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IN THIS EDITION

A Raft of Legislative Change for the Insurance Industry

2020 is sure to present challenges for the insurance industry as the Government lines up its ducks to introduce legislation which will implement its reforms to the financial services sector in response to the findings of the Hayne Royal Commission.

Treasury is quickly rolling out exposure draft legislation on discrete reform topics and inviting feedback from stakeholders on proposed legislation. Generally there is a 4 week consultation period. Once the consultation period closes and feedback is considered we can look forward to the introduction of new legislation before June 2020.

So lets take a deep breathe and look at what's been rolled out recently.

In November 2019 Treasury published exposure draft legislation dealing with the Royal Commission's recommendation that the handling and settlement of insurance claims should no longer be excluded from the definition of financial services. Consultation on the exposure draft legislation concluded on 10 January 2020.

The exposure draft legislation proposes the addition of a definition of "claims handling and settling service". The *Corporations Act 2001* will be amended to provide that a person provides a claims handling and settling service if a person makes a recommendation or states an opinion in the following circumstances:

- a recommendation or statement of opinion is made in response to an enquiry by or on behalf of another person about a potential claim by the other person under an insurance product; and
- the recommendation or statement can reasonably be expected to influence a decision whether to make the claim or the person assists another person to make a claim under an insurance product; or
- the person assesses whether an insurer has a liability under an insurance product or provides assistance in relation to such an assessment; or

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- a person makes a decision to accept or reject all or part of a claim under an insurance product; or
- the person quantifies the extent of the insurer's liability to another person under an insurance product; or
- provides assistance in relation to the quantification of the extent of such a liability; or
- the person offers to settle all or part of a claim under an insurance product;or
- the person satisfies a liability of the insurer under an insurance product in full or partial settlement of a claim under the insurance product.

However advice given by a lawyer in a professional capacity and other actions taken by lawyers are not claims handling and settling services.

To facilitate the requirement that those providing claims handling and settling services must have a financial services licence Section 911A(2) of the *Corporations Act 2001* will be amended such that persons that provide "claims handling and settling services" are exempted from holding an Australian Financial Services Licence except unless they are one of the following:

- the insurer under the insurance product;
- a loss assessor;
- an insurance fulfilment provider who has authority to reject all or part of a claim;
- an insurance claims manager;
- an insurance broker who provides the claims handling and settling service in relation to the insurance product on behalf of the insurer;
- a person who has provided or who has entered into an arrangement to provide financial product advice to a person under the insurance product and also provides the claims handling and settlement service on behalf of the insurer.

The definition of claims handling and settling service is wide. Those that will be required to have an Australian Financial Services Licence will be limited to those acting for insurers on claims and loss adjustors.

The consultation on the removal of the exemption of claims handling services from being a financial service closed on 10 January 2020.

The new regime will require the addition of specific conditions to a licence permitting AFS holders to provide claims handling and settlement services on behalf of another person (insurers) as well additional licence conditions for insurers.

An AFS licensee can provide financial services on behalf of an insurer under the insurer's AFS licence pursuant to a binder and does so as an authorised representative (s911B(2) of the Corporations Act) and providers of claims handling and settling services will need to consider whether they should operate under their own AFS licence or the insurers with the driver for that decision being the insurers preference to follow its dispute process instead of the providers own dispute process which will be a requirement of its licence.

This is a quantum shift from current arrangements but is only one of the many changes in 2020.

Treasury, on a different tangent issued a consultation paper on the enhancement to unfair contract term protections. The consultation seeks comments on the expansion of the definition of "small business contracts" which unfair contract term laws currently apply to. The consultation ends on 16 March 2020. The consultation is part of Treasury's review of the unfair contract term legislation introduced in 2016. It must be remembered that unfair contract term laws will apply to insurance contracts and the definition of "small business contracts" will act define the insurance contracts to which unfair contract laws will apply.

Under the current law one of the requirements for a contract to be considered a small business contract is that at least one party to the contract employs fewer than 20 persons at the time the contract was entered into. The consultation seeks comment on whether or not the definition of small business contract should be maintained, whether it should be defined by reference to annual turnover rather than head count or whether the definition should reference head count or turnover in the alternative.

Any expansion of the definition of small business contract will lead to wider application of unfair contract term legislation for insurance contracts issued to small business once unfair contract term laws apply to insurance contracts.

But that's not all folks.

There is an ongoing consultation on the Government's proposed compensation scheme of last resort which closes on 7 February 2020.

Treasury released a significant number of discrete exposure draft laws on 31 January 2020. The consultation period on those proposed laws ends on 28 February 2020.The exposure draft legislations deal with:

- amendments to the *Insurance Contracts Act 1984* to limit a life insurer's right to avoid life insurance contracts. Where a non disclosure or misrepresentation is not fraudulent an insurer must act within three years after the contract was entered into to avoid the contract,
- a regulatory régime to permit ASIC to impose caps on vehicle dealer commissions.
- the introduction of a deferred sales model for add on insurance.
- a new duty of disclosure for consumer insurance contracts and proposed contracts of insurance that if entered into would be consumer insurance

contracts. Consumer insurance contracts will include all contracts of insurance obtained wholly or predominantly for personal, domestic or household purposes of the insured. Accordingly most contracts of insurance entered into by consumers will fall within the province of the new duty of disclosure.

The duty of disclosure owed by insureds and intending insureds will morph to a more limited duty, namely a duty to take reasonable care not to make a misrepresentation to the insurer before the relevant contract is entered into and matters which will be taken into account in determining whether an insured has taken reasonable care not to make a misrepresentation include:

- the type of consumer insurance contract in question and its target market;
- explanatory material publicity produced or authorised by the insurer;
- how clear and how specific any question asked by the insurer is;
- how clearly the insurer communicated the importance of answering those questions and the possible consequences of failing to do so; and
- whether or not an agent was acting for the insured.

An insured will not be taken to have made a misrepresentation merely because they failed to answer a question or gave an incomplete or irrelevant answer to the question.

- a new régime to make financial services industry codes enforceable. ASIC will be required to approve Codes of Conduct and specify the provisions within the Code that are enforceable and which will give rise to enforceable rights which will be available to consumers.
- changes to the Corporations Act which will tighten the prohibition on hawking of financial products through unsolicited personal contacts including sales during face to face meetings and resulting from telemarketing;
- the use of the words "insurance" and "insurer", making it an offence for a person to use those terms except where the product concerned is insurance.
- powers which will be given to ASIC including the power to give an AFS licensee directions which must be acted on where ASIC has reason to suspect a financial services licensee has engaged or is engaging in conduct that constitutes a contravention of a financial services law or ASIC has reason to suspect a financial services licensee will engage in conduct that would constitute a contravention of a financial services law. ASIC will have the power to direct that an AFS licensee:
  - not authorise persons as authorised representatives of a licensee;
  - not accept new clients;
  - not transfer a specified asset to another person;
  - to conduct a review or audit of the activities or records of an authorised representative of the licensee;
  - to appoint, engage or deploy persons to carry out specified tasks including a person in a specified class of persons or a person who is nominated in writing by the licensee and approved by ASIC.

  ASIC must not make a direction unless the licensee has been given the opportunity to appear or be represented at a hearing before ASIC that takes place in private and the opportunity to make submissions to ASIC on the matter.

28 February 2020 will see the close of the majority of Treasury's consultations on financial services sector reforms which have been issued so far and the next step is the introduction of the final form of the legislation before 30 June 2020.

Interesting times lie ahead.

The financial services sector is changing and those in the insurance industry will grapple with comprehensive reforms in the not too distant future.

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There Must Be Coordinate Liabilities Between Insurers To Create An Entitlement To Dual Insurance Contribution

Pursuant to the principles of dual insurance, an insurer is entitled to claim equitable contribution from another insurer where both insurers, under separate contracts of insurance, insure the same insured for the same risk.

This is often described as the insurers having coordinate liabilities to indemnify the insured.

The fundamental premise of a dual insurance claim is that both policies of insurance must respond to the insured's claim. Put another way, the insured must be entitled to indemnity under each policy regardless of whether the insured brought the claim under one policy or the other.

If one policy does not respond to the insured's claim, there is no entitlement to dual insurance contribution as the respective liabilities of each insurer to indemnify the insured are not coordinate.

These principles were recently considered by the

Federal Court of Australia in *Epsilon Insurance Broking Services Pty Ltd t/as Epsilon Underwriting Agencies v Liberty Managing Agency Limited for and on behalf of Syndicate 4473 & Ors (No.2)*.

Ditchfield Contractors Pty Ltd ("Ditchfield"), a civil and mining contractor, was engaged by Newcastle City Council in the construction of a landfill cell waste management facility at Wallsend. Ditchfield occupied a site for plant and equipment including vehicles that needed to be refuelled from time to time with diesel fuel.

To facilitate the refuelling process, Ditchfield installed a 69,200L bulk fuel tank onsite to store the fuel which was then pumped into a fuel cart by a hose as the fuel cart stood on a graded area, positioned above a spill grate, with a 1,350L capacity to catch and store any spillage.

The fuel cart would then be taken around the site to refuel vehicles as needed.

An incident occurred when an employee of Ditchfield began pumping fuel from the tank to the fuel cart and carelessly left the pumping operation unattended causing an overflow and spillage of more than 1,500L of diesel fuel.

The spillage escaped onto the ground and across the boundary of the waste management facility, entering the adjoining property and out along the route of an electricity easement, down a drainage line, and into a creek.

Ditchfield and contractors it engaged undertook mitigation works to clean up and remediate the spill path.

The company was also charged by the EPA with a pollution offence under a summons brought against it in the Land and Environment Court. Prior to being charged, the EPA conducted an investigation which resulted in Ditchfield being required to carry out further remediation works.

The company pleaded guilty to the pollution offence and was ordered to pay a fine of $105,000 and the prosecutor's costs. Ditchfield also incurred defence costs in the defence of the EPA prosecution.

Epsilon is an underwriting agency which issued a Combined Business Liability Policy ("Epsilon Policy") to Ditchfield on behalf of certain underwriters at Lloyd's (as to 60%) and Berkley Insurance Company (as to 40%) ("Epsilon Insurers").

Ditchfield made a claim under the Epsilon Policy for indemnity with respect to the mitigation costs it incurred ("Mitigation Claim").

The Epsilon Insurers accepted the Epsilon Policy responded to the Mitigation Claim and indemnified Ditchfield in the amount of $262,666.95.

Dual Australia Pty Ltd ("Dual") as underwriting agent for four Lloyd's syndicates ("Dual Insurers") issued a Management Liability Policy ("Dual Policy") to Ditchfield.

Ditchfield made a claim under the Dual Policy for indemnity with respect to the fine, prosecutor's costs and defence costs arising from the EPA prosecution for the pollution offence ("EPA Claim").

The Dual Insurers accepted the Dual Policy responded to the EPA Claim and indemnified Ditchfield in respect of the fine, EPA costs and defence costs.

The Epsilon Insurers then sought equitable contribution from the Dual Insurers, claiming 50% of the $262,666.95 paid by the Epsilon Insurers to Ditchfield under the Epsilon Policy regarding the Mitigation Claim.

Epsilon contended the Epsilon Policy and the Dual Policy both provided cover to Ditchfield with respect to the Mitigation Claim, even though Ditchfield only made a claim in that regard under the Epsilon Policy.

The Dual Insurers denied liability for the dual insurance claim.

The Epsilon Insurers brought proceedings at the Federal Court of Australia. Chief Justice Allsop was called upon to decide, as a preliminary question, if the Epsilon Policy and the Dual Policy each provided cover to Ditchfield in respect of the Mitigation Claim.

His Honour held the Dual Policy did not respond and accordingly the claim for dual insurance contribution failed.

The insuring clause under the Dual Policy relevantly provided cover to Ditchfield in respect of:

> *"…all loss on account of any claim against the company for a wrongful act by the company."*

"Loss" and "Claim" were defined separately but did not have any significant bearing on the outcome.

The Dual Insurers relied on an exclusion clause to defeat the claim for dual insurance.

The Epsilon Insurers argued the "Additional Benefits" clauses in the Dual Policy had the effect of cancelling out the exclusion clause such that the Mitigation Claim fell for cover under the Dual Policy.

In particular, those insurers relied upon an Additional Benefits clause for "Statutory Liability" which they contended not only cancelled out the exclusion clause but provided cover for the Mitigation Claim.

Allsop CJ rejected the Epsilon Insurer's interpretation of the Dual Policy. His Honour held the terms of the exclusion clause were clear such that:

> *"…whatever might be the reach of 'loss' as defined for the purposes of cover … that cover was cut or carved back by [the exclusion clause] to exclude from cover … loss for or in connection with … any claim for … damage to … any tangible property … any claim arising from or in any way connected with the actual … discharge, dispersal, release or escape of*

pollutants into or upon land … or any water course of body of water, whether such discharge, dispersal, release or escape is intentional or accidental … or any direction or request to … clean up, remove, contain … or neutralise pollutants."

The Chief Justice further stated:

"… there could be no doubt that, subject to any extension of cover by the Additional Benefits there was no cover under the Dual Policy for the loss represented by the expenses of dealing with the property damage caused by the negligent release of diesel fuel as a pollutant."

His Honour then considered the argument that the exclusion clause did not apply due to the operation of the Additional Benefits clause for Statutory Liability.

Allsop CJ concluded the Statutory Liability Additional Benefits clause did not provide cover to Ditchfield for the Mitigation Claim. Rather, the clause provided cover for loss (as defined in the Dual Policy) with respect to civil fines and civil penalties, and pecuniary penalties awarded in criminal proceedings in respect of accidental and unintentional breaches by an insured resulting in the discharge, dispersal, release, or escape of pollutants.

Chief Justice Allsop emphasised the Statutory Liability Additional Benefits clause did not resuscitate or resurrect some property damage cover which may have been within the definition of "Loss" but which was plainly excluded by the exclusion clause upon which the Dual Insurers correctly relied.

His Honour concluded that Ditchfield, had it brought a claim, would not have been entitled to indemnity for the Mitigation Claim under the Dual Policy.

It followed the Epsilon Insurers' claim for dual insurance contribution was dismissed.

This decision reinforces the fundamental principle of dual insurance that there must be coordinate liabilities between insurers to indemnify an insured for its loss.

Here, although the Dual Policy responded to the Pollution claim, it did not respond to the Mitigation Claim.

To succeed in its claim for dual insurance contribution it was necessary for the Epsilon Insurers to establish the Dual Policy also responded to the Mitigation Claim.

It failed to do so.

In that event, the liability of the Epsilon and Dual Insurers to indemnify Ditchfield for the Mitigation Claim were not coordinate.

Accordingly, there was no dual insurance.

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Limitation Period: "Fault of the Defendant" – Take 1

Section 50C of the *Limitation Act 1969* (NSW) imposes a three year limitation period for personal injury claims to which that section applies running from the date on which the cause of action was "discoverable" by the plaintiff.

Section 50D of the Act confirms that a cause of action is discoverable by a person on the first date the person knows or ought to know each of the following facts:

- The fact that the injury concerned has occurred.
- The fact that the injury was caused by the fault of the defendant.
- The fact that the injury was sufficiently serious to justify the bringing of an action on the cause of action.

The second issue concerning knowledge by the plaintiff that the injury was caused by the "fault of the defendant" is the issue which invariably leads to litigation.

More than 10 years ago the NSW Court of Appeal held, in *Baker-Morrison v State of NSW*, that Section 50D requires knowledge, not of moral blameworthiness, but of fault in relation to a cause of action. As such, it is necessary to show when the plaintiff first knew of the key factors necessary to establish a legal liability against the putative defendant.

This principle requiring knowledge of "fault" in the legal sense was confirmed in 2012 by the NSW Court of Appeal in *State of NSW v Gillett* which comprised a Bench of five appeal judges.

Over the years since *Gillett* the Courts have considered the "fault of defendant" issue in several cases, usually at an interlocutory stage of proceedings, either as a Motion for dismissal or summary judgment brought by a defendant, or as a separate question for determination before the trial.

The Court of Appeal has consistently expressed concerns about these issues being determined at an interlocutory stage before trial.

These concerns were repeated in two recent decisions handed down by the NSW Court of Appeal which involved a consideration of the "fault of the defendant" issue.

In both cases, the plaintiff's claim had been dismissed by the primary judge, at an interlocutory stage, but was successfully overturned on appeal.

This article deals with the first judgment in *Murgolo v AAI Ltd t/as AAMI.*

In January 2012, Murgolo was seriously injured whilst working on a building site at Miranda Public School. At the time, Murgolo was the sole director and employee

of Hysela Constructions Pty Ltd which contracted with Proline Building – Commercial Pty Ltd ("Proline") to provide bricklaying and concreting services.

Proline engaged another business known as "Class Welding" who employed two workers to erect scaffolding and acrow props at the building site.

The accident occurred when an acrow prop dislodged, fell and hit Murgolo. The critical issue for Murgolo was to establish the correct identity of the defendant at fault.

In February 2012, Murgolo's solicitors received correspondence from Proline which identified the relevant employer as Class Welding Pty Ltd ("CW").

In June 2012, a liquidator was appointed to CW.

In February 2013, Murgolo's solicitors commenced proceedings against CW. Leave of the Court was not obtained to proceed against CW in liquidation but the proceedings were served upon the liquidator.

Murgolo's solicitors subsequently became aware that CW was insured by GIO (now AAI) with respect to the claim.

In June 2013, Murgolo's solicitors brought an application to join GIO directly. Before that application was determined, GIO's solicitors wrote to Murgolo's solicitors alleging that CW was not the relevant entity who employed the two workers and that on the basis of available information it appeared the correct employer was Class Welding (NSW) Pty Ltd ("CW(NSW)").

Rather than pursue the application to join GIO to the proceedings, Murgolo's solicitors were granted leave to substitute CW(NSW) as the defendant in place of CW.

An Amended Statement of Claim was filed in August 2013. From that date the claim against CW was effectively abandoned and Murgolo pursued his claim against CW(NSW) based on the information provided by the solicitors for GIO.

However, CW(NSW) was not insured and did not file an appearance which resulted in the entry of default judgment in favour of Murgolo, with damages assessed in excess of $940,000.

In March 2014 a statutory demand was issued against CW(NSW) which was not met.

In August 2014, CW(NSW) was placed in liquidation.

In March 2016, Murgolo's solicitor attended a meeting of creditors of CW(NSW) at which the directors of CW(NSW), who were also the former directors of CW, asserted it was in fact CW which employed the workers who caused Murgolo's injury.

In August 2016, CW was deregistered.

In November 2017, CW(NSW) was deregistered.

In May 2018, Murgolo's solicitors filed a fresh Statement of Claim at the NSW Supreme Court against AAI (formerly GIO) and Proline. Relevantly, the claim against AAI was brought pursuant to *Corporations Act 2001* (Cth), s601AG on the basis that AAI (formerly GIO) was the insurer liable to indemnify CW for the claim and that CW was a deregistered company.

In October 2018, AAI's solicitors filed a Motion seeking summary dismissal of the proceedings against it on the basis the claim was statute barred. The summary dismissal application proceeded to hearing before his Honour Justice Adams. Relevantly, it was necessary for AAI to establish that Murgolo knew his injury was caused by the fault of CW before May 2015 being three years before he commenced the Supreme Court proceedings against AAI.

AAI contended that Murgolo had such knowledge noting he had previously commenced the earlier proceedings, initially against CW, in February 2013 before filing the Amended Statement of Claim to replace CW with CW(NSW).

This, so it was argued on behalf of AAI, was when Murgolo first knew his injury was caused by the fault of CW and, as his knowledge was obtained prior to May 2015, the current action against AAI was statute barred.

Murgolo argued the correspondence received from the solicitors for AAI (GIO) in June 2013 raised for the first time the identity of CW(NSW) and doubts concerning whether CW or CW(NSW) was the correct defendant. In reliance upon that information, an Amended Statement of Claim was filed in August 2013 naming CW(NSW) as the defendant at fault.

The position changed again in 2016 when the directors of CW(NSW) confirmed the correct defendant to be CW. Murgolo contended his knowledge could only therefore be assessed from that date, not February 2013, despite his earlier belief that CW was the defendant at fault.

Adams J accepted AAI's contentions and dismissed the claim as it was statute barred.

Murgolo sought leave to appeal to the NSW Court of Appeal with a concurrent appeal hearing at which leave was granted.

In a unanimous decision (Basten, Macfarlan & Leeming JJA) the Court of Appeal upheld the appeal and reversed the orders made by the primary judge.

AAI contended Murgolo's knowledge of the fault of the defendant could not be "unknown" by further information suggesting the initial facts were incorrect or unfounded.

Basten JA wrote the leading judgment with which the other justices agreed. His Honour observed there were two possible employers namely CW and CW(NSW) but the existence of the latter was unknown to Murgolo when his initial belief regarding "fault of the defendant" was formed in February 2013.

Justice Basten stated:

"In the present circumstances, the relevant 'fact' required the determination of which of two potentially responsible parties was the employer of the two workers. That fact cannot be known until discovery of the existence of two companies, the contract with Proline and the employment arrangement of the workers. A belief based on ignorance of the choice to be made does not constitute relevant knowledge for the purpose of s50D(1)."

Basten JA also rejected AAI's contention that Murgolo's initial belief CW was the correct defendant at fault could not be unknown. His Honour remarked:

"In short, it is true that the Court must determine a fixed point in time at which a claimant knew certain facts; it does not follow that the first date on which the claimant thought he knew those facts was frozen in time as the relevant date, regardless of subsequent events revealed in the evidence."

The Court of Appeal also held the question of knowledge is to be assessed when the defence that the claim is out of time comes to be resolved by the Court.

It was held that Murgolo did not have knowledge that CW was the defendant at fault until the creditor's meeting took place in March 2016. As the Statement of Claim against AAI was filed in May 2018 it was thus within time. Accordingly the appeal succeeded and the orders of Justice Adams were reversed.

This case is authority for the proposition that a plaintiff's knowledge of certain facts can change over time based on new information that was not available when an initial belief was formed. Knowledge concerning the "fault of the defendant" is therefore pliable and not frozen in time.

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Limitation Period: "Fault of the Defendant" – Take 2

This article deals with the second of two recent judgments handed down by the NSW Court of Appeal which considered a plaintiff's knowledge of the "fault of the defendant" for the purpose of the three year limitation period under Sections 50C and 50D of the *Limitation Act 1969* (NSW).

In *Pomare v Whyte*, Kereopa Pomare was injured in April 2012 whilst travelling as a passenger in the sleeper berth of a prime mover pulling two long trailers which collided with a bull on the Silver City Highway west of Wentworth in NSW.

In May 2017, Pomare commenced proceedings against Angus Whyte at the NSW Supreme Court in which he alleged Whyte had care and control of the bull and the property from which the bull had escaped.

In his defence Whyte alleged the proceedings were out of time by reason of Section 50C of the *Limitation Act* on the basis that Pomare knew his injury was caused by the fault of Whyte prior to May 2014 being three years before he commenced proceedings against Whyte.

In August 2018 Pomare filed a Motion seeking to have the limitation defence determined as a separate question before trial. That application was granted and the separate question proceeded to hearing before her Honour Justice Adamson who accepted Whyte's limitation defence was made out and dismissed the proceedings.

Pomare appealed to the NSW Court of Appeal. By a majority decision (Basten & Macfarlan JJA; Emmett AJA dissenting), the appeal was allowed and the orders of the primary judge were reversed.

Basten and Macfarlan JJA also presided in the Murgolo appeal that we summarised in our "Take 1" article.

Here, the majority justices referred to their decision in Murgolo to emphasise that "knowledge" for the purpose of Section 50D is to be assessed at the time the Court determines the limitation defence. The Court must therefore assess the evidence of the plaintiff's knowledge of a fact held at a particular time but which can be affected by later information not available when the initial belief was formed and which only became known after the relevant date.

However, the issue in Murgolo concerned the plaintiff's knowledge of the correct identity of the defendant at fault in circumstances where there were two possible defendants but one of them was not known to the plaintiff when his initial belief was first formed.

In Pomare, there was no issue concerning whether Whyte was the correct defendant. The issue for the Court was to determine when Pomare first knew that Whyte was the defendant at fault.

Whyte argued that Pomare held a belief in 2013, based on information available to him at that time which included a claim form he submitted to the CTP insurer of the driver of the prime mover, and gleaned from an ABC report of the incident on television; that Whyte had admitted to police he was responsible for the bull and he did not personally close a gate from which it escaped.

By the time of the hearing before Adamson J, however, there was no evidence to support Pomare's belief that Whyte had personally left the gate open and there was much plausible evidence to the contrary.

In fact, the evidence available to the Court included statements made by Whyte in related property damage proceedings, that he:

- had not personally left the gate open;
- had no knowledge of the gate being left open; and

- had a group of four hunters on the property at the time of the collision who may have disturbed the lock on the gate.

There was also evidence before the primary judge concerning legal advice Pomare received from his solicitors and senior counsel which addressed the prospects of bringing a claim against Whyte and further evidence that should be obtained before a concluded legal opinion could be formed.

However, the decision ultimately turned on whether the belief held by Pomare in 2013 was sufficient to establish he had knowledge that Whyte was the defendant at fault prior to May 2014.

The Court of Appeal held that Pomare's initial belief that Whyte had left the gate open was unfounded due to evidence which came to light after 2013.

Basten JA stated:

> *"First, on the evidence before the Court, the plaintiff's belief was ill-founded and could not now be said to be knowledge. Indeed, even in 2013, the plaintiff had no reasonable basis for his belief. Secondly…there was no finding that, before May 2014, the plaintiff had any information as to precisely how the gate came to be open, when Mr Whyte first knew it was open, or as to what steps he should have taken to keep the gate closed, which he had not taken. The reason why there was no finding in relation to those matters was that there was no evidence before the Court upon which to base such a finding as to the plaintiff's state of knowledge…absent appropriate findings as to each of those matters, the plaintiff did not know that the escape of the bull was caused by the negligence of Mr Whyte or of those for whom he was responsible"*

Macfarlan JA agreed with Justice Basten and also stated:

> *"If, to whatever standard may have been applicable, it had been established as a 'fact' that Mr Whyte had been at fault, the next question would have been when, if at all, Mr Pomare came to 'know' of that fact. Mr Pomare may have believed it to be the 'fact' but belief does not necessarily equate to knowledge."*

As there was no evidence to establish that Pomare knew, in 2013, how the gate was left open, the Court of Appeal concluded he did not have knowledge that Whyte was the defendant at fault prior to May 2014.

In dissent, Justice Emmett took a different view concerning the belief held by Pomare in 2013. His Honour stated:

> *"…an inference can clearly be drawn, from the statements made by Mr Pomare in the various claim forms…that Mr Pomare believed that Mr Whyte had some culpability that gave rise to legal liability or responsibility for the collision in circumstances where he failed to ensure that his livestock did not escape onto the public roadway."*

As such, Emmett AJA concluded the initial belief formed by Pomare in 2013 was sufficient to establish he held the requisite knowledge before May 2014 that Whyte was the defendant at fault within the meaning of Section 50D. Accordingly, his Honour would have dismissed the appeal.

This majority decision follows the authority of *Murgolo* handed down three weeks earlier.

The Court of Appeal has now held in two recent decisions that a plaintiff's "knowledge" concerning "fault of the defendant" is not frozen in time and can change based on information that only comes to light after the relevant date.

Further, the Court emphasised that when the requisite "knowledge" was held by the plaintiff is to be assessed on the evidence available to the Court when determining the limitation defence.

In both *Murgolo* and *Pomare* the Court of Appeal overturned the decision of the primary judge to dismiss the proceedings for being out of time. In each case, the appeal justices expressed concerns about those decisions having been made at an interlocutory stage before trial, where no oral evidence was called.

Whether this puts a stop to limitation defences being argued on an interlocutory application remains to be seen but these recent decisions highlight the growing difficulty facing defendants and their insurers to successfully establish a limitation defence.

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CONSTRUCTION ROUNDUP

Proposed Construction Industry Reforms Intended To Protect Purchasers Of Newly Built Properties

In our last newsletter, we detailed some of the recommendations made by the NSW Government's Public Accountability Committee to reform the beleaguered construction industry in this State.

One of the criticisms made by the Committee was that the NSW Government's approach has been piecemeal, with many additional pieces of legislation proposed to address issues that have been identified. According to the Committee, a better solution would be to overhaul regulation of the industry as a whole, with the implementation of a new Building Act.

The Committee's criticism of the Design and Building Practitioners Bill released last year (and since passed by the NSW Lower House) has resulted in the enactment of that legislation being stalled, despite the bill being initially released with some urgency in the aftermath of the Opal Tower evacuation. (The NSW Government has recently announced that the Upper

House will resume debate on this bill in the last week of February.)

The recommendation of a wholesale overhaul of the industry has not been adopted by the NSW Government. Instead, there have recently been several announcements of further specific areas of proposed reform which are intended to address the lack of public confidence in the quality of construction, particularly in high rise apartment blocks.

Stronger protections for off the plan buyers

The NSW Government has announced that prospective buyers of apartments "off the plan" will be better protected by "sweeping changes" to be made to the *Conveyancing Act 1919* (NSW).

The intended changes include:

- The buyer being provided with key information about the development including copies of the proposed strata plan, proposed by-laws and a schedule of finishes before the contract to purchase an apartment is signed.
- Requiring the developer to notify the buyer of any material changes to these documents.
- Allowing the buyer to end the contract or claim compensation in some cases if they are "materially impacted" by these changes.
- The final plan being provided to the buyer at least 21 days before the buyer is required to settle the purchase.
- Widening existing legislation to clarify that the Supreme Court can award damages where the vendor terminates under a sunset clause; and
- Extending the cooling off period to 10 days with any deposit to be held in a controlled account until settlement.

As is usually the case with proposed reform, the devil will be in the detail. Various issues will be likely to arise from these proposed reforms which no doubt will be dealt with by way of regulation. For example, the legislation would need to define what constitutes a "material change" to the development and what would be a "material impact" to the buyer. In this regard, the deletion of a bedroom or the reduction in size of a balcony or terrace (as often happens) can significantly change the use and desirability of the apartment from a buyer's perspective. There is the additional question of whether the materiality of the impact should be assessed objectively or instead subjectively (ie from the buyer's viewpoint).

Fire safety reforms to be enforceable from April 2020

To address the issue that until now fire safety systems have been designed and certified by consultants who were not subject to any formal accreditation, the NSW Government has introduced the Fire Protection Association Australia Fire Protection Accreditation Scheme. This scheme will commence operation in April this year.

Only persons who are accredited as competent fire safety practitioners under this scheme will be authorised to endorse plans and specifications of fire safety systems.

Fire safety practitioners will be responsible for the annual assessment of fire safety measures generally required for large residential, commercial and retail premises (which includes an inspection of the property's fire exits etc).

Also, any application for a construction certificate (required before construction of a new building is permitted to commence) must include an endorsement from a fire safety practitioner of the plans and specifications with respect to the building's intended fire safety systems.

The only alternative to obtaining such an endorsement will be to obtain a certificate of compliance from an accredited certifier.

Since complaints about defective buildings often include poorly designed or installed fire safety systems, and there is a lack of public confidence in the current certification system, it is hoped that this reform will be a positive step to address this issue.

Ratings system for building professionals

According to the NSW Government, "dodgy developments will be a thing of the past" under their recently announced rating systems for professionals in the building industry.

This rating system is intended to help the NSW Building Commissioner, Mr David Chandler, determine who the risky players are in the industry and prevent "dodgy apartments" from being sold to unsuspecting buyers.

Under this system, the NSW Building Commissioner would investigate and assign ratings to builders based on their previous work. A low rating could prevent an occupation certificate being issued for a new development, which could force the builder to return deposits to purchasers.

This reform is being promoted as part of "Six Reform Pillars", which include:

- Building a better regulatory framework.
- Building ratings systems to identify risky players.
- Building skills and capabilities to improve accreditation and standards in the industry.
- Building better procurement methods, including establishing clear standards of responsibility and making building participants accountable for their performance.
- Building a digital future, such as ensuring that all information about a builder is easily accessible online.

- Building a reputation for quality research, which is designed to improve public confidence in the industry.

While these reforms sound generally positive, they will not solve the problem of buildings that have already been constructed with multiple defects. Nor will they prevent defective buildings being constructed in the future.

Further, the common practice by developers of phoenixing will need to be addressed by the NSW Government for the above reforms to have any success. Phoenixing is where a special purpose company is created solely for the development and is deregistered soon after the apartments have sold, in order to avoid liability to the purchasers for any defects in the building. The builder often starts another project under a totally different entity (and often with a different licence) which will itself be deregistered in due course. Some developers are directors of over 50 corporate entities, each created solely for this purpose.

It has previously been suggested by the NSW Building Commissioner that the directors of the companies engaged in development projects should themselves be licensed, rather than requiring the companies to obtain licences. In theory, this would be an effective measure to eliminate this practice.

If you are affected by defects in a newly constructed building, the expert construction lawyers at Gillis Delaney Lawyers can advise you about your rights and options under the legislation and common law

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No Power for NCAT to Award Damages For Owners Corporation's Breach of Duty to Maintain Common Property

A common complaint by owners of home units is that water and dampness enters their apartment through the walls of the building due to a failure of the waterproofing of the external skin of the building or through the window or balcony door frames. These parts of the building are ordinarily part of the strata scheme's common property, which the owners corporation has a statutory duty to maintain and repair. Such a duty is prescribed by s.106(1) the *Strata Schemes Management Act 2015* (NSW) and an identical duty was also included in the previous version of this legislation: the *Strata Schemes Management Act 1996* (NSW).

Pursuant to s.106(5) of the 2015 Strata Act, an owner of a lot in a strata scheme may recover from the owners corporation, as damages for breach of statutory duty, any reasonably foreseeable loss suffered by the owner as a result of a contravention of this statutory duty by the owners corporation. This would be likely to include the costs that the lot owner has incurred in (for instance) replacing water logged carpet or damaged floorboards, or in addressing mould growth in their unit.

However, it is important to note that a claim against the owners corporation for such loss and damage must be brought by the lot owner in the appropriate court rather than in the NSW Civil and Administrative Tribunal. This was confirmed by the Appeal Panel of NCAT in its recent decision in *the Owners – Strata Plan No. 74835 v. Pullicin; the Owners – Strata Plan No. 80412 v. Vickery* [2020] NSWCATAP 5.

Mr & Mrs Pullicin owned an apartment in Sydney which they complained suffered mould infestation due to water ingress sourced from outside their apartment. They commenced proceedings in NCAT against the owners corporation for their lost rental income and other losses, and the Tribunal ordered that the owners corporation pay them approximately $73,000 in damages.

Similarly, Mr Vickery suffered a loss of rental income due to water ingress into an apartment he owned in Newcastle. In that case, the Tribunal ordered that the owners corporation pay damages of $97,000.

Each owners corporation appealed to the Appeal Panel of NCAT, arguing that the Tribunal did not have the power to order the payment of damages (or of any other form of compensation) for breach of the statutory duty prescribed by s.106(1). Because the two appeals involved common issues, the Appeal Panel heard them together and delivered a single judgment applicable to both cases.

The Appeal Panel commenced its examination of the issues by noting that s.28 of the *Civil and Administrative Tribunal Act 2013* (NSW) provides that "*the Tribunal has such jurisdiction and functions as may be conferred or imposed on it by or under [the NCAT Act] or any other legislation*"; however, the Appeal Panel also noted that this section merely explains the source and extent of the Tribunal's jurisdiction and does not itself confer any jurisdiction on it.

Section 29 of the NCAT Act provides that in its "general jurisdiction" the Tribunal has certain jurisdictional and order making powers where legislation (other than the NCAT Act) enables the Tribunal to make decisions or exercise other functions, including the jurisdiction to make interlocutory or ancillary orders or orders in connection with the conduct of proceedings before it.

Accordingly, the Tribunal would have jurisdiction to make orders with respect to a breach of the owners corporation's statutory duty to maintain common property only if (and to the extent that) such jurisdiction and order making powers have been conferred upon it by or under either the NCAT Act or the 2015 Strata Act.

Section 232 of the 2015 Strata Act empowers the Tribunal to make orders to settle complaints or

disputes about strata matters, including an owners corporation's failure to exercise a function conferred on it by that Act. However, the question arose whether the order making power conferred by s.232 extended to a power to award damages to a lot owner pursuant to s.106(5) of the 2015 Strata Act.

The Appeal Panel drew several distinctions between the jurisdiction to entertain a dispute or complaint about such a matter, and the right of a lot owner to recover damages for breach of statutory duty.

Firstly, the Tribunal's jurisdiction and the lot owner's right to damages are dealt with in different part of the 2015 Strata Act.

Secondly, different limitation periods are imposed by the 2015 Strata Act with respect to the bringing of disputes or complaints to the Tribunal about strata matters, and the commencement of a claim for damages for breach of the s.106(5) duty.

Thirdly, s.232 deems the owners corporation to have not (in certain circumstances) to have performed its duty, while s.106 does not include any such deeming provision.

Finally, s.106 requires the relevant loss to be reasonably foreseeable; s.232 does not include any provision in relation to the foreseeability of the loss claimed to have been suffered.

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EMPLOYMENT ROUNDUP

Annualised Salaries – Major New Obligations For Employers

The Fair Work Commission (FWC) continues in its steady re-shaping of the Australian industrial landscape. A recent decision will impact employers significantly, and requires prompt attention.

For many years, employers have utilised an all inclusive "annualised salary" to provide a simple and efficient method of remunerating employees – most often those in the low to middle management band. The fundamental idea of an annualised salary is that in return for a yearly income which is "above the award", employees give up their entitlement to be paid strictly according to the award which covers them - a "swings and roundabouts" arrangement.

From 1 March 2020, this practice will become significantly more regulated, when model salary annualisation clauses will be inserted into a number of modern awards.

There are around 20 affected awards, the most important of which are the Clerks – Private Sector Award, the Banking, Finance and Insurance Award, and the Manufacturing and Associated Industries and Occupations Award.

The model clause amendments form part of the FWC's ongoing four-yearly review of modern awards. The number of employees covered is vast.

The new model clauses impose a number of notification, recordkeeping and wage reconciliation obligations on employers who wish to pay an employee who is award covered an annualised salary. They are designed to ensure that employees are not disadvantaged by annualised wage or salary arrangements.

Essentially, the amendments require employers to:

- Notify employees in writing of the annualised salary payable to them, the clauses of the modern award satisfied by the annualised salary, and how the annualised salary has been calculated. Employers also must specify the outer limit of ordinary hours that would attract a penalty rate or overtime hours the employee may be required to work in a pay period or roster cycle without being entitled to wages in addition to the annualised salary.
- Keep records of the starting and finishing times and unpaid meal breaks of each employee, for the purpose of complying with the reconciliation obligation discussed below.
- Reconcile every 12 months from the commencement of the arrangement (or on termination of employment) by comparing the annual salary paid and the amount that would have been payable to the employee if they had been paid in accordance with the modern award. The employer must then pay to the employee any difference (within 14 days).

In addition, some of the model clauses require the employee's consent before entering into an annualised salary arrangement.

The use of the annualised wage arrangement provisions in a particular award is not compulsory where an employer and an employee wish to enter into an annual salary arrangement. This can be achieved through the use of a separate contractual arrangement with an appropriate set-off clause in a common law employment contract.

The FWC Full Bench decision implementing the new model clauses makes clear that the new annualised wage arrangement clauses do not prevent an employer and employee implementing such an annual salary arrangement through the use of an appropriate set-off clause in an employee's employment contract, separately from the model clause in the relevant award. Many employers will find it better to rely on an annualised salary arrangement under a contract of employment which identifies the entitlements which are offset by the "all inclusive" annualised salary.

These new requirements bring some risk to employers. A failure to comply may amount to an actionable breach of award provisions.

Employers need to:

- Review the potential award coverage of each employee within their organisation. This will dictate both the specific annualise salary terms applicable, and the classification and award rates for each employee.
- Decide whether they wish to pay an annual salary to employees covered by certain modern awards. If so, an assessment of whether to utilise the new award clauses, or to rely on a contractual "set-off' provision, needs to be made.
- Comply with new notification, recordkeeping and reconciliation obligations to ensure employees are not disadvantaged. This includes the obligation to conduct an annual reconciliation (or on the termination of employment) for each employee.

Accuracy in setting appropriate outer limits and in record keeping is essential. If an annualised salary is not sufficient to compensate for hours actually worked by an employee, employers will be exposed to the risk of underpayment claims and potential penalties for breaches of the modern award. These can be enterprise destroying.

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WORKERS COMPENSATION ROUNDUP

Medical Examination of Overseas Workers

Part 3 of Chapter 7 of the *Workplace Injury Management and Workers Compensation Act 1998* introduced new claims procedures with respect to weekly payments, medical expenses, lump sum payments and enforcement of claims obligations. Division 4 relating to claims for lump sum compensation and work injury damages includes section 281 which is directed towards early determination of liability and provision of all relevant particulars about a claim.

Section 282 defines "relevant particulars" and provides that a worker has not provided all relevant particulars about a claim until the worker has submitted himself or herself for examination by a medical practitioner if required by the employer.

But what happens in cases where a worker faces an impediment to attending the employer's medical examination, such as exclusion from Australia as a result of lacking the relevant visa?

This issue was recently the subject of an appeal determination by Acting Deputy President Geoffrey Parker SC in *Thadsanamoorthy v Teys Australia Pty Limited* [2019] NSWWCCPD 61

The worker sustained injury to his left knee on 11 November 2014. At the time he sustained injury he was awaiting review of a decision by the Administrative Appeals Tribunal to decline his application for a Protection Visa after arriving in Australia illegally in June 2012. He was subsequently deported to Sri Lanka on 2 August 2016.

In March 2017 an arbitrator determined the worker's incapacity was likely to be of a permanent nature and therefore he was entitled to continuing payments of weekly compensation pursuant to Section 37.

In September 2017 the worker was examined by an IME in Colombo who assessed whole person impairment as a result of the injury to his left knee to be 25%.

The worker's solicitors served on the employer a permanent impairment claim form together with a copy of the IME report.

The employer's solicitors advised the insurer required the claimant to undergo medical examination and they would consider paying the claimant's travel expenses to return to Australia if he was able to enter the country.

The worker's solicitor responded to the effect the worker was unable to obtain a visa to come to Australia.

Subsequently the employer's solicitor reiterated the requirement of the worker to submit himself for medical examination in accordance with Section 281 of the WIM Act.

In this case the issue for the WCC was whether the worker had provided to the employer all relevant particulars about the claim in accordance with Section 281(2)(b) of the 1998 Act where he failed to submit himself to a medical examination. The arbitrator determined the worker had not provided the respondent all relevant particulars about the claim and struck the Application to Resolve a Dispute out.

The arbitrator relied upon the Court of Appeal decision in *Wattyl Australia Pty Limited v Macarthur* which made it quite clear the procedural provisions of the 1998 Act must be complied with in respect of a claim for lump sum compensation. He found there was no discretion to waive compliance with the procedural requirements for making a claim for lump sum compensation.

On the hypothetical basis there was a discretion, the arbitrator stated he would have exercised the discretion against the worker's application.

On appeal the parties were requested to provide submissions as to whether it was accepted the worker would be denied entry to Australia to attend a medical examination. They were also requested to provide submissions as to whether Section 282(2) required the

medical practitioner to have been qualified to practice in New South Wales or whether a medical practitioner qualified and practising in a foreign jurisdiction would satisfy the requirements of Section 282(2).

Submissions were also sought on whether the worker must be present in New South Wales to submit himself for examination or whether he could do so in Sri Lanka.

Submissions were also sought as to whether the employer was obliged to provide for a medical practitioner to examine the worker in Sri Lanka or some other convenient venue.

Acting Deputy President Parker SC considered the statutory construction of Sections 281 and 282 of the 1998 Act in the context of Section 3 which provided the system objectives of providing injured workers with income support, compensation for permanent impairment and reasonable treatment and other expenses.

The Acting Deputy President indicated it was evident the text of Section 281 was intended to promote the early determination of liability and assessment of claims for lump sum compensation. This objective required the claimant to provide relevant particulars about the claim sufficient to enable the insurer to make a proper assessment of the worker's full entitlement on the claim to enable the insurer to make determinations of liability and early offers of settlement.

Sub-section 282(2) facilitated that purpose by directing that the employer could have the worker examined which was intended to inform the insurer as to the impairment, if any, thereby avoiding referral to an AMS. Until the worker submitted for examination he was not considered to have provided all relevant particulars about the claim. Section 281 provides a claim must be determined (a) within 1 month after the degree of permanent impairment first becomes fully ascertainable, as agreed by the parties or as determined by an approved medical specialist, or (b) within 2 months after the claimant has provided to the insurer all relevant particulars about the claim.

A failure to attend the medical arranged by the insurer amounted to a failure to supply particulars such that the obligation to determine the claim imposed by Section 281(2)(b) within two months after provision of all relevant particulars was not engaged.

The Acting Deputy President considered there was no option for the worker not to be examined if the employer required him to submit for examination.

In the particular case under consideration where the worker could not attend Australia for medical examination the Deputy President determined the relevant particulars were not furnished and therefore the time within which the insurer was required to determine the claim had not commenced to run.

After considering the Court of Appeal's decision in *Wattyl*, the Deputy President concluded if the insurer insisted on examination the worker was required to submit and until such time as he did the relevant particulars were not furnished.

Further, the Deputy President could see no basis in the legislation to require an insurer to take steps to facilitate examination such as arranging for an appropriately qualified medical practitioner to conduct an examination in Sri Lanka or some other venue.

The Deputy President also stated the medical practitioner was required to be a suitably qualified health practitioner, practising in New South Wales or Australia, trained in the WorkCover Guidelines, October 2019.

The Deputy President was satisfied the arbitrator had provided sufficient reasons as to why there was no discretion and if there was a discretion it had not been satisfied.

Accordingly the arbitrator's decision was confirmed.

We understand the worker intends to appeal against the decision to the Court of Appeal.

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Damages in NSW and Section 151A

A recent decision of President Judge Phillips in the NSW Workers Compensation Commission ("WCC") has confirmed that workers in NSW who accept damages in settlement of proceedings commenced in another jurisdiction run the risk of precluding themselves from an entitlement to compensation pursuant to the provisions of the *Workers Compensation Act 1987* ("1987 Act").

Section 151A of the 1987 Act provides a worker who recovers damages in respect of an injury from the employer liable to pay compensation ceases to be entitled to any further compensation in respect of the injury concerned.

Section 149 of the 1987 Act defines "damages" to include:

> *(a) any form of monetary compensation; and*
>
> *(b) any amount paid under a comprise or settlement of a claim for damages (whether or not legal proceedings have been instituted) ..."*

In *Gardiner v Laing O'Rourke Australia Construction Pty Limited* [2019] NSWWCCPD 66, the worker, Dr Gardiner, lodged an Application to Resolve a Dispute ("ARD") in the Commission seeking compensation in respect of a psychological injury which he attributed to the *"nature and conditions"* of his employment which included unaddressed administrative issues, a failure by his direct line manager to remedy his situation, inadequate support staff and being deceived by management.

The worker's employment was terminated by his employer on 12 March 2018. On the same date, the worker filed a complaint with the Anti-Discrimination Board of NSW ("ADB") alleging he had been discriminated against on the grounds of his disability as well as being victimised in the course of his employment.

The complaint was subject to a conciliation conference and was ultimately resolved by way of a Deed of Release between the worker and employer dated 5 September 2018. Relevantly, the Deed detailed a chronology of the worker's complaints regarding the subject workplace and its impact on the worker's mental health before providing for payment of $29,412 to the worker as *"General Damages"* in full and final settlement of *"all claims"* which the worker may have against the employer *"excluding any claim that Dr Gardiner might elect to pursue pursuant to any applicable workers compensation legislation"*.

On commencement of proceedings in the WCC the threshold issue arose as to whether the Deed entered into by the worker and employer provided for the payment of damages in regard to the psychological injury for which the worker sought compensation, thereby triggering the operation of Section 151A of the 1987 Act and denying the worker the right or capacity to pursue his proceedings in the Commission.

Decision of Arbitrator

The Arbitrator at first instance determined there had been a payment of damages by the worker's employer for the psychological injury for which the worker sought to agitate a distinct claim for compensation pursuant to the provisions of the 1987 Act.

In so doing, the Arbitrator relied not only on a detailed consideration of the terms of the Deed of Release itself but also had regard to the worker's evidence before the ADB which detailed a chronology which identified alleged incidents at the workplace that were the subject of the proceedings before the Commission.

The Arbitrator then considered the issue of whether the purported exclusion of a claim by the worker for workers compensation as a matter of construction saw the worker avoid the operation of Section 151A of the 1987 Act.

Noteworthy, the arbitrator adopted a broad definition of a "Claim" as provided by the Deed, determining the definition included claims in respect of personal injury damages arising from employment.

Accordingly the Arbitrator determined the broad language of the release and the payment of damages to the worker pursuant to the Deed constituted a recovery of damages by the worker in respect of the injury for which he now sought compensation thereby enlivening Section 151A and defeating his claim before the Commission.

Decision of President on Appeal

The worker appealed the decision of the Arbitrator dismissing his claim which was determined "on the papers" by President Judge Phillips in accordance with Section 354(6) of the *Workplace Injury Management and Workers Compensation Act 1998* ("1998 Act") on 19 December 2019.

In dismissing the appeal, the President determined there was a "real and obvious" connection between the facts relied upon by the worker in his proceedings before the ADB and those which the medical evidence revealed as causative of his psychological injury for which he sought to press a claim for compensation in the Commission.

Further, on the issue of the proper construction of the Deed, the President agreed with the decision below that the release was drafted in sufficiently wide terms to cover a potential claim for compensation for personal injury. Accordingly, it could be concluded with confidence that the parties to the Deed resolving the proceedings before the ADB intended to resolve a number of claims and not just the claim for discrimination pursued in another jurisdiction.

The above analysis led the President to confirm there was "*no doubt"* the injury pleaded in the Application before the Commission was the same injury for which the worker had recovered damages pursuant to a Deed, a conclusion supported by a proper review of the evidence.

The President reinforced the opinion of Handley AJA in *Adams v Fletcher International Exports Pty Limited* [2008] NSWCA 238, that if a proper construction of the Deed establishes that a worker has recovered damages from the employer in respect of an injury for which he or she subsequently seeks compensation then Section 151A of the 1987 Act is "*intractable and the Court has no option but to give effect to the clear language of Parliament".*

The recent decision of President Judge Phillips in *Gardiner* is noteworthy for confirming the Commission's willingness to adopt a broad construction of a Deed between a worker and employer when considering the issue of whether the former has accepted payment of damages for an injury for which the worker subsequently seeks to pursue a claim for compensation pursuant to the provisions of the 1987 Act.

Further, the decision confirms the Commission will not confine itself to the terms of the Deed itself and will have regard to the evidence put forward by the parties in another jurisdiction when determining the intentions of those parties when entering into a full and final settlement.

The decision and the authorities considered in the determination of the Commission continue to be of relevance to employers and insurers in NSW where a worker has sought remedy in another jurisdiction.

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Warning. The summaries in this review do not seek to express a view on the correctness or otherwise of any Court judgment. This publication should not be treated as providing any definitive advice on the law. It is recommended that readers seek specific advice in relation to any legal matter they are handling.