life of strata developments. However the scheme only applies to those residential or partially residential (mixed use) strata buildings that are more than four storeys high, with some protection offered to smaller buildings under the home warranty insurance scheme.

With 1 January 2020 marking two years since the scheme came into effect, many buildings to which the scheme would now apply should be nearing completion and it is important to understand the process and limitations of the scheme to ensure that owners corporations and individual lot owners are protected and can gain some benefit from the scheme despite its limitations.

The process

In summary the process provided under the scheme is as follows;

1. The developer must first create an account on an online portal maintained by Fair Trading NSW. At this stage, the developer is required to lodge a bond (through the portal) for 2% of the contract price (plus pay a fee of $1,500).
2. Within 12 months after the occupation certificate being issued, the developer must appoint a independent building inspector to undertake an inspection of the development and provide an interim report.
3. The inspector is then required to carry out his inspection (he has certain powers of access to the common property and individual strata lots) between 15 and 18 months after the occupation certificate is issued and prepare an interim report of his findings which is to be uploaded to the portal.
    (i) If no defective works are identified in the report, then the developer can apply to the Secretary to decide that there is no need to arrange the inspector to also produce a later, final report. In this case, the interim report becomes the final report.
    (ii) If defects are identified in the interim report, the developer is to arrange with the builder for the defective work to be fixed.
4. Within 18 months after the issue of the occupation certificate, the developer must arrange a final report from the inspector (or a replacement inspector if the first is no longer available). The inspector's final report must be issued through the portal to the developer, the owners corporation, the builder and the Secretary no later than two years after the issue of the occupation certificate, and must be confined to the defects identified in the interim report. No additional defects are to be identified.
5. Following the issue of the final report, all or part of the bond "can be claimed or realised by the Secretary" to pay the owners corporation to pay for the rectification of defective work – either by consent of the developer, or if the final report identifies defective work that has not been rectified (or sufficiently rectified). Such an application must be made by the owners corporation to the Secretary within 14 days of the later of:
    (a) two years following completion of the building covered by the bond; or
    (b) 60 days after the final report is uploaded to the portal.
6. If no defective work is identified in the final report, the bond is to be release to the developer. The Secretary must give 14 days notice to the developer and the owners corporation via the portal of any proposed payment.

Potential limitations of the process

Through the scheme the Government has attempted to provide an element of comfort to owners corporations and individual lot owners. However, it is recognised that the protections offered under the scheme are limited.

Some potential limitations which should be considered are discussed below:

- Amount of bond - the two per cent bond required under the scheme when put into perspective does not provide much protection. Recently in the media, there have been numerous high profile cases in which high rise residential buildings have been identified to have major structural or waterproofing defects or combustible cladding. Major defects such as these can easily cost more than the two per cent bond offered under the scheme.
- Timing of inspections and release of bond - Many latent defects will not come to light within the first 18 months of construction being completed. Many waterproofing defects are only identified as a consequence of persistent rain or major storm events, and cracking in the structural components may not appear immediately or be visible during an inspection. There is also the additional issue that the inspector's final report is not permitted to identify any new defects.
- Lack of control by owners corporation – the benefit offered to the owners corporation and individual lot owners relies on quick decisions being made in relation to any objections to the Secretary's decisions. This can be problematic for

a number of reasons:

(i) In a new development the owners corporation comprises of individuals, who are essentially strangers to each other, from various walks of life, each with differing levels of understanding in relation to the processes provided under the scheme and other relevant legislation.

(ii) The first strata managing agent may be appointed by the developer and thus may not be proactive in relation to the identification of defects. The relevant Act provides that the strata managing agents appointed at the first annual general meeting may only be appointed for a term of 12 months, meaning that a new strata managing agent may be appointed after 12 months, by which time they will only have six months (or less) to gather the necessary information to ensure that the scheme process is followed and seek instructions from the owners corporation.

- One inspector to identify all potential defects – the design and construction of any high rise building requires the expertise of numerous suitably qualified engineers and consultants. The scheme only allows for a single inspector to be appointed to examine and identify defects across various areas of expertise within a short time frame. There is no requirement that the inspector possess any specific qualification.

Statutory warranties

In addition to the rights provided under the scheme stakeholders may seek remedy through the statutory warranties provided under the *Home Building Act 1989* (NSW).

Under s. 18B of the Act owners corporations and individual lot owners are provided with various warranties in relation to residential building work which includes that the building was constructed in accordance with the plans and specifications as set out in the contract and that all the materials used in the construction of the building were suitable for the purpose for which they are used etc.

Given the above limitations of the bond scheme it is prudent that stakeholders consider and pursue their rights through court action in addition to any claims made under the scheme.

With this in mind, it is important to note that the Act only provides a two year window from the final occupation certificate being issued for a claim to be filed in relation to minor defects, and six years for any claim in relation to major defects.

Since there are strict time limits for pursuing claims for defects in new developments under both the scheme and Home Building Act, we highly recommend that owners corporations and individual lot owners seek legal advice as soon as defects are first identified. Unfortunately, if they wait to ascertain whether the developer bond will cover the cost of rectification, they may find out that the bond is inadequate or does not cover the defect, and they may be out of time to take any other action.

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EMPLOYMENT ROUNDUP

Long Service Leave – What is the "base rate of pay"?

Seemingly simple words and expressions can sometimes be very difficult for an employer to properly apply to a particular situation.

The phrase *"base rate of pay"* is an example. It is a common enough expression, and widely used in industrial legislation and instruments. But what does it mean?

The Federal Court of Australia recently looked at this issue in Association of *Professional Engineers, Scientists and Managers Australia v Bulga Underground Operations Pty Ltd [2019] FCA 1960.*

The main question raised was whether an employer (mining company) failed to pay its former employee the full amount due to him in respect of untaken long service leave upon the termination of his employment. If it had underpaid him, then it had breached s 323(1) of the *Fair Work Act 2009* (Cth) and s 39CB(2) of the *Coal Mining Industry (Long Service Leave) Administration* ***Act*** *1992* (Cth).The employee sought declarations of breaches, compensation, and an order that the employer pay his union a penalty in respect of its contravention.

The answer to the question turned on the correct calculation of the employee's "base rate of pay" during the period that he did not take leave having regard to the definition of that expression in s 16 of the FW Act and the terms of the enterprise agreement and contract of employment that governed the employment.

The employer (*Bulga*) was a coal miner company which employed certain employees in supervisory and administrative roles (*staff employees*). Those employees were covered by the *Black Coal Mining Industry Award 2010*.

The employee (***Mayhew***) was a staff employee, was first employed in 2003.

An enterprise agreement (*Agreement*) made in January 2001 continued to cover staff employees. In addition, an employment contract (*Contract*) between the employer and employee existed, and was expressed to be subject to the terms and conditions of the Agreement.

Contract

Clause 3.1 of the Contract said:

> Your remuneration at commencement of this Agreement for the position stated in Clause 2, is set at *One hundred and Eight Thousand Dollars ($108,000)* per annum as detailed in Schedule A to this Agreement. This will be known as the Total Employment Compensation (***TEC***). The TEC is in lieu of all entitlements, Award, Agreement, over award or legislative. The TEC will be reviewed in December of each year. Any changes that may apply will take effect from 1 January the following year.

Schedule A to the Contract comprised a table which detailed Mayhew's remuneration, and set out his TEC. To that figure was added a shift allowance. There was then deducted sums in respect of superannuation. The table also detailed "Notional Base Salary" (***NBS***) as being 80 % of TEC.

Agreement

Clause 10 of the Agreement provided:

> *The Employees Salary Package Offer will consist of the following:*
>
> 10.1 Total Employment Compensation (TEC)
>
> *The Employee's remuneration will be known as the Total Employment Compensation (TEC). The TEC is in lieu of all entitlements, Award, Agreement, over award or legislative. The TEC will be reviewed in December of each year, with any changes applying from 1 January the following year.*
>
> 10.2 Shift/Roster Allowance
>
> *If the Employee is required to work shiftwork or rosters outside the normal Monday-Friday working week the Employee will be paid an additional Shift/Roster Allowance…. Shift/Roster Allowance is not payable on payments made on termination of employment.*
>
> 10.3 Notional Base Salary
>
> *The Notional Base Salary (NBS) shall be 80% of the Employee's TEC. The NBS shall be used to compute payments on termination of employment.*

Clause 6.8.1 provided as follows:

> *On termination of employment (other than by dismissal for serious misconduct) the Employee shall be paid for untaken Annual Leave and Long Service Leave (if applicable), at the NBS at the time of termination of employment.*

Retrenchment

Mayhew was retrenched by Bulga in September 2016. At the date of retrenchment, he had accrued 833.75 hours of long service leave.

Bulga paid Mayhew an amount in respect of his long service leave entitlements, calculated on the basis that his base rate of pay was his Notional Base Salary as defined in the Agreement and Contract, being 80% of his TEC.

The LSL Act

The key element in determining the amount of the payment for long service leave is the employee's "base rate of pay". Section 4(1) of the LSL Act provides that the expression "base rate of pay" has the same meaning as in the FW Act.

Section 16(1) of the FW Act defines "base rate of pay" in the following terms:

> The ***base rate of pay*** of a national system employee is the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:
>
> (a) incentive-based payments and bonuses;
>
> (b) loadings;
>
> (c) monetary allowances;
>
> (d) overtime or penalty rates;
>
> (e) any other separately identifiable amounts.

The Issue

The central issue for determination, was whether "base rate of pay", for the purpose of the calculation of long service leave was the amount referred to in the Contract and Agreement as TEC (less superannuation), or Notional Base Salary (being 80% of TEC).

The Court determined that Mayhew's base rate of pay at the time of the termination of his employment was his annual salary of $171,500 less the superannuation component. That was the "rate of pay payable for his … ordinary hours of work". It did not include any loadings, monetary allowances, overtime or penalty rates or any other "separately identifiable amounts".

The combined effect of the relevant provisions in the Agreement and the Contract made it clear that Mayhew was paid a yearly salary, which was $108,000 at commencement and $171,500 at termination. The Contract provided that the yearly salary would "fully compensate" Mayhew for "fulfilling all of the requirements of [his] position". The Agreement provided that staff employees were required to work on "different shifts and rosters" and to work "such hours as may be necessary … to fully perform all the requirements of the position".

It followed that Mayhew was paid his salary or TEC irrespective of the number of hours that he had to work to fully perform the requirements of his position. There were no circumstances in which Mayhew could be paid less than his TEC, and in particular, there were no circumstances in which he could be paid 80% of his TEC, being the Notional Base Salary.

The TEC therefore was the *"rate of pay payable for his … ordinary hours of work"* for the purposes of s 39AC

of the Long Services Leave Act.

Whilst the Court accepted that the point or purpose of the salary arrangement was to provide for a single sum to remunerate the employee for performing his duties and responsibilities and to move away from previous remuneration packages that involved remuneration based on hourly wages, it did not follow, however, that when calculating an employee's base rate of pay for the purposes of the LSL Act, the employee's single salary package should be taken to relevantly include any loading, allowance or penalty rate that may otherwise have been paid or payable to the employee under the previous arrangements.

Aside from the Shift/Roster Allowance payable to Mayhew under the terms of the Contract and Agreement, Bulga was unable to point to any specific or separately identifiable loading, monetary allowance, overtime or penalty rate or other amount that was paid or payable to Mayhew in addition to, or as part of, his salary or Total Employment Compensation.

Bulga's submission concerning the Notional Base Salary, that 20% of Mayhew's TEC could properly be characterised as constituting some form of loading, allowance, overtime or penalty rate or other separately identifiable amount for the purposes of the definition of "base rate of pay", could not be accepted.

The payments and amounts which s 16(1) of the FW Act excludes from the determination of an employee's base rate of pay are actual identifiable amounts which are paid or payable to an employee and which are separate from, or payable in addition to, the rate of pay payable to the employee for his or her ordinary hours of work. They are not notional amounts or contractual constructs.

The NBS was an entirely notional amount which was defined and provided for in the Agreement and Contract for the purpose of calculating entitlements. It did not reflect, in any way, the rate of pay actually payable to Mayhew for his ordinary hours of work.

Relief Granted

In all the circumstances, the Court thought it appropriate to make declarations concerning Bulga's contravention of s 323(1) of the FW Act and s 39CB(2) of the LSL Act.

The Court also ordered Bulga to pay compensation to Mayhew for the long service leave entitlements due but not paid in full, together with interest.

Whether Bulga should also be the subject of a civil penalty was deferred to another hearing.

Implications

It is not difficult to imagine the flood of claims from former employees that the employer will now face.

More widely, the decision highlights the difficulties which are faced in attempting to 'wrap up' the entitlements of administrative workers, particularly in circumstances where their employment is governed by an enterprise agreement or an award. Often, the better method may be simply to remunerate as prescribed by the industrial instrument or legislation.

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If An Employee is Terminated A So Stop Bullying Claim Cannot Succeed

The Fair Work Commission can issue a stop bullying order to prevent a worker from being bullied at work by an individual or group. The Commission can exercise its discretion to make an order to stop bullying only if the Commission is satisfied:

- the worker has been bullied at work by an individual or a group of individuals; and
- there is a risk the worker will continue to be bullied at work by the individual or group.

The *Fair Work Act 2009* requires the Commission to be satisfied the first limb is capable of being proved as well as there being a risk the worker will continue to be bullied at work by the individual or group.

Deputy President Clancy of the Fair Work Commission dismissed an anti-bullying application in October 2019 on the basis it had no reasonable prospects of success.

The employee lodged an anti-bullying application on 7 August 2019 alleging that during her employment she had been subjected to bullying at work by a colleague. During the course of the proceedings and before the hearing of her application, the employer terminated her employment with effect from 23 September 2019. After the termination of employment, the employer immediately brought an application to dismiss the employee's stop bullying application on the basis there were no reasonable prospects of success as the applicant was no longer employed and as such she was no longer "at work".

On 8 October 2019 the applicant lodged a General Protections Application involving dismissal pursuant to Section 365 of the *Fair Work Act 2009*. She later withdrew that Application and lodged an unfair dismissal claim.

Deputy President Clancy noted in the matter of *Shaw v Australia & New Zealand Banking Group Limited*, that Section 789FF(b) of the Fair Work Act makes it clear the Commission must be satisfied not only that Mr Shaw has been bullied at work by an individual or group of individuals, but also there is a risk he will continue to be bullied at work by that individual or group of individuals. The Commission noted the difficulty for Mr Shaw was he had been dismissed at the time of his stop bullying application.

The Deputy President concluded he had no power to

make an order to stop bullying unless he could be satisfied there was a risk that at work Mr Shaw would continue to be bullied.

As the employment relationship had come to an end, even though Mr Shaw was taking steps to remedy it by way of an unfair dismissal application which may result in reinstatement in the future, the result of the unfair dismissal application was speculative and uncertain. The Deputy President stated it was clear there cannot be a risk that Mr Shaw will continue to be bullied at work because he was no longer employed.

Deputy President Clancy determined as at the date of the application to dismiss the anti bullying claim the employee was not at work and as such there could not be a risk she would continue to be bullied at work. Consequently the Deputy President was satisfied he did not have power to make the stop bullying order which resulted in the application to issue a stop bullying order having no reasonable prospects of success.

The Deputy President was asked to consider an adjournment for an indefinite period pending the resolution of the unfair dismissal application.

The Deputy President noted that should the employee succeed in securing reinstatement and at that point still held concerns there was a risk of continued bullying at work, she was free to make another anti-bullying application.

The employer was able to avoid a hearing of a stop bullying application by terminating the employee which resulted in the employee not being at work and at risk of bullying. However employees have a right to bring a stop bullying application and be protected at work from bullying. Employers should be careful they do not take adverse action by terminating an employee because an employee takes, or threatens to take, action to protect them from bullying.

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WORKERS COMPENSATION ROUNDUP

Work Injury Damages Claims - The Employer's Liability Is Not Absolute

In New South Wales an employer owes an employee a duty to take reasonable care for their safety. Often the term "non delegable duty" will be used in the context of an employer/employee relationship. This is often confused with "strict liability". However the Courts have confirmed there is no strict liability on the part of an employer.

The NSW Court of Appeal have confirmed this in the recent decision of *Scone Race Club Ltd v Cottom*.

Gregory Cottom was employed by Scone Race Club Ltd as a waste management labourer. On 23 May 2008, which happened to be the Scone Club Race Day, Cottom sustained injury to his right knee whilst removing a bin liner that was loaded with rubbish from a garbage bin. The matter proceeded to hearing in the District Court before His Honour Judge Olsson who found in favour of Cottom.

The Club appealed.

There was no issue that as his employer the Club owed the worker a duty of care. The issue was whether or not that duty had been breached.

The worker's argument was that the duty had been breached as the worker was required to lift a heavy, large and overflowing garbage bag from a garbage bin that was on a sloping grass area contaminated with water and garbage.

Although the proceedings were commenced more than three years after the date of injury, the trial judge granted the worker leave to commence proceedings out of time and that finding was not challenged on appeal.

The evidence demonstrated the worker had been employed on a casual basis by the Club since 2005. He had previously worked at several of the race days which were busy. On the particular day there were two wheelie bins which had a 240 litre capacity around the public enclosure. There were around six of these bins on the grassy area. The bin that the worker suffered injury whilst emptying was located around 20 metres from the garbage skip. Prior to the race day the Club had published a safety document which included an instruction to "ensure that bin liners are changed regularly, whenever it is identified that bin is possibly filled, it must be changed immediately".

On the day of his injury the worker saw that one of the bins was "over full" and went to empty it. In cross examination the worker rejected an argument that it was the ordinary system of work to take bins to the garbage skip and also denied he had been provided with instructions to empty bins before they were full. He indicated his usual method was to drag the bin liners to the skip.

Ms Sinclair and Ms McKinnon gave evidence on the part of the Club. Ms Sinclair's evidence was to the effect there had been no complaints about anyone slipping on the grass or injuring themselves whilst removing garbage.

Ms McKinnon also denied the worker had ever indicated to her the grassy slope was slippery or dangerous or that the bins should be placed on concrete pads.

The trial judge in her Honour'sjudgment commented that although there was evidence from Ms Sinclair and Ms McKinnon in relation to the system of work, there was no evidence as to whether that system was communicated to the worker.

Ultimately the trial judge concluded that a reasonable person in the Club's position would have foreseen there was a risk of injury to employees on removal of garbage from a large bin.

The Club's arguments on appeal included the fact the reasons of the trial judge gave serious doubt as to whether her Honour was applying a standard of reasonable care or a higher standard. Further, the Club contended her Honour limited her reasons to consideration of the Scone Cup Day which was inappropriate when other far less busy race days were taken into account. The Club argued the trial judge ought to have concluded there was no foreseeable risk of injury or no risk that was sufficiently substantial to warrant steps that Her Honour held should be taken.

Emmett AJA delivered the leading judgment and stated:

> *"I consider, for the reasons advanced on behalf of the club, that the primary judge erred in concluding that the club failed to take reasonable care by reason of its failure to install concrete pads upon which to locate the bins. There was no evidence as to the gradient of the slope to indicate why the slope itself was a hazard for an employee removing loaded bin liners from the bins. Clearly, the slope was not so steep that the bins were unstable. The precise mechanism of the worker's fall, in relation to his standing on an incline, is quite unclear. There was no specific or reliable evidence as to the area of, or depth of, the pads or the places where they should have been installed. It is by no means certain that a concrete pad would be less prone to causing injury than grass. I do not consider that the club was in breach of any duty of care or any statutory duty that it owed to the worker."*

The appeal was therefore allowed.

The decision is therefore a reminder that the duty of an employer is only a duty to take reasonable care for a person's safety. It is not a strict liability.

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The Repeal of Section 65(3) – Arbitrators Replace an AMS

Section 65(3) of the Workers Compensation Act 1987 Act previously provided the Commission could not award permanent impairment compensation where there was a dispute about the degree of permanent impairment of an injured worker unless the degree of permanent impairment had been assessed by an approved medical specialist ("AMS").

The section was repealed by the 2018 Amendment Act which commenced on 1 January 2019. Savings and transitional provisions extended the provisions of the amending legislation to injuries received before the commencement of the amendment. Consequently the amendment applies to all whole person impairment disputes determined after 1 January 2019.

The reading speeches relating to the Bill reveal the amendment recognised the requirement to refer all permanent impairment disputes to an AMS was unduly delaying proceedings and the cost of AMS referrals was also a consideration.

The practical effect of the repeal of Section 65(3) is that an arbitrator may now enter an award of compensation for whole person impairment.

The approach taken by arbitrators since the repeal has been demonstrated in a number of recent decisions which we discuss below.

In *Monahan v Anicich & Deegan & Ors* [2019] NSWWCC 26 the worker alleged a psychological injury secondary to workplace bullying.

A claim was made for lump sum compensation based upon a report from an independent medical assessor ("IME") who provided an opinion the worker had a whole person impairment ("WPI") of 22% as a result of the injury.

The employer's solicitors obtained their own IME opinion which also assessed 22% whole person impairment. The employer declined to resolve the dispute by consent and sought referral to an AMS.

In her determination the arbitrator considered the content of both IME reports and the assessments made by each IME in accordance with the PIRS Table noting both assessors' assessments resulted in an aggregate score of 18 and a median class of 3, resulting in 22% whole person impairment.

The employer conceded service of their IME evidence but declined to rely upon it, instead seeking to rely upon psychometric tests administered by a psychologist which identified inconsistency and potential malingering or an acquired brain injury. As there was no allegation of brain injury the employer submitted this raised an issue as to consistency of the worker's presentation. It was therefore submitted it was more appropriate that complex medical issues be determined by an AMS as opposed to an arbitrator who lacked the requisite experience to determine whether the worker's IME assessment provided sufficient evidence of permanent impairment in light of the psychologist's evidence. It was submitted this was a medical question.

The worker submitted the Guidelines clearly stated WPI assessments could only be made by a qualified psychiatrist and not a clinical psychologist. The employer's IME had emphatically rejected the psychologist's opinion. It was further submitted there was no medical dispute for the purpose of Section 319 of the 1998 Act because both IME's provided the same assessment. Therefore the worker submitted it was vexatious of the employer not to accept the decision of its own psychiatrist. This was also against the

principles of the Workers Compensation Guidelines and the Model Litigant Policy.

The arbitrator noted there was no dispute the worker had sustained a psychological injury as a result of events in the workplace. She noted the history taken by both IME's was consistent and their mental state examinations were comparable. They both provided detailed and reasoned opinion and their aggregate scores, median classes and WPI assessments were identical.

As the employer had taken the position of not relying on its own IME opinion, this left the worker's report as the only qualified opinion on permanent impairment. The arbitrator agreed the psychologist was not qualified under the Guidelines to assess permanent impairment resulting from a psychological injury. The evidence in the psychologist's report did not persuade the arbitrator there was not a fair climate of fact to accept the worker's IME opinion and assessment of permanent impairment.

The arbitrator was satisfied the worker's IME was qualified to make the assessment he did and there was no suggestion he had failed to comply with the Guidelines. Where there was no qualified evidence to contradict the worker's assessment, the arbitrator was satisfied the worker's assessment provided an appropriate and reliable basis on which to determine the worker's entitlement to compensation under Section 66.

The arbitrator considered it was an appropriate case for an award of compensation to be made without referral to an AMS, particularly in a case where examination by a third IME had the potential to cause the worker further unwarranted distress.

Accordingly the arbitrator ordered the employer pay the worker lump sum compensation pursuant to Section 66 for 2% whole person impairment.

This decision was followed by a further decision from the same arbitrator in *Kato v City of Sydney* [2019] NSWWCC 288. In this particular case the worker alleged injury to her back and she made a claim for lump sum compensation pursuant to Section 66 for 16% whole person impairment of her lumbar spine and skin as a result of the nature and conditions of her employment.

On receipt of the claim the employer wrote to the worker advising a WPI assessment had been requested from the treating neurosurgeon, an accredited WPI assessor. There was no further response from the employer and proceedings were filed in the Commission seeking compensation in accordance with the worker's IME assessment of 16%.

The matter proceeded to teleconference where the employer's representative confirmed the only matter in dispute was the degree of permanent impairment. A request was made to remit the matter to the Registrar for referral to an approved medical specialist to determine the issue. The worker objected and requested the matter be determined by the Commission without a referral to an AMS.

Whilst the arbitrator stated that in many cases it may still be appropriate for an arbitrator to remit a dispute as to the degree of permanent impairment for referral to assessment by an AMS that was not appropriate in the case under consideration. There was no dispute about injury or the following treatment by surgery, leaving scarring to the skin. The worker's IME was a WorkCover approved assessor of permanent impairment. He took a history of injury consistent with the worker's written statement. He considered a number of investigations of the worker's lumbar spine and recorded his findings on physical examination. In assessing WPI he used the DRE Model for assessment of spinal impairment and gave reasoning as to why he allowed an additional 2% WPI for impairment of activities of daily living in accordance with the Guidelines.

The arbitrator noted the IME's findings on physical examination satisfied the conditions of the definition of radiculopathy in the Guidelines to permit the addition of an additional 3% whole person impairment.

The IME had also described why he found 1% WPI to be the best fit according to the TEMSKI Table for scarring.

In circumstances where there was no evidence as to the degree of permanent impairment to contradict the opinion of the worker's IME, the arbitrator was satisfied the assessment provided an appropriate and reliable basis on which to determine the worker's entitlement to lump sum compensation under Section 66. She was not persuaded further delay and costs associated with referral to an AMS were warranted.

A further demonstration of the circumstances in which an arbitrator has used the new powers is seen in *Etherton v ISS Property Services Pty Limited* [2019] NSWCC 107 where the worker sought lump sum compensation in respect of 18% whole person impairment following a knee replacement based upon an IME opinion where there was an assessment of 20% whole person impairment, which the IME reduced by one tenth under Section 323 for the pre-existing degenerative condition.

The worker's IME stated:

> *"the medical interpretation would be to make a deduction of at least 50% under Section 323. From a legal perspective, noting the history of no impairment, symptoms or treatment to his right knee and assuming he was using his right leg normally for work and domestic environments then I would make a deduction of one tenth under Section 323 ..."*

The employer lodged evidence from the worker's treating practitioners which demonstrated radiological evidence of degenerative osteoarthritis and early patello-femoral degenerative changes. The employer's

Counsel submitted the arbitrator had jurisdiction to consider Dr Giblin's opinion as to the application of Section 323 of the 1998 Act.

The arbitrator accepted the IME's opinion a 50% deduction was appropriate as the assumptions upon which the IME based the one tenth deduction had not been proven. As a consequence the claimant was assessed with 10% whole person impairment which was insufficient to cross the relevant threshold for entitlement to lump sum compensation.

The decision has been the subject of Presidential determination in an appeal lodged by the worker: [2019] NSWWCCPD 53. His Honour President Judge Phillips agreed the amendments of the 2018 Amending Act were applicable to the claim and the arbitrator was acting within power when he proceeded to determine the worker's claim for lump sum compensation. He determined the arbitrator had properly assessed the worker's entitlement to lump sum compensation in the amount of 10% and by virtue of the provisions of Section 66(1) the worker did not meet the threshold for entitlement to lump sum compensation.

While many arbitrators presently appear to be reluctant to determine disputes pertaining to the degree of a worker's whole person impairment particularly in the face of competing medical evidence, the foregoing decisions of *Monahan* and *Kato* indicate in circumstances where there is a single opinion from an IME that is well reasoned, consistent with the worker's complaints and history of treatment provided in accordance with the provisions of the WorkCover Guidelines, an arbitrator may rely upon the worker's IME evidence to make an award under Section 66(1).

The clear message from the *Kato* decision is that where employers do not have evidence from an IME in response to claims for permanent impairment compensation, particularly in cases where the insurer determines the opinion of the worker's IME is not provided on the basis of a proper history or is not in compliance with the WorkCover Guidelines the employer faces the risk that an arbitrator will determine the WPI without referral to an AMS.

The dangers of not resolving a claim when identical IME assessments are obtained by both parties is clearly demonstrated in the *Monahan* decision.

Whilst the outcome in *Etherton* was to a large extent dependent upon the particular facts of the case, the decision demonstrates there is a propensity for arbitrators to apply their new power even where the worker's evidence is somewhat unfavourable to the worker's claim.

With the significant importance of the assessment of a worker's whole person impairment in determining entitlement to compensation at various stages of the claim and in the face of the "only one assessment" provisions of the legislation, the decisions highlight the importance of obtaining reliable IME opinions on whole person impairments.

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Reality TV Stars Considered To Be Employees Under Section 4

Section 4 of the *Workplace Injury Management and Workers Compensation Act* 1998 ('Act") defines a worker as "a person who has entered into or works under a contract of service or a training contract with any employer (whether by way of manual labour, clerical work or otherwise and whether the contract is expressed or implied, and whether the contract is oral or in writing)".

Recently, the Workers Compensation Commission has made a landmark ruling, finding a reality TV contestant to be an employee of the production company within the meaning of section 4 of the *Workers Compensation Act 1987*.

The applicant alleged that she had suffered a psychological/psychiatric injury as a consequence of being bullied, harassed and isolated during the filming of the program by both producers and fellow contestants.

In considering whether the relationship between the applicant and the network was one of employment, the arbitrator noted four essential features of a contract of employment, which may be summarised as follows:

- There can be no employment without a contract: *Lister v Romford Ice & Cold Storage Co Ltd* [1959] UKHL 6;
- The contract must involve work done by a person in performance of a contractual obligation to a second person: *Abdalla v Viewdaze* (2003) 122 ILR 215. That is because the essence of a contract of service is the supply of the work and skill of the worker;
- There must be a wage or other remuneration, otherwise there will be no consideration: *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497; and
- There must be an obligation on one party to provide and on the other party to undertake work: *Forstaff Pty Ltd v Chief Commissioner of State Revenue* [2004] NSWSC 573.

The arbitrator further referred to the decision of *Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] HCA 1 at 36, in which Wilson and Dawson JJ set out a number of relevant indicia to be considered when determining whether a relationship is one of employment. This includes the mode of remuneration, the provision and maintenance of equipment, the right to dismiss the person and the right to dictate the hours

or work, place of work amongst other factors.

In the matter before the Commission, the signed agreement between the applicant and the production company notably required that the applicant be available during the production period with the exact dates to be specific by the respondent, be absent from her job, or business, premises and family including any children in this period and abide by and carry out all reasonable directions of the respondent's producers or presenters amongst other requirements. The agreement did not allow for any negotiation of the terms and expressly required the applicant to agree not to dispute any of them.

The agreement further provided that:

> *"[The applicant] acknowledge that [her] participation in the program is not employment, does not create an employer/employee relationship between Seven and you and is not subject to any award or collective bargaining or workplace agreement and does not entitle [her] to any wages, salary, corporate benefits, superannuation, workers compensation benefits or any other compensation."*

The applicant submitted that the network retained substantial control over the applicant's activities whilst engaged on the show. She had to make herself exclusively available to the network, had to carry out tasks set for her by the respondent, only use equipment given to her and was at all times made aware that she was representing the show and the network.

The arbitrator acknowledged that the network did not withhold income tax for the applicant and that she was not entitled to annual leave, sick leave or superannuation. However he emphasised that earlier cases make it clear that these are merely aspects of the relationship and are not determinative of its nature. They should only be taken into consideration when examining the totality of the relationship and on that basis found that the applicant was an employee of the production company.

This therefore demonstrates that whilst the intention of the parties to enter into a relationship of employment is relevant this is not determinative. The Commission will also consider the nature and circumstances of the relationship to determine whether an employment relationship has been established within the meaning of section 4 of the Act.

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