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GD NEWS / JUNE 2020

IN THIS EDITION

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Class Actions: Can the Plaintiff get Access to the Defendant's Insurance Documents?

Litigation is not always transparent. A plaintiff sues a defendant but the defendant is not always the party who conducts the defence. Defendants will generally have insurance which responds to the claim and the insurer steps in to conduct the defence.

In most cases Court proceedings are brought against the named defendant and not the defendant's insurer. However, the plaintiff will have no idea about the insurance arrangements between the defendant and its insurer, the type of insurance policy, the limit of indemnity available to the defendant under the insurance policy or indeed if the policy may or may not respond depending on the findings made by the Court.

The general rule is that insurance documents are not relevant to the determination of any fact in issue in Court proceedings nor are they discoverable save for specific exceptions dealing with the defendant's insolvency. In that event, a plaintiff may seek the production of insurance documents to ascertain whether a claim should be brought directly against the insurer if the insured defendant is deregistered or insolvent.

The second aspect of the general rule is that a plaintiff has no right to examine a defendant ahead of a trial in an endeavour to elicit information about the defendant's means with a view to deciding whether it is worth the plaintiff's while to proceed with the case or some part of it except for specific exceptions such as insolvency.

With the advent of class actions and other types of representative proceedings since their introduction in the 1990s the Courts have sometimes taken a different approach to the general rule.

In the Federal Court, her Honour Justice Gleeson held in *Simpson v Thorn Australia Pty Limited t/as Radio Rentals (No. 4),* that Section 33ZF(1) of the *Federal Court of Australia Act 1976* (Cth) empowers the Court to compel production of documents relevant to the ability to recover judgment from a respondent even if such documents are not relevant to an issue arising on

the pleadings provided that the Court thinks such an order is appropriate or necessary to ensure that justice is done in the proceedings.

In that case, her Honour ordered the production of Thorn's insurance documents from primary and excess layer insurers to enable the group members to receive advice about the limit of indemnity available to Thorn prior to mediation.

That decision was handed down before the High Court considered the breadth of the Court's power under Section 33ZF(1) in *BMW v Brewster* (December 2019) when the High Court held the section did not empower the Court to make a common fund order.

Whilst *BMW* was decided in the context of common fund orders, the High Court's judgment threw into doubt whether Section 33ZF(1) could, as Gleeson J had earlier held, empower the Court to order the production of insurance documents to a class action applicant.

That question was recently considered by his Honour Justice Beach in *Evans v Davantage Group Pty Limited (No. 2)*.

Evans sought production of Davantage's insurance documents to better inform himself as to whether it was commercially viable to prosecute the group proceeding to judgment and whether it might be necessary to take action directly against the insurers of Davantage in order to obtain declaratory relief as to the existence or scope of any indemnity cover that may be available to Davantage in respect of the claim.

Davantage opposed the application and its insurers, AAI Limited (Primary Layer) and Berkeley Insurance Australia (Excess Layer) were granted leave to intervene on the application to make submissions opposing the orders sought.

AAI had withdrawn its provisional grant of indemnity and asserted the relevant policy did not respond to most of the significant claims.

Berkeley Insurance had also denied indemnity.

Evidence was presented to Justice Beach which raised concerns about the financial viability for Davantage to meet any judgment in the claim in the absence of being indemnified under its insurance policies with AAI and Berkeley Insurance. The claim was quantified in excess of $47.6 million plus interest plus costs and Davantage's financial statements revealed net assets of less than $1 million.

It was contended for Evans that the High Court's decision in *BMW v Brewster* does not deny the Court power to order production of insurance documents under Section 33ZF(1). Further, it was argued that questions of recoverability are not extraneous to the proceeding or beyond the compass of the section. Indeed, Senior Counsel for Evans submitted recoverability is at the heart of the class action procedure established by Part IVA of the FCA Act.

In addition, Senior Counsel for Evans emphasised that pursuant to Section 33V(1) of the FCA Act, no representative proceeding can be settled without the Court's approval such that Part IVA imposes a responsibility upon a group applicant to weigh the prospect of recovering a substantial judgment against the risk of litigation.

It was argued for Evans that in order to discharge this responsibility the applicant would need to be apprised of Davantage's insurance documents to know the respondent's ability to meet any judgment and receive advice on any compromised settlement requiring the Court's approval.

Further, Evans relied upon the decision of Justice Gleeson in *Simpson v Thorn* where it was argued before her Honour that Simpson would be assisted by access to Thorn's insurance documents for the purpose of advancing discussions at mediation and that the prospects of any settlement would be reduced if Simpson's legal representatives were required to assess any settlement offers without any information about Thorn Australia's insurance position.

Beach J rejected the application.

Justice Beach held the power to order the production of insurance documents is not available under Section 33ZF(1).

However, his Honour conceded the Court does have power to make that order under Section 23 of the FCA Act (not Section 33ZF(1)). Nevertheless, Justice Beach held it was inappropriate to make that order in this case.

Beach J noted the High Court in *BMW v Brewster* emphasised that although the power provided by Section 33ZF(1) is wide, it is essentially a supplementary or gap filling power only to be exercised in the context of *how* an action should proceed in order to do justice.

Second, Section 33ZF(1) can be used to support any interlocutory procedural order necessary to ensure the pleaded issues are resolved justly between the parties or to bring the matter to a fair hearing on a just basis.

Beach J observed:

> *"There is nothing expressed in such observations to suggest that Section 33ZF(1) could be used to override the conventional position that insurance documents are not discoverable. And it is not a sufficient justification for ordering production of the insurance documents that they may be of some assistance to group members. The criterion 'justice is done' in Section 33ZF(1) involves a consideration of the position of all parties."*

His Honour considered the decision of Gleeson J in *Simpson v Thorn* and observed the insurer for Thorn had been joined separately in that case. Further, the insurer had conceded there was an arguable case against it for indemnity. Justice Beach noted none of those features applied in the present case.

His Honour held that Gleeson J's interpretation regarding the breadth of the Court's discretion under Section 33ZF(1) did not find favour with the High Court in *BMW v Brewster*.

To the extent that Evans sought access to the insurance documents to determine whether to commence proceedings against the insurers, Beach J held this application was not the appropriate means by which to do so.

As to whether the insurance documents ought be produced to assist the group members in a mediation his Honour stated:

> *"... the fact that the insurance documents might assist the applicant in a mediation does not justify their discovery ... In circumstances where production or disclosure of the relevant insurance details will confer a tactical advantage on the applicant, and a corresponding disadvantage upon the respondent, thereby creating an asymmetry in the parties' positions at mediation, facilitating such a course would not usually be appropriate to ensure that justice is done in the proceeding. The interests of the applicant and group members do not trump those of the respondent to that extent."*

In relation to whether the insurance documents ought be produced to assist the Court on any application to approve a settlement, Justice Beach formed the view the applicant's lack of access to those documents would not preclude the Court from being able to approve a settlement. His Honour raised the possibility of implementing procedures to flush out the insurance question at the approval stage, if necessary, such as requiring the production of confidential material by Davantage or its insurers at the approval hearing.

His Honour concluded:

> *"I have carefully considered the Court's protective role under Part IVA. But the boundaries thereof are not unlimited and do not go so far as to justify giving the applicant, under the collective action of a group proceeding, the right to obtain a respondent's insurance documents in a context such as the present that the applicant and group members would not normally have in individual proceedings."*

This interesting decision is a throwback to the general proposition that insurance documents are not discoverable in litigation if they do not relevantly assist in determining the facts in issue.

The breadth of the Federal Court's power under Section 33ZF(1) of the FCA Act has been clarified in light of the High Court's recent judgment in *BMW v Brewster*.

Insurers in class action litigation can breathe a collective sigh of relief!

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Roadmap for Reform of the Insurance Industry - 6 Months Delay

The Royal Commission into misconduct in the banking, superannuation and financial services industry made 76 recommendations, with 54 directed to the Government, 12 to the regulators and 10 to the industry. 40 recommendations require legislation. The Government has taken on board all recommendations and has announced additional commitments.

The roadmap for legislative reform was announced by Treasury in August 2019 and COVID-19 has put paid to that roadmap with the Morrison Government announcing on 8 May 2020 that there will be a 6 month deferral of its plans.

The Treasurer has announced:

> *"Under the updated timetable, those measures that the Government had indicated would be introduced into the Parliament by 30 June 2020, will now be introduced by December 2020. Similarly, those measures originally scheduled for introduction by December 2020 will now be introduced by 30 June 2021.*
>
> *In relation to commencement dates contained in Royal Commission related exposure draft legislation issued prior to the coronavirus pandemic, the Government will also extend these dates by an additional six months."*

So where are we now at when it comes to the Insurance Industry?

What's Happened To Date

The Government has concluded consultations which have addressed:

- ✓ Disclosure in General Insurance: Improving Consumer Understanding
- ✓ APRA Capability Review: Release of Final Terms of Reference and Request for Written Submissions regarding APRA's Capability
- ✓ Enforceability of financial services industry codes
- ✓ Ending Grandfathered Conflicted Remuneration for Financial Advisers: Draft Regulations
- ✓ Mortgage broker best interests duty and remuneration reforms.

The Government has introduced design and distribution obligations for financial products and strengthened consumer protection. ASIC now has intervention powers permitting it to ban or impose conditions on the offering of financial products to retail clients. In addition financial services providers will not be able to offer financial products to retail clients unless there is a target market determination for the product. The Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention

Powers) Act 2019 was passed by Parliament in April with the new regime being phased in.

The Government released the Australian Prudential Regulation Authority (APRA) Capability Review.

ASIC has released a consultation paper which charts the way forward for foreign financial services providers who intend to operate in Australia or offer financial services to Australians. Foreign financial services providers will need an AFSL to provide financial services in Australia.

2019/2020 So Far

Legislation addressing the following was consulted on and has been introduced:

- ✓ Product Design and Distribution Enhanced powers delivered to ASIC already and from 5 April 2021 target market determinations are required (*Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* and *Corporations Amendment (Design and Distribution Obligations) Regulations 2019* (**Regulations**) and final ASIC Regulatory Guide yet to be published).;
- ✓ Unfair contract term legislation will apply to insurance contracts from 5 April 2021 (***Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020 in late February 2020***);
- ✓ Ending grandfathered commissions for financial advisers from 1 January 2021 (*Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Act 2019*);
- ✓ Removing the exemption for funeral expenses policies from categorisation as a financial product-generally, from 1 April 2020, if you provide a funeral expenses facility, you will need to hold an AFS licence and comply with relevant obligations set out in the licence and the Corporations Act. (*Treasury Laws Amendment (Financial Services Improved Consumer Protection) (Funeral Expenses Facilities) Regulations 2019*).

Post 2021

The legislation to be introduced by 31 December 2020 and commence in 2021 or later will address the following:

- ✓ Introducing licensing for claims handling and removing the current exemption
- ✓ Enforceable code provisions for industry codes of conduct. The Government expects the Financial Services Council and the Insurance Council of Australia to work co-operatively with ASIC to have the relevant provisions of their codes approved as 'enforceable code provisions' as soon as practicable after legislation providing ASIC with these powers
- ✓ Changes tightening up prohibitions on hawking of insurance products
- ✓ Deferred sales model for add-on insurance
- ✓ Caps on commissions paid to vehicle dealers for sale of add-on insurance products
- ✓ Change the duty of disclosure for consumers in Insurance - Duty to take reasonable care not to make a misrepresentation to an insurer
- ✓ Limiting circumstances where insurers can avoid life insurance contracts
- ✓ Restricting use of the term 'insurer' and 'insurance'
- ✓ Disclosure of lack of independence - insert new specific obligations in the Corporations Act 2001 (Corporations Act) in relation to fee recipients(a financial services licensee or authorised representative) providing personal financial product advice to retail clients under ongoing fee arrangements and draft regulations relating to record-keeping requirements and amending the Corporations Act to require entities (a financial services licensee or authorised representative) who are authorised to provide personal advice to a retail client to disclose in writing to the client where they are not independent and why that is so
- ✓ A new oversight authority for APRA and ASIC

Legislation to be consulted on and introduced by 30 June 2021 will address the following:

- ✓ A compensation scheme of last resort
- ✓ Extending the BEAR to APRA-regulated insurers

And Further Down the Track

The Government has not indicated any deferral of its intention to increase AFCA's role in remediation programs with legislation due to be introduced by mid-2021.

Additionally the following reviews are scheduled for 2022 and there has been no announcement of deferral of these:

- ✓ A review by the Council of Financial Regulators and the Australian Competition and Consumer Commission looking at the changes to mortgage broker remuneration and operation of upfront and trail commissions
- ✓ A review of measures to improve the quality of financial advice – Consistent with the Royal Commission recommendations, the review will examine all exemptions from the ban on conflicted remuneration, including for general insurance, consumer credit insurance, timeshare and stockbroking remuneration, and stamping fees
- ✓ A review of each remaining exemption from the ban on conflicted remuneration. This review will

occur as part of the review of measures to improve the quality of financial advice

- ✓ An independent inquiry into changes in industry practices
- ✓ Assessment of the effectiveness of changes made by the regulators following the Royal Commission by the (to be established) financial regulator oversight authority

The second half of 2020 will see the majority of the Government's proposed legislative reforms in response to the recommendations of Hayne Royal Commission introduced to Parliament and passed by the end of the year. 2021 is shaping up to herald in new challenges for the insurers, underwriting agencies, insurance brokers and claims handlers as well as their advisers. COVID-19 has slowed the progress but not dampened the desire to follow through with the Government's reforms.

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Litigation Funders Will Need an AFSL from 22 August 2020

Life for Litigation Funders will be more complex from 22 August with the Treasurer's announcement of the removal of exemptions for litigation funders from the requirements to hold an Australian Financial services licence and comply with the managed investment scheme regime. The Treasurer announced the removal of the exemptions on 22 May with Regulations to be made which will take effect 3 months after the announcement.

The Treasurer observed this change will complement the Inquiry being undertaken by the Parliamentary Joint Committee on Corporations and Financial Services into litigation funding. The Committee's report is due by 7 December.

The Treasurer announced:

"The removal of these exemptions will require litigation funders to obtain an AFSL from the Australian Securities and Investments Commission. AFSL holders are obligated to:

- *act honestly, efficiently and fairly;*
- *maintain an appropriate level of competence to provide financial services; and*
- *have adequate organisational resources to provide the financial services covered by the licence."*

It is a little surprising that the proposed change was announced before the Parliamentary Committee Report on whether present regulation of the industry is impacting on fair and equitable outcomes for claimants but it is now plain that the Government sees that Litigation Funding requires better Regulation which will be put in place irrespective of the findings of the Parliamentary Joint Committee findings.

It is possible that the Government will do more than remove the 2 exemptions. The terms of reference of the Inquiry included consideration of:

- the impact of litigation funding on the damages and other compensation received by class members in class actions funded by litigation funders;
- the potential impact of proposals to allow contingency fees and whether this could lead to less financially viable outcomes for plaintiffs;
- the financial and organisational relationship between litigation funders and lawyers acting for plaintiffs in funded litigation and whether these relationships have the capacity to impact on plaintiff lawyers' duties to their clients;
- the Australian financial services regulatory regime and its application to litigation funding;
- the regulation and oversight of the litigation funding industry and litigation funding agreements;
- the application of common fund orders and similar arrangements in class actions;
- factors driving the increasing prevalence of class action proceedings in Australia;
- what evidence is becoming available with respect to the present and potential future impact of class actions on the Australian economy;
- the effect of unilateral legislative and regulatory changes to class action procedure and litigation funding;
- the consequences of allowing Australian lawyers to enter into contingency fee agreements or a court to make a costs order based on the percentage of any judgment or settlement;
- the potential impact of Australia's current class action industry on vulnerable Australian business already suffering the impacts of the COVID-19 pandemic.

The Parliamentary Joint Committee was also tasked with reviewing "the potential impact of the move by the Victorian Government to abolish the long-held prohibition on lawyers being paid on a contingency basis, where lawyers claim costs as a percentage of their clients' damages."

Perhaps we will see interest in a competing model to litigation funding with the Government supporting lawyer's contingency fees, however, charges by lawyers based on a percentage of the sum recovered is also likely to be seen as impacting on fair and equitable outcomes for claimants in the same way that litigation funding is currently viewed.

Whilst there are likely to be further changes that will impact on Litigation Funders, once an AFSL is required the product design and distribution obligations introduced by (*Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* and *Corporations Amendment (Design and Distribution Obligations) Regulations 2019* (**Regulations**) will apply to Litigation Funders.

Litigation Funders will be obliged to prepare target market determinations for each funded action which will be reviewable by ASIC.

ASIC will be able to intervene in respect of a Litigation Funder's financial product and can make:

- an individual product intervention order ; or
- a market-wide product intervention order.

ASIC has the power to make product intervention orders when a financial product has resulted in, or will or is likely to result in, significant detriment to retail clients.

In considering whether a financial product has resulted in, or will or is likely to result in, significant detriment to retail clients.

ASIC must take into account:

- the nature and extent of the detriment;
- the actual or potential financial loss to retail clients resulting from the product;
- the impact that the detriment has had, or will or is likely to have, on retail clients.

However, ASIC must not make a product intervention order unless it has consulted persons who are reasonably likely to be affected by the proposed order.

Intervention orders can include a requirement that a product must not be issued to a retail client unless the retail client has received personal advice.

ASIC can also make orders:

- that a product only be offered to specific classes of consumers
- restricting marketing;
- prohibiting the distribution of a product without prescribed improvements;
- banning the product;
- banning a feature of a product.

An order may last for up to 18 months but may remain in force permanently if determined by the Minister (after consultation with ASIC).

Interesting times lie ahead for the litigation funding industry.

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Dual Insurance: Can Defence Costs be Included in the Claim for Equitable Contribution?

Pursuant to the principles of dual insurance an insurer is entitled to claim equitable contribution from another insurer if both insurers have coordinate liabilities to indemnify the same insured under separate policies of insurance.

The insurer who has indemnified the insured will be entitled to claim 50% contribution from the other insurer towards the amount paid under the policy, subject to any policy deductible or excess which must be deducted first.

What if the insurer claiming dual insurance contribution has also incurred defence costs by acting for the insured in the defence of Court proceedings brought against the insured? Is the insurer entitled to include those defence costs in the claim for equitable contribution from another insurer? Does it matter if the insurer was under a duty to defend the insured pursuant to the terms of the insurance policy rather than an obligation to indemnify the insured in respect of defence costs?

These issues were recently considered by Chief Justice Allsop of the Federal Court of Australia in *QBE Insurance (Australia) Limited v Allianz Australia Insurance Limited.*

In 2010, QIG Property Development Pty Limited ("QIG") retained Southern Cross Constructions (ACT) Pty Limited ("SX") to undertake building works in Double Bay. SX retained Pile & Bucket Pty Limited ("PB") to carry out excavation work.

The owners of the adjacent property complained of damage to their building caused by the work onsite by QIG, SX, PB and others.

Proceedings were commenced in the NSW Supreme Court in 2013. A referee assessed the entitlement to damages in excess of $4 million. PB then settled with the plaintiffs for approximately $675,000 in damages plus $150,000 for costs.

In early 2019 the Supreme Court proceedings were heard on the question of liability against SX which was by now in liquidation, Allianz as insurer of SX, and another party involved in the excavation works. The claims against SX and Allianz were dismissed. There were no cross claims between SX and PB.

QBE was the liability insurer of PB and paid the total settlement of $825,000 to the plaintiffs. QBE also incurred defence costs in excess of $700,000 in relation to the Supreme Court proceedings which settled against PB.

QBE claimed equitable contribution from Allianz, arguing that PB was entitled to indemnity under both policies. QBE contended it was entitled to include, in

its claim for contribution, the amount it incurred for defence costs in addition to the amount paid to the plaintiffs under the settlement.

Allianz disputed QBE's entitlement to dual insurance contribution and also challenged its entitlement to include defence costs in the claim.

QBE commenced proceedings in the Federal Court in relation to the dual insurance dispute. The insurers agreed on two issues being decided at a preliminary hearing, namely:

- whether PB was an "insured" within the meaning of the Allianz policy so as to entitle QBE to claim equitable contribution as a matter of principle; and
- whether any entitlement to contribution would extend to the costs incurred by QBE in the defence of the proceedings against PB in all the circumstances.

The Allianz policy contained the following definition of "the Insured":

"1. the Named Insured;

...

3. all subcontractors ... but only whilst acting in the scope of their duties as subcontractors in relation to the Insured Contract and only to the extent this insurance (or part of it) is required for such interest under the Insured Contract."

One of the issues that arose for the Court's consideration was the relevant "Insured Contract" for the purpose of the Allianz policy. QBE submitted the contract between QIG and SX was the relevant Insured Contract which required SX to effect insurance covering all subcontractors, which would include PB. Allianz submitted the relevant Insured Contract was the subcontract between SX and PB which did not create an obligation on SX to take out insurance to cover the interests of PB.

As long as at least one of those contracts (whether the QIC/SX contract or the SX/PB subcontract) contained a requirement for SX to effect insurance to cover PB's interests, QBE argued that was the end of the matter. However, Allianz submitted both contracts must be considered in combination and if one of them did not contain such obligation then PB was not an insured within the meaning of the Allianz insurance policy.

The Chief Justice considered the argument by Allianz to be commercially and textually wrong. His Honour stated that whilst the subcontractors were required to effect their own insurance policy pursuant to the SX/PB subcontract, this did not affect the obligation contained in QIC/SX head contract requiring SX to effect insurance covering all subcontractors.

It followed that PB was an insured within the meaning of the Allianz policy and the first question for the Court's consideration was answered in the affirmative, such that QBE was entitled to claim equitable contribution pursuant to dual insurance principles.

In relation to the second issue, namely whether the claim for equitable contribution extended to cover QBE's defence costs, the QBE policy contained terms which required QBE to defend a claim against PB and pay all legal costs and expenses in the defence of the claim.

Allsop CJ considered QBE incurred defence costs in fulfilment of its obligation to defend PB in the Supreme Court proceedings under the QBE policy terms.

Whereas, the Allianz policy contained terms which required Allianz to pay defence costs either incurred by Allianz or by way of reimbursement if incurred by the insured (with Allianz's prior consent). The policy did not contain the same "duty to defend" clause as the QBE Policy.

Allianz submitted that QBE conducted the defence of the Supreme Court proceedings, appointed its own lawyers and spent its own money on defence costs. PB had no liability for, nor did QBE indemnify PB, in respect of those defence costs. Therefore, it was argued on behalf of Allianz that QBE was not entitled to include its defence costs in the claim for equitable contribution.

Chief Justice Allsop rejected Allianz's argument. His Honour stated:

"As a matter of principle, there is no basis for the proposition that the direct expenditure of money on costs by the insurer (as opposed to a reimbursement by the insurer of expenditure of money on costs by the insured) is otherwise than properly viewed as a subject of contribution. The insured is held harmless against the consequences of its liability to the third party by the payment of liabilities by way of indemnity ... and by the insurer (QBE) defending the proceedings at its own cost."

Further, the Chief Justice observed:

"The character of a provision for an insurer directly paying defence costs and of a provision providing for an insurer indemnifying an insured which has paid its own defence costs is the same: both are directed at the same risk – the costs of defence."

Allsop CJ held it would be contrary to principle to allow an insurer to recover equitable contribution only in circumstances where it reimbursed defence costs first paid by an insured but to deny the insurer which undertook a clear and beneficial duty to pay those costs in furtherance of its obligation to defend.

The Chief Justice noted the nature of contribution is a substantive principle based on natural justice and equity, and is a form of prevention of unjust enrichment. It does not require that the insured first pay sums of legal defence costs for its insurer to be entitled to seek equitable contribution.

His Honour also noted the duty to defend and the defence costs provision in the QBE policy were together part of a policy of indemnity that should not be

hived off as non indemnificatory provisions for which contribution is not available. Together, those provisions provided a form of indemnity or protection or holding harmless against costs and there was no reason in justice or equity why the appropriate proportion of those costs should not be shared justly between the insurers.

Accordingly this question was also answered in the affirmative. In the event, QBE was successful in establishing an entitlement to dual insurance contribution from Allianz which extended to include QBE's defence costs.

This interesting judgment illustrates that where an entitlement to dual insurance contribution is established it matters not whether the policy terms required the first insurer to defend proceedings brought against the insured or to indemnify the insured with respect to any defence costs incurred.

If an insurer has incurred those defence costs in the defence of a claim for which the insured is entitled to indemnity under two policies of insurance, the insurer who indemnifies the insured is entitled to include those defence costs in the claim for equitable contribution against the other insurer.

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An Insurer Cannot Hedge its Bets When it Comes to Non-Disclosure

Section 21 of the *Insurance Contracts Act 1984* (Cth) imposes a duty upon an insured to disclose to the insurer, prior to entering into the contract of insurance, all matters which the insured knows or a reasonable person in the circumstances could be expected to know is relevant to the insurer's decision whether to accept the risk and on what terms.

An insurer can seek to reduce its liability to nil under Section 28 of the Act by reason of any non-disclosure within the meaning of Section 21.

What happens if an insurer:

- discovers the insured failed to disclose a material fact before entering into the contract of insurance but, despite being made fully aware of the non-disclosure, grants indemnity for the claim;
- proceeds to adjust the claim which involves the insurer gaining access to the property insured and obtaining the cooperation of the insured in relation to the claim and potential subrogated recovery claims against third parties; and
- later seeks to rely upon Section 28 of the Act by reason of the non-disclosure by the insured, having previously confirmed it would not do so?

These were the facts in a recent decision handed down by Chief Justice Allsop of the Federal Court of Australia in *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Limited (No. 2)*.

Delor Vue was the body corporate of an apartment building in Cannonvale approximately 500 km north of Yeppoon in Queensland that was built in 2008 and 2009 by a developer, Delorain Pty Limited and a builder, Beachside Constructions (National) Pty Limited.

Between 2014 and 2016 various engineering reports were obtained by Delor Vue which provided evidence of building defects in the soffits and eaves. They were described as major defects but of a non-structural nature which created safety hazards that could, if not ameliorated, give rise to serious personal injury or death.

Several meetings of the body corporate committee were held to address these reports and take action including obtaining various quotes for repair works.

By early 2017 the body corporate committee resolved to accept a quotation to remove soffit panels, repair the eave framing and then reinstate soffit panels. Lawyers were also instructed to send letters of demand on behalf of Delor Vue to the original developer (Delorain) and the builder (Beachside) regarding the building defects.

In February 2017 the insurance broker for the body corporate obtained an insurance quotation from Strata Community Insurance ("SCI") as underwriting agent for Allianz for property and liability insurance. The quotation contained a statement regarding the insured's duty of disclosure under the Act with information regarding the consequences of non-disclosure.

None of the information that was available to the body corporate regarding the building defects with respect to soffits and eaves was disclosed to SCI or Allianz before entering into the contract of insurance for the period 23 March 2017 to 23 March 2018.

On 28 March 2017 Cyclone Debbie crossed the coast and damaged the apartments. On 30 March 2017, the broker for the body corporate submitted to SCI a notification of loss for *"roof damage from cyclone"*.

SCI quickly retained a loss adjustor who undertook a site inspection a few days later. The following day he sent an email to SCI raising concerns about the original construction of the roof structure which appeared to have pre-existing structural defects before the cyclone.

In response to enquiries made by the loss adjustor, the body corporate provided a full and frank summary of the history of the building defects which the body corporate had been dealing with as per the various reports and quotations it obtained.

Some of those reports were provided to the loss adjustor and were passed on to SCI. Various

correspondence was subsequently exchanged between SCI and the body corporate in which the underwriting agent expressed concerns about what appeared to be the non-disclosure by the insured of material facts relevant to the building defects.

This culminated in an email dated 9 May 2017 which SCI sent to the insurance broker for the body corporate which stated:

"Despite the non disclosure issue which is present, SCI is pleased to confirm that we will honour the claim and provide indemnity to the body corporate, in line with all other relevant policy terms, conditions and exclusions."

The email went on to say that SCI would not cover the cost of repairs to defective materials and construction of the roof but it would cover resultant damage.

Over the next 12 months, SCI's loss adjustors engaged various experts to provide it with reports regarding repair costs. During that time the body corporate cooperated with the underwriting agent of the insurer to allow access to the property and to assist the insurer in pursuing a potential subrogated recovery claim against Beachside.

However, by May 2018 the relationship between insured and insurer had become strained due to a tension with respect to the quantum of the insured and uninsured losses and the delay in finalising the claim.

On 28 May 2018, SCI wrote to lawyers who were now instructed to act for the body corporate in which it made an offer to settle the claim that was covered by the policy for an amount just shy of $1 million. The letter also confirmed the insurer would not pay the uninsured component which was assessed at $3.5 million.

The SCI letter also stated that, if the body corporate did not accept the offer by Allianz, the insurer would reduce its liability for the claim to nil under Section 28 of the Act by reason of the insured's non- disclosure, despite SCI's previous decision.

The body corporate's lawyer responded by disputing the insurer's entitlement to rely upon Section 28 of the Act and rejecting the offer. SCI appointed lawyers who subsequently confirmed the insurer had proceeded to reduce its liability to nil.

The body corporate commenced proceedings in the Federal Court. Delor Vue contended the insurer was precluded from relying upon Section 28 of the Act pursuant to the principles of election, waiver, estoppel and a breach of utmost good faith.

Allianz argued it was entitled to reduce its liability to nil by reason of the non-disclosure of building defects prior to entering into the contract of insurance despite the 9 May 2017 email which expressed a contrary intention.

These issues proceeded to hearing as a separate question before Chief Justice Allsop who held the insurer was entitled to reduce its liability to nil under Section 28 of the Act by reason of the non-disclosure, not in relation to the property section of the policy, but in relation to the liability section of the policy.

His Honour considered a reasonable person in the circumstances could be expected to know that the building defects, which created a risk of significant personal injury or death, were materially relevant to the insurer's decision whether to place the risk and on what terms with respect to the liability section of the policy and therefore ought to have been disclosed.

However, the Chief Justice held that by reason of estoppel, waiver and a breach of the insurer's duty of utmost good faith, Allianz was now unable to rely upon Section 28 of the Act.

His Honour emphasised the operation of an estoppel is *prima facie* to preclude departure from the assumed state of affairs. Allsop CJ stated:

> *"The insurer had all the knowledge about the underwriting, the claim and the history of the soffits and eaves, and it represented, in effect promised, that cover was confirmed, and that it would adjust the claim in accordance with the policy terms. It should be held to that representation or promise…That conclusion is premised on the injustice of resiling from the clear position in all the circumstances, include the relevant detriment."*

On waiver, his Honour stated:

> *"Here the waiver brought about by taking a position inconsistent with relying on the non-disclosure issue is rooted in the act of choice of position and the advantage obtained therefore, not detriment…Thus, I would hold the insurer to the choice it made to confirm cover in accordance with the terms of the policy by the principle of waiver, whereby the insurer is taken to have waived any right to assert relief from the operation of s28(3) of the Act."*

On the insurer's duty of utmost good faith, the Chief Justice was less than impressed with the insurer's conduct, stating:

> *"Here there was no dishonesty but in my view the resiling from the clear representation, in effect a promise, in the 9 May 2017 email was unjust, unreasonable, unfair and did Allianz no credit as a commercial insurer by reference to expected standards of decent commercial behaviour…Decency and fairness were not displayed by threatening an approach previously clearly disavowed which involved further significant personal strain and financial risk to [the insured] unless a take-it-or-leave-it offer was accepted."*

This decision demonstrates that a Court will take a dim view of an insurer going back on its earlier decision to grant indemnity despite being aware of a non-disclosure by the insured.

An insurer cannot hedge its bets. Once a decision to grant indemnity is made the insurer will be bound by its

decision especially where the insurer proceeds to adjust the claim and obtains the insured's cooperation over several months after indemnity was granted.

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Virtual Meetings and Electronic Signatures During Covid-19 and Beyond

On 5 May 2020, the Treasurer made the *Corporations (Coronavirus Economic Response) Determination (No.1)* 2020 (the "**Determination**").

The changes made to the *Corporations Act 2001* (Cth) (the "**Act**") enable companies to hold virtual meetings without the need for a physical location and provide assurance to company officers that documents which have been signed electronically have been validly executed.

The Determination will be in effect for six months and expires on 5 November 2020.

Meetings

Under section 5(1) of the Determination, meetings may be held using one or more technologies that give all persons entitled to attend the meeting a reasonable opportunity to participate without the requirement to be physically present at the same place.

Any vote taken at the meeting must be taken on a poll (not a show of hands) by using one or more technologies to give each person entitled to vote the opportunity to vote in real time, and where practicable, by recording their vote in advance of the meeting.

Notice of such meetings (together with other information to be provided with the notice or that relates to the meeting) may be provided using one or more technologies to communicate to those entitled to receive notice:

- the contents of the notice and the other information; or
- details of an online location where the items covered by the above paragraph can be viewed or downloaded.

The Determination gives the example of a company that has email addresses for some members. Under the changes, the company could send those members an email containing or attaching the notice of meeting, or provide a link to where the notice and other material can be viewed or downloaded. To the remaining members, the company could send a letter or postcard setting out a URL for viewing or downloading the notice and other material.

It is important to note that the modifications are subject to the following conditions:

- the person required or permitted to give notice of a meeting must include in the notice, information about how those entitled to attend can participate in the meeting;
- if notice of the meeting has already been given before 5 May 2020, at least 7 (seven) days before the meeting is held, give fresh notice of the meeting that includes the above information;
- if a proxy is entitled to attend the meeting and/or vote, the person conducting the meeting must treat the proxy in the same way as the proxy would be entitled to be treated if he or she attended the meeting in person.

The Determination provides relief to those companies and other entities that are required to or elect to hold meetings such as annual general meetings by allowing them to do so using technology without being physically present in the same place.

Companies should ensure they employ methods to retain records and logs of notices sent, attendances and participation to maintain compliance and mitigate the risk of disputes relating to procedural and conduct matters.

At this stage, it remains to be seen whether the Determination is sufficient to override any specific provisions of a company's constitution to the contrary. As such, uncertainty remains around the personal rights of aggrieved shareholders at common law.

Company directors should exercise caution if there is any inconsistency between the relevant provisions of their company's constitution and the changes made by the Determination.

Execution of company documents

The Determination also alters the operation of section 127 of the Act to give certainty regarding electronic signatures and the execution of a document in electronic form.

Section 6 of the Determination provides that a company may execute a document if each person required to sign the document on behalf of the company either:

- signs a copy or counterpart of the document that is in a physical form; or
- uses an electronic communication which reliably identifies the person and indicates the person's intention about the contents of the document.

It is important to note that the copy, counterpart or electronic communication must include the entire contents of the document, but need not include the signature of another person signing the document.

Electronic signatures may include:

- pasting a copy of a signature into a document;
- signing a PDF on a tablet, smartphone or laptop using a stylus or finger;

- cloud-based signature platforms like DocuSign or AdobeSign that require identity authentication or certificate-based digital ID's.

The modification means that signatories do not need to sign the same physical document. Instead, a document could be signed and scanned by the first signatory and then printed and signed by the second signatory, or separate electronic signatures could be applied to fully executed versions of the document.

Provided these elements are satisfied, then an electronic signature applied under section 127 of the Act will be valid.

Under section 7 of the Determination, a person may assume that anyone that complies with the requirements of electronic communication and is identified in the electronic communication as the sole director and sole company secretary of the company occupies both offices.

The Determination is significant. While companies have been able to sign electronically in certain circumstances, there has been doubt about whether such execution satisfies the requirements under section 127 of the Act. Execution under section 127 is important as it will generally grant the counterparty the benefit of a statutory assumption that the document has been validly executed.

In light of the Determination, companies should:

- review their execution protocols and procedures for providing authority to execute documents; and
- ensure details of their officers recorded with ASIC remain current.

Deeds

At this stage, it remains unclear whether the Determination will apply to the execution of deeds.

Using a conservative approach, companies should continue to execute deeds in the standard manner.

You can find out more on executing documents in our April newsletter.

Key takeaways

- meetings of companies can now be held as virtual meetings (subject to certain requirements described previously);
- "split execution" (i.e. where directors and/or the company secretary print out and sign separate copies of the same document) is now expressly permitted; and
- electronic execution of documents is now expressly permitted.

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CONSTRUCTION ROUNDUP

Can the Court Slice and Dice a Security of Payment Adjudication

As part of the security of payment process set out in the *Building and Construction Industry Security of Payment Act 1999* (NSW), the building contractor claiming an entitlement to payment may apply for adjudication of its claim. However, if the adjudicator does not comply with the requirements of the Act, he may be acting outside the confines of his statutory jurisdiction, and his determination may thus be declared by a court to be void and of no effect.

However, if the adjudicator's error is in relation to only part of his determination, the question arises whether this will have the effect of making the whole of the determination void, or whether the infected part of the determination can be severed from the part made within jurisdiction, thus allowing the remainder of the determination to still have effect.

In the past, it was generally accepted that an adjudication determination that was infected by jurisdictional error was void, not voidable, thus affecting the whole of the determination: refer to *John Holland Pty Limited v. Roads & Traffic Authority of NSW* [2007] NSWCA 19 and the cases cited in *Fulton Hogan Construction Pty Limited v. Cockram Construction Limited* [2018] NSWSC 264.

However, uncertainty arose following the more recent decision of the Court of Appeal in *YTO Construction Pty Limited v. Innovative Civil Pty Limited* [2019] NSWCA 110. In that case the Court of Appeal held that the relief given by the court is discretionary and that in some cases the court has made it a condition of exercising that discretion that the responding party undertook to pay to the claimant that part of the claim that was unaffected by the error (eg *Emergency Services Superannuation Board v. Davenport* [2004] NSWSC 697). Therefore, by exercising their discretion in this manner, the courts have allowed the part of the determination not affected by jurisdictional error to be severed from the part that is not.

This issue has been addressed by Parliament with the recent amendment to the Act to include a new section 32A, which provides that the Supreme Court "may" set aside the whole or any part of the determination.

However, since this statutory power is discretionary, there remains the question of the circumstances in which the court should exercise such a discretion.

Further, the recent amendment to the Act is not of retrospective effect, and therefore some determinations will still need to be decided by reference to court authority, rather than solely the

exercise of the new statutory power.

The severability of an adjudication determination and the exercise of such discretion was discussed recently by Stevenson J in *Diona Pty Limited v. Downer EDI Works Pty Limited* [2020] NSWSC 480.

Diona was carrying out safety upgrades to the Great Western Highway at Blackheath and had subcontracted certain works to Downer.

On 16 April 2020 an adjudicator appointed under the Act had determined that Diona should pay Downer $430,990.13.

Diona commenced proceedings in the Supreme Court seeking an order that the determination be declared void. In subsequent discussions, the parties resolved all but approximately $30,000 of the claim.

Diona claimed that Downer was liable to pay it liquidated damages, and for its part Downer argued that it was entitled to set off against that claim two claims for extensions of time (EOT). The parties referred to these two EOT claims as "EOT 18" and "EOT 21".

Diona's case was that Downer was not entitled to either EOT 18 or EOT 21 because it had submitted its claims out of time, and under the terms of the contract they were now barred from pursuing those claims.

Diona submitted that the adjudicator had failed to address his statutory function by not, as required by section 22(2)(b) of the Act, considering the provisions of the construction contract.

Clause 40 of the contract provided that all determinations by Diona of Downer's claims for EOT were final and could not be disturbed except by raising a claim under the dispute resolution procedures of the contract (which Downer had not done).

In his determination, the adjudicator had noted that he was required under section 22(2)(b) to consider the construction contract, but he had dealt with Downer's claims for EOT only under clause 28 of the contract, which set out the circumstances in which a claim for EOT could be made.

The adjudicator did not make any reference at all to clause 40.

Diona submitted that by failing to consider the effect of clause 40, the adjudicator had not considered the terms of the contract and thus had made a jurisdictional error.

However, Stevenson J did not accept this submission. His Honour noted that in its adjudication response Diona had simply noted that Diona had rejected Downer's claims for EOT but it had failed to develop its argument that pursuant to clause 40 Downer was not longer entitled to maintain its entitlement to EOT.

His Honour stated that there were a number of possible reasons why the adjudicator did not refer to clause 40 in his consideration of the claim, including that the adjudicator may have come to the view that in circumstances where Diona did not clearly articulate such an argument, that it was a point that he did not have to deal with. Alternatively, the adjudicator may have misunderstood Diona's argument or simpy have come to the wrong decision about Downer's entitlement to EOT. Without more, Stevenson J was not prepared to set aside the determination.

Having held that the adjudication determination had not been affected by jurisdictional error, Stevenson J considered whether he would have exercised his discretion to sever just the $30,000 portion of the adjudication, with the balance remaining of full effect.

Downer had submitted that the judge should exercise his discretion to sever and declare void only the infected part of the determination because of the disproportionality of the error ($30,000 out of $430,000) and also because Downer had already agreed to forego the disputed amount if the balance of $400,000 was paid promptly.

For its part, Diona had submitted that this course was not open to the court, and that the circumstances in which the court could refuse to declare the whole determination void were limited to cases where:

- the applicant had not exhausted other remedies;
- there had been an excessive delay by the applicant in prosecuting its case; or
- the making of the order would be futile.

Stevenson J noted that there had been several decisions of the Court of Appeal and NSW Supreme Court in which it has been held that the court has a discretion whether to sever an infected part of a determination (including *John Holland* and *Emergency Services*). He also pointed to the more recent decisions of Ball J in *Rhomberg Rail Australia Pty Limited v. Concrete Evidence Pty Limited* [2019] NSW SC 755 and *Hanson Construction Materials Pty Limited v. Brolton Group Pty Limited* [2019] NSWSC 1641 in which his Honour had noted that the recent trend is to the effect that the court does have the power to sever the determination to allow the uninfected part to still have effect.

Stevenson J stated that with those more recent authorities "the matter has rested" and the question will be moot in the future with the insertion of section 32A into the Act.

If Stevenson J had indeed found that the adjudicator had made a jurisdictional error by not considering clause 40, and given the small proportion of the overall determination affected by that hypothetical error, it is likely that his Honour would also have exercised his discretion to sever the infected part of the determination, leaving Downer entitled to the balance of $400,000.

It should be remembered that when exercising the discretion given to it by section 32A, the court is likely to try to give effect to the purpose of the security of

payment process in the Act, namely to ensure that cash flow is maintained down the contractual chain. Accordingly, it is likely that the court will not allow a small error by an adjudicator to prevent a contractor being paid the amount to which it would otherwise be entitled.

However, since the court may also take into account any other factor it considers relevant (including the conduct of each of the parties), it is advisable that each party to an adjudication still approach the matter with caution.

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Security of Payments: What Happens when Adjudicators go Beyond Their Statutory Powers?

The adjudication process, governed by the *Building and Construction Industry Security of Payment Act 1999* (NSW), is designed to ensure the speedy resolution of payment disputes in the construction industry. However, adjudication determinations are often the subject of court proceedings where the respondent to the payment claim seeks to have the determination quashed.

The High Court has held that the Security of Payment legislation only permits a court to review and quash determinations of adjudicators if it is found there has been a jurisdictional error of law.

A jurisdictional error occurs when an adjudicator does something that is beyond the adjudicator's power, or fails to do something the adjudicator is required to do. Although these limitations are a technical aspect of the adjudication process, breaches by adjudicators often lead to an appeal from the adjudicator's determination. Therefore it is important to recognise when this occurs and seek legal advice.

In New South Wales, an adjudicator's powers are governed by s 22 of the Act which requires the adjudicator to only determine:

(a) the amount of the progress payment (if any) to be paid by the respondent to the claimant;

(b) the date on which such amount became or becomes payable; and

(c) the rate of interest payable on any such amount.

In determining an adjudication application, the adjudicator may only consider the following:

(1) the provisions of the Act;

(2) the provisions of the construction contract from which the application arose;

(3) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule; and

(4) the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

The adjudicator must also follow the rules of procedural fairness. For example, the adjudicator cannot communicate exclusively with only one party or, if the adjudicator seeks further submissions, the parties must be given the same opportunity to advance their case.

An adjudicator who acts beyond the boundaries of his or her statutory power invalidates the adjudication determination and renders any decision meaningless.

By way of example, a jurisdictional error may be found where an adjudicator adjudicates on the following issues:

- whether or not the Act applies to the construction contract subject to the dispute;
- whether an entitlement to a progress payment has arisen; or
- if a valid payment claim has been issued.

These types of issues should also be included within any adjudication response to prevent a potentially invalid adjudication determination from being issued and the adjudicated amount from being garnished from the respondent (albeit on an interim basis only).

In April this year, the NSW Court of Appeal handed down its decision in *Brolton Group Pty Ltd v Hanson Construction Materials Pty Ltd* [2020] NSWCA 63 which illustrates how adjudicators can breach their statutory powers.

Brolton Group was the contractor under a construction contract with Hanson dated 13 September 2017. The contract related to the construction of a quarry processing plant at Bass Point, near Shellharbour. Circumstances eventuated which resulted in the contract being terminated by Hanson on 3 October 2018.

On 28 August 2019, Brolton served a payment claim on Hanson in the amount of $6,300,962.64 inclusive of GST. The claim was described as *"Progress claim No: September 2018"* and was expressed as made pursuant to *"cl 11.4 'Interim Payments'…for work completed up to September 2018"* but which included amounts referable to work completed after 25 September 2018 and also interest up to August 2019.

Under the Act, a payment claim must be supported by a specific reference date that is available under a construction contract.

The specific reference date for the claim was not expressly stated in this case.

Hanson responded on 10 September 2019 by serving a payment schedule which stated the amount owing to Brolton was "$Nil", claiming that Brolton had exceeded

the guaranteed maximum price under the Contract and that Hanson was entitled to liquidated damages of $1,625,000 up to the date of termination of the Contract.

On 20 September 2019, Brolton lodged an adjudication application, to which Hanson served an adjudication response.

On 31 October 2019, the adjudicator issued an adjudication determination in favour of Brolton for $2,877,052.75 inclusive of GST on the basis that Brolton's payment claim was supported by a reference date of 23 October 2018.

Hanson commenced proceedings in the NSW Supreme Court seeking an order that the adjudication was void for jurisdictional error.

Justice Ball accepted Hanson's submissions and held the determination was void based on jurisdictional error for two reasons:

(i) since Brolton was not entitled to a progress claim under the Act "on and from" the purported reference date of 23 October 2018, the adjudicator did not embark on the task he was required by s 22(1) of the Act to undertake; and

(ii) the adjudicator's decision involved a denial of natural justice or procedural fairness because the adjudicator determined the dispute on a basis for which neither party had contended without giving the parties an opportunity to make submissions on the matter:

Brolton appealed to the NSW Court of Appeal, challenging both of the primary judge's findings.

The Court of Appeal (per Gleeson JA; Meagher and Payne JJA agreeing) rejected the appeal on largely the same basis as the primary judge namely:

1. the adjudicator's determination involved jurisdictional error; and
2. the adjudication determination involved a denial of natural justice.

Justice Gleeson provided the following reasons for his decision:

> *"…it is not to the point that there was an available reference date of 25 September 2018 under the contract. The adjudicator did not embark upon the determination of the amount of the progress payment (if any) to be paid by Hanson to Brolton on the basis that the payment claim was supported by a reference date of 25 September 2018.*
>
> *Instead, he determined the progress payment to which Brolton was purportedly entitled on the basis that the payment claim was made in respect of a reference date of 23 October 2018.*
>
> *As that was not an available reference date the payment claim supported on that basis was not a payment claim under the Act and ineffective to trigger the procedure established by Pt 3.*
>
> *It follows that the adjudicator had no authority or jurisdiction to make any determination with respect to Brolton's payment claim supported and understood in that way. Accordingly, jurisdictional error of the kind grounding relief in the nature of certiorari was established."*

As jurisdictional errors can have a substantial impact upon the adjudication process and may ultimately deem the adjudication determination invalid and unenforceable, it is highly beneficial to identify any potential breaches of jurisdiction and to raise these issues at the earliest opportunity.

The identification of such issues can also have the effect of changing the balance of power between parties in any further negotiations flowing from the dispute.

It is therefore important to seek specialised legal advice in the preparation of adjudication applications and responses. It would also be prudent to have any determinations reviewed to identify any potential points of appeal and protect your interests.

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EMPLOYMENT ROUNDUP

Is this the End for Casual Employees?

In an explosive decision for employers across Australia, the Full Bench of the Federal Court of Australia has delivered a ruling which will allow many, if not most, casual employees to claim – and be paid – annual leave, paid personal/carer's leave, paid compassionate leave and payment for public holidays. All this is in addition to the hourly rate casual loading, usually 25%, which such workers receive.

For many employers, this 'double dipping" will create a significant liability for the past, and fundamentally alter the viability of their workforce model moving forward. Some businesses will simply cease trading as a result.

For labour hire businesses the decision will be devastating. Their existence is threatened.

The case is *WorkPac Pty Ltd v Rossato [2020] FCAFC 84.*

A common work arrangement

Between 2014 and 2018, WorkPac employed Mr Rossato and supplied his labour to client companies of WorkPac. He was employed under six consecutive contracts during this period.

Mr Rossato was a qualified and experienced production employee in the open cut black coal mining

industry. WorkPac specialises in the provision of labour to clients in particular industries including in the black coal mining industry.

Mr Rossato first engaged with WorkPac by completing an online web registration form in 2013. At a subsequent meeting he signed a copy of a document headed "Casual or Maximum Term Employee Terms & Conditions of Employment - Employee Declaration" (Employee Declaration). By signing this, Mr Rossato declared that he had read and understood a document titled "Casual or Maximum Term Employee - Terms and Conditions of Employment" (General Conditions).

Mr Rossato commenced employment with WorkPac on 28 July 2014. Over the next three and a half years he was in continuous employment with WorkPac pursuant to six "assignments" or employments under six separate contracts of employment. The written terms of each of those contracts were contained in two documents; first, the General Conditions, an umbrella document applicable to each; and secondly, a Notice of Offer which was applicable to each particular contract.

Under the various contracts, Mr Rossato was employed to work at the Collinsville Mine and the Newlands Mine operated by Glencore Australia Pty Ltd and its related entities (Glencore). Changes to his pay rate took place at different times.

At all relevant times and at each of those mines, Glencore had a workforce structure for its production workforce which included both its own employees and an appreciable component of production employees sourced through a labour hire company like WorkPac. The production employees employed by Glencore were "permanent" or on-going indefinite employees of Glencore.

Throughout his employment with WorkPac, Mr Rossato worked as part of the production workforce at the Glencore mines, and like many other employees of WorkPac, his service was provided by WorkPac to Glencore to meet Glencore's requirement for production workers at those coal mines.

Mr Rossato performed work as directed by Glencore. He was allocated work in accordance with Glencore's work allocation system. For the entirety of each contract Mr Rossato was allocated to a crew under the then applicable shift roster issued by Glencore. Each crew consisted of a combination of Glencore employees and WorkPac employees like Mr Rossato. All employees performed the same production operator duties under the supervision of a Glencore employee.

During his employment Mr Rossato did not take any day or part-day off due to personal illness or injury (whether paid or unpaid). He worked every shift that he was rostered to work save for where the mine was shut down over Christmas, and some other infrequent occurrences, including one occasion shortly before he retired when he urgently left work to support his partner who had been airlifted to hospital.

Throughout his employment, Mr Rossato was paid only for the time he worked (although he did receive paid lunch breaks). He did not receive from WorkPac:

- paid annual leave;
- paid personal/carer's leave;
- paid compassionate leave;
- payment for Christmas Day, Boxing Day and New Year's Days on which he did not work; and
- payment for any rostered shifts not worked (such as over the Christmas shutdown periods).

When is a "casual" not a casual?

WorkPac sought declarations from the Federal Court that Mr Rossato could not make claims for paid annual leave, personal/carer's leave, and compassionate leave entitlements under the National Employment Standards in the Fair Work Act 2009 (Cth) (the Act) because he was a casual employee or, claim payment for public holidays under the Act.

It also sought declarations that Mr Rossato could not claim corresponding entitlements under an applicable enterprise agreement (the 2012 EA) because he was a "Casual Field Team Member" (casual FTM) within the terms of that agreement.

WorkPac argued a person is a casual when there is an absence of a "firm advance commitment as to the duration of the employee's employment or the days/ hours the employee will work." It argued that the presence or absence of such a commitment was to be determined by reference to the terms of the parties' written contract of employment and without reference to other materials, including evidence of the way in which the contract was performed in practice.

The Court found that the presence or absence of the "firm advance commitment" is to be assessed by regard to the employment contract as a whole, including by considering whether it provided for the employment to be regular or intermittent, whether it permitted the employer to elect whether to offer employment on a particular day, whether it permitted the employee to elect whether to work, and the duration of the employment. It has also found that the description given by the parties as to the nature of their relationship is relevant, but not a conclusive consideration.

All members of the Court found that, even taking WorkPac's case at its highest, Mr Rossato was not a casual employee for the purposes of the FW Act and for the relevant enterprise agreement.

The Court held that the parties had agreed on employment of indefinite duration which was stable, regular and predictable such that the postulated firm advance commitment was evident in each of his six contracts.

Recovery of the casual loading?

In the event that the Court found that Mr Rossato was

not a casual employee, WorkPac sought declarations that it was entitled to restitution of the casual loading which it claimed was included in the hourly rate it had paid to Mr Rossato. It sought that restitution on the basis of mistake and/or partial failure of consideration.

Alternatively, WorkPac claimed that in assessing the entitlements that Mr Rossato claimed, it was entitled to bring into account the payments of remuneration that it had made to Mr Rossato on the basis that he was a casual employee.

All members of the Court found that WorkPac was not entitled to restitution of the casual loading which it claimed was included in the hourly rate it had paid to Mr Rossato. There was no relevant mistake, and no failure of consideration such as would support restitutionary relief.

Also, WorkPac was not entitled to bring into account the payments of remuneration that it had made to Mr Rossato on the basis that he was a casual employee. That is because the purposes of the payments of remuneration did not have a close correlation to the entitlements that Mr Rossato sought.

Outcome

In summary the Court concluded that:

- in his employment under each of the contracts, Mr Rossato was other than a casual employee for the purposes of the FW Act and the enterprise agreement;
- Mr Rossato is entitled to the entitlements that he claimed for respect to paid annual leave, paid personal/carer's leave paid compassionate leave and payment for public holidays; and
- WorkPac is not entitled to either restitution or to "set off" against its liabilities any of the payments made under the six contracts of employment.

Implications

A vast number of 'casuals' throughout Australia are engaged in employment which is:

- of indefinite duration which is stable, regular and predictable
- All of them are likely now to be classified as not casual for the purposes of the FW Act and other industrial instruments.

Employers are likely to be faced with claims for back pay and ongoing leave entitlements from such workers.

The Federal Government may well intervene to address the implications of the decision, but until then, all employers who engage 'casuals' need to immediately seek professional advice and reassess their business models and liability.

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Sushi Operator no Hero as Record Fines Dished up by the Federal Court for Underpayment of Wages

On 18 May 2020 the Federal Court imposed record fines totalling $891,000.00 on 3 Hero Sushi restaurant franchisees, their shareholders and employed book keepers for underpayment of employees in the fast food industry and for providing false records to the Fair Work Ombudsman ("FWO") in response to requests for information issued by the FWO.

Justice Flick who heard the proceedings brought by the FWO for civil penalty orders under s 545(1) of the FW Act was called on to determine the quantum of the penalties for breaches of the Fair Work Act ("FW Act") conceded by Sushi Hero and those prosecuted.

Justice Flick observed:

> *"the Fair Work Ombudsman sought to rectify the wrong done to 94 employees who were underpaid by a total amount of $700,832.88. To the employers and those responsible, this money was more profit; to the employees, or at least some of them, the underpayment prejudicially affected their independence."*

Justice Flick also observed:

> *"This is a case about greed and the exploitation of the vulnerable. Those in a position to ruthlessly take advantage of others pursued their goal of seeking to achieve greater profits at the expense of employees. In doing so, a great number of false documents were deliberately and repeatedly created with a view to concealing the fraud being perpetrated. Lies were told to cover up the wrongdoing. It was only when the "game was up" that those responsible admitted their misdeeds".*

The owners and employees were pursued under s550(2) of the FW Act which provides:

Involvement in contravention treated in same way as actual contravention

(1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.

Note: If a person (the involved person) is taken under this subsection to have contravened a civil remedy provision, the involved person's contravention may be a serious contravention (see subsection 557A(5A)). Serious contraventions attract higher maximum penalties (see subsection 539(2)).

(2) A person is involved in a contravention of a civil remedy provision if, and only if, the person:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced the contravention, whether by threats or promises or otherwise; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or

(d) has conspired with others to effect the contravention.

There was no issue that the directors and shareholders were involved in the contraventions.

The decision of Justice Flick in *Fair Work Ombudsman v HSCC Pty Ltd [2020] FCA 655* followed last year's finding by the Court that Hero Sushi franchisees located at Canberra, Newcastle and the Gold Coast breached the Fair Work Act 2009 (Cth) (the FWA) by underpaying its staff under the Fast Food Industry Award 2010 (the Award) including:

- minimum hourly wage rates;
- casual loadings;
- weekend loadings
- overtime;
- penalty rates,
- public holiday penalty rates;
- annual leave entitlements; and
- superannuation entitlements.

Of the 94 staff employed by Hero Sushi franchisees that were underpaid who were mainly Korean and Japanese nationals on international student and working holiday visas in the period between April 2015 and July 2016:

- 30 employees were underpaid $215,066.45 at Westfield Kotara in Newcastle;
- 43 employees were underpaid $293,451.26 at the Canberra Centre;
- 21 employees were underpaid $192,315.17 at Pacific Fair in Queensland.

The Court also observed Fair Work Inspectors had been provided with hundreds of false records on 11 separate occasions, which showed inaccurate hours of work and pay rates.

This led to the prosecution for contraventions of the FW Act which included:

- making and keeping records in relation to employees knowing that those records were false or misleading;
- producing those records to the FWA knowing that those records were false or misleading;
- failing to make and keep records that the employer was required to make and keep under the FW Act and the FW Regulations for seven (7) years; and
- failing to give pay slips in the form prescribed by the FW Regulations in respect of the employees within one working day of making payment.

There were 3 corporate respondents pursued, HSCC Pty Ltd (HSCC), HSCK Pty Ltd (HSCK) and HSPF Pty Ltd (HSPF). HSCC operated a Hero Sushi outlet at Kotara, HSCK operated at Canberra and HSPF operated at Pacific Fair.

The corporate respondents formed part of a group of 17 companies operating Hero Sushi outlets.

In addition to corporate respondents, there were five individual Respondents, Deuk Hee Lee ("Lee"); Hokun Hwang ("Hwang"); Chang Seok Lee ("Tommy Lee"); Ji Won Cho ("Cho"); and Junsung Kim ("Kim").

Lee and Hwang were both 50% shareholders in all of the companies that formed part of the Hero Sushi Group. Tommy Lee, Cho and Kim were employed as bookkeepers in payroll in Hero Sushi's head office.

Fines Imposed by the Court

The Court fined the companies who operated the respective Hero Sushi outlets:

- HSCC (Newcastle) $225,000.00
- HSCK (Canberra) $225,000.00
- HSPF (Gold Coast) $150,000.00

The Court fined Lee and Hwang $85,000.00 each for breaches of s550 of the FWA.

Lee told the court himself and Mr Hwang "decided that we would offer our employees a minimum of $12 per hour in cash so that we can be more competitive in the industry".

Similarly, fines were also imposed on Tommy Lee, Cho and Kim in their capacity as bookkeepers in Hero Sushi's head office for creating false payroll records. Their fines were $75,000.00, $16,000.00 and $30,000.00 respectively.

The Court affirmed that when determining civil penalties the Court must take into account:

- *"the nature and extent of the conduct which led to the breaches;*
- *the circumstances in which that conduct took place;*
- *the nature and extent of any loss or damage sustained as a result of the breaches;*
- *whether there had been similar previous conduct by the respondent;*
- *whether the breaches were properly distinct or arose out of the one course of conduct;*
- *the size of the business enterprise involved;*
- *whether or not the breaches were deliberate;*
- *whether senior management was involved in the breaches;*

- *whether the party committing the breach had exhibited contrition;*
- *whether the party committing the breach had taken corrective action;*
- *whether the party committing the breach had cooperated with the enforcement authorities;*
- *the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements; and*
- *the need for specific and general deterrence"*

$891,000 is a record fine for civil penalties for breaches of the FW Act for employers who underpaid employees and shareholders and employees involved in that underpayment.

The penalties sound a warning to all shareholders, directors and employees that any involvement in the underpayment of employees can result in civil penalties being imposed not only the employer but also on those involved in any contravention of the FW Act.

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Stand Down – What Entitlements do Employees Have?

The COVID-19 pandemic, and the disruption to normal business and working arrangements, has thrown up a host of unique issues. Many businesses and individuals are struggling to determine what their rights and obligations might be, and to keep up with the changing rules.

An area of much confusion is the concept of "standing down" employees. When can an employer do this, what does it mean, and what are the rights and obligations when a stand down takes place?

Is there a right to Stand Down employees?

There is no general right in an employer to stand down an employee without pay in circumstances where there is no work the employee can usefully perform. Generally, if the employee is willing and able to perform his or her duties, the fact that the employer has no work to do does not relieve the employer from the obligation to pay the employee.

Any right of an employer to stand down an employee without pay is only to be found in either legislative provisions or in the terms of an industrial agreement (such as an award or an enterprise agreement) or in the express terms of a contract of employment.

Section 524(1) of the *Fair Work Act 2009* (Cth) (***FWA***) is such a legislative provision. It says that an employer may stand down an employee during a period in which the employee cannot usefully be employed because of one of the following circumstances:

(a) industrial action (other than industrial action organised or engaged in by the employer);

(b) a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown;

(c) a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

If an employer uses the power in s.524(1) to stand down an employee, the employer is not required to make payments of wages to the employee for that period.

The power in s.524(1) however cannot be used if an enterprise agreement or contract of employment provides a power to stand down in similar circumstances. If that is the case, the power in the enterprise agreement or contract must be used, and any additional provisions (such as giving notice) complied with.

In the present climate it is the *"stoppage of work for any cause for which the employer cannot reasonably be held responsible"* which forms the basis of almost all stand downs.

In many cases the application of this is clear – if, for instance, a government order prevents an enterprise from operation, then the employer is not responsible for the stoppage of work.

At the other end of the spectrum, the simple fact that a business has seen a downturn of turnover as a result of the Covid-19 crisis and decides to temporarily close down, would not qualify as a cause for which the employer could not be held responsible.

What payments have to be made during stand down?

Usually, unless the employment contract or industrial agreement says otherwise, there is no obligation to pay wages to the employee.

What is less clear is whether employees continue to be able to access accrued leave entitlements whilst they are stood down. When payment of wages is not being made, the ability to receive some form of payment would provide relief to many.

The Federal Court of Australia has recently ([2020] FCA 656) delivered a decision providing some clarity in relation to the rights of employees who have been stood down to access leave entitlements. The case concerned access to personal/carer's leave (sick leave) and compassionate leave.

From mid-March 2020, Qantas stood down approximately two-thirds of its 30,000 employees.

The stood down employees were covered by an enterprise agreement. The employees were stood down either pursuant to a provision on the relevant enterprise agreement, or pursuant to the power in section 524(1) of the FWA.

A number of unions, on behalf of Qantas' employees, brought proceedings in the Federal Court claiming an entitlement of Qantas' employees to access paid personal/carer's leave (section 96 of the FWA) or compassionate leave (section 105 of the FWA) during their stand down. Qantas denied such an entitlement.

The Court held that there was no entitlement to take personal or compassionate leave whilst stood down.

At the heart of that conclusion was the determination by the Court that such leave entitlements are an entitlement on the part of the employee to take leave from otherwise performing the work they are required to perform. The Court characterised the leave entitlements as a form of "income protection", and took the view that this presupposes that an employee is in receipt of income. According to the Court, income is not being protected if there is no available or required work from which to derive income in the first place.

The Court said:

> *In circumstances where an employee has been lawfully stood down, and thus in circumstances where there is no work which the employee can perform and thereby derive income, an employee is not entitled to access the leave entitlements conferred by ss 96 or 105.*

The decision will be unpalatable to the unions. One of their arguments will be that workers should not be effectively penalised by denying them access to a bank of wage equivalent security which they have accrued – some over many years. There will be a real fear that many affected workers might lose these accursed entitlements altogether if they are made redundant during the course of the current crisis.

For now, the position is clear. Employees who have been lawfully stood down pursuant to the power in the FWA are not able to access sick leave or compassionate leave entitlements whilst they remain stood down.

It is more than likely, however, that an appeal of this decision will follow.

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WORKERS COMPENSATION ROUNDUP

COVID-19 Update Further Legislation and Impact on the NSW Workers Compensation Landscape

The NSW Government continues to grapple with the challenges arising from the current public health crisis and the impact of social distancing on judicial, economic and social policies in the State.

In our previous editions of GD News we considered the NSW Government's legislative response to the pandemic and the civil, economic and judicial changes introduced by the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* which commenced on 25 March 2020.

On 13 May 2020 the NSW Parliament passed three further emergency Bills with the stated aim to assist citizens, business and the justice system in managing the impacts of the COVID-19 Pandemic.

The legislation which commences on 14 May 2020 comprises the following:

- *COVID-19 Legislation Amendment (Emergency Measures – Attorney General) Act 2020;*
- *COVID-19 Legislation Amendment (Emergency Measures – Treasurer) Act 2020;*
- *COVID-19 Legislation Amendment (Emergency Measures – Miscellaneous) Act 2020.*

On introduction of the legislation to the NSW Parliament, Attorney General Mark Speakman confirmed the latest suite of amendments was designed to build on legislation enacted by the NSW Parliament in late March to ensure the health and safety of the people of NSW was the Government's first priority.

Based on the desire to maintain social distancing and the practical difficulties that can arise, the cognate legislation is broadly directed to the following:

- the modification or suspension of laws requiring individuals to meet in person, including a company board meeting or physical examination by a medical practitioner for a particular purpose;
- the continued drive to facilitate wholly electronic signing of documents; and
- the extension of limitation periods given the delays caused by the pandemic.

The *COVID-19 Attorney General Act 2020* amends the *Court Security Act 2005* to empower a security officer to require a person who is entering or in Court premises to submit to testing and questions in regard to their health if that person shows a sign of illness.

If a person exhibits or reports a sign of illness, a security officer may require that person to leave the premises or refuse the person entry to Court premises.

Similarly, a selected juror who exhibits or reports a sign of illness or refuses to undergo a health check undertaken by a security officer must be referred to the judicial officer or Coroner having the conduct of the trial or Coronial Inquest concerned and comply with any condition prescribed by the Regulation.

The *COVID-19 Miscellaneous Act 2020* is wide ranging in its application and impact, directed to matters from the protection of annual holiday entitlements of workers stood down by an employer without pay as a direct or indirect result of the COVID-19 Pandemic to

facilitating examination by audio visual link by a medical practitioner to determine whether a person is mentally ill in accordance with Section 27 of the *Mental Health Act 2007*.

The Act notably amends the *Associations and Corporation Act 2009* to allow for committee meetings and votes to proceed electronically at two or more venues provided the technology allows for a reasonable opportunity to participate.

The *Industrial Relations Act 1996* is amended to provide that the Industrial Registrar may, on application by a State organisation, defer an election for an office of the organisation for a period up to 12 months if the Electoral Commission is unable to conduct the election because of the COVID-19 Pandemic.

Noteworthy, the *COVID-19 Miscellaneous Act* provides for regulating power to modify or suspend limitation and other statutory time limits for civil and criminal proceedings and processes.

COVID-19 and the NSW Workers Compensation Landscape

The NSW State Insurance Regulatory Authority ("SIRA") Standards of Practice relating to the Regulator's expectations in regard to insurer claims management, administration and conduct were initially published in December 2018 and applied to all claims from 1 January 2019.

In response to the current public health crisis, SIRA has developed a new COVID-19 related Standard of Practice on the management of claims with its aim to set expectations for insurers concerning the handling of COVID-19 workers compensation claims and claims handling practices more generally throughout the period of the pandemic.

According to SIRA, the new Standard is designed to:

- expedite certain claims management decisions to provide certainty for impacted workers;
- reduce barriers and ensure workers are fully informed of support and options available to them;
- support workers through their recovery and return to work and ensure workers receive their correct entitlements.

SIRA has confirmed the new Standard will apply to insurers during the COVID-19 Pandemic period. The Regulator has advised the Standard will likely be in effect for a 12 month period although it will closely monitor the management of COVID-19 related claims and further consult with the industry if appropriate.

On 13 May 2020 the NSW Parliament passed an amendment to the *Workers Compensation Act 1987* ("1987 Act") providing that certain workers in NSW at an elevated risk of exposure to COVID-19 by reason of their occupation and who contract the virus are presumed to have done so in circumstances so as to entitle them to compensation in accordance with the 1987 Act.

The amendment ensures that workers including nurses, paramedics, teachers and other "essential workers" do not bear the usual onus of establishing their employment was the *main contributing factor* to the contraction of the disease as required by Section 4(b)(i) of the 1987 Act.

If a worker within the defined class of occupations contracts COVID-19 then the requisite causal relationship between the contraction of the disease and employment will be presumed, thereby entitling the worker to compensation.

The Workers Compensation Commission has also implemented procedural changes to its operations which have significantly impacted injured workers, employers, insurers and their legal representatives alike.

The Commission has suspended face to face conciliation/arbitration hearings and mediations in line with developments in other jurisdictions and is conducting proceedings by telephone.

The above has proved challenging to all stakeholders although there is currently no indication that the Commission is contemplating a return to conducting proceedings on a face to face basis.

On 25 March 2020 Judge President Phillips advised all stakeholders of his decision to cease all face to face medical assessments by approved medical specialists ("AMS") to whom a worker has been referred in the context of a medical dispute in accordance with Part 7 of the *Workplace Injury Management and Workers Compensation Act 1998* ("1998 Act").

In so doing, President Judge Phillips confirmed the decision to suspend AMS examinations was motivated by concern for the wellbeing of injured workers, doctors and their staff.

The decision has necessarily resulted in delay in the resolution of medical disputes before the Commission. In an attempt to reduce that delay, the Commission is currently identifying matters involving claims for permanent impairment compensation where the dispute is confined to the degree of permanent impairment suffered by the injure worker.

Ordinarily, such matters would proceed directly for assessment by an AMS. Presently the Commission is listing those matters for a teleconference in an attempt to resolve the dispute on a compromise basis or in some cases, proceed to a determination by the arbitrator.

The ability of an arbitrator to determine a medical dispute confined to the extent of permanent impairment suffered by the injured worker is not new and was facilitated by the *Workers Compensation Legislation Amendment Act 2018.*

The 2018 Amendment Act removed the prohibition on the Commission awarding permanent impairment compensation in the absence of an assessment of the degree of permanent impairment by an AMS.

On and from 1 January 2019 and well before the current COVID-19 crisis, arbitrators of the Commission were empowered to make an order for an assessment of permanent impairment which was binding on the parties.

In response to stakeholder concern, the Commission issued a Bulletin which confirmed where a claim involved a dispute regarding the 15% threshold in respect of a claim for work injury damages or whether a worker satisfied the definition of "high needs" or "highest needs", the Registrar would likely refer the dispute to an AMS for determination in any event.

In view of the current pressures on the Commission and its stated objective to facilitate timely resolution of disputes, it is apparent that some arbitrators are revisiting the power bestowed on them by the 2018 Amendment Act with renewed vigour.

This development is clearly of some concern to employers and their insurers where the permanent impairment assessments of the respective parties fall either side of the Section 66(1) or more significantly, the 15% work injury damages threshold imposed by Section 151H of the 1987 Act.

Where such matters are listed for teleconference before an arbitrator, employers and insurers should, if appropriate, insist the injured worker be referred for an independent AMS assessment.

This is particularly so where medico-legal opinion and consequently, assessment of permanent impairment differ on the basis of the presence or absence of clinical signs observable on clinical examination.

It seems that the legislative response to the COVID-19 crisis currently being rolled out by the NSW Government and the drive for expediency in the NSW workers compensation landscape will continue to present challenges to employers and their insurers for the foreseeable future.

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Interpretation of the Permanent Impairment Rating Scale ("PIRS")

In New South Wales entitlement to permanent impairment compensation in respect of a psychiatric or psychological disorder arising out of or in the course of a worker's employment is limited to cases where the whole person impairment as a result of the injury is assessed at 15% or more. This same threshold governs a worker's right to make a claim for work injury damages arising out of the circumstances in which the injury occurs.

Disputes relating to the degree of whole person impairment are determined in accordance with Chapter 11 of the SIRA Guidelines for Evaluation of Permanent Impairment. The Guidelines provide that the behavioural consequences of psychiatric disorders are assessed on six scales, each of which evaluates an area of functional impairment:

- Self care & personal hygiene;
- Social & recreational activities;
- Travel;
- Social functioning (relationships);
- Concentration, persistence & pace;
- Employability.

The Guidelines provide that impairment in each area is rated using class descriptors in each scale which range from 1-5 in accordance with severity. The Guidelines provide that the examples of activities in each scale are examples only.

Application of the Guidelines was recently the subject of a Court of Appeal decision in *Ballas v Department of Education (State of NSW)* [2020] NSWCA 86.

The worker was employed by the Department as a primary school teacher. During her employment she was exposed to a series of events that resulted in a significant psychological injury. The worker made a claim for permanent impairment compensation and she was referred to an AMS, Dr Hong, for assessment of whole person impairment resulting from her psychiatric/psychological disorder. Dr Hong assessed the claimant with 8% whole person impairment which meant she had no entitlement to compensation for permanent impairment in respect of her injury and she was also precluded from making a claim for work injury damages.

The worker's lawyers lodged an Application to Appeal against the medical assessment on the basis that Dr Hong had made a demonstrable error and applied incorrect criteria when assessing the degree of impairment of the worker's social and recreational activities. The worker complained that when Dr Hong completed the PIRS rating form he assessed the worker's social and recreational activities as Class 2 on the basis of *"Frequency of social reaction reported to have reduced, sees one friend regularly, goes to RSL Club, around once each month unaccompanied. Gambles on poker machines, at times $500. Spends around one hour at the Club".*

The worker argued that the AMS failed to take into account relevant considerations and also took into account an irrelevant consideration. It was submitted the descriptor for Class 3 was more appropriate than Class 2 which the AMS assessed which referred to a worker being actively involved in social and recreational activities.

The Registrar's Delegate refused the application to appeal on the basis that PIRS Categories are examples of activities only. She found the worker's submissions attempted to unreasonably place limitations on the manner in which the PIRS Categories were applied by AMS'. She commented that PIRS Categories were generic in general in description and they were to some extent overlapping. The categorisation of what category applies was a matter within the AMS' discretion based on his or her clinical assessment.

The Registrar's Delegate did not accept the activity of attending an RSL Club only once a month was necessarily an activity that ought fall within Class 3, and not Class 2 as the AMS found. Overall she considered the AMS' findings were consistent with the description of mild impairment for social and recreational activities.

To the extent the worker relied upon the assessment by her own psychiatrist, the Delegate noted a mere difference of opinion was not a ground of appeal and the fact the qualified psychiatrist came to a different conclusion as to the class of social and recreational functioning was immaterial.

The worker sought a Judicial Review of the Delegate's decision in the Supreme Court of NSW. The application was dismissed by his Honour Judge Wright.

The worker then lodged an appeal with the Court of Appeal, arguing Judge Wright erred in holding the Registrar's Delegate did not err in her application of Section 327(3) WIM Act to the grounds of appeal sought to be raised by the worker in respect of the assessment of whole person impairment by the application of PIRS Categories as mandated by the WorkCover Guides.

The primary judgment was delivered by the President Justice Bell and Acting Justice Payne. Their Honours considered the Registrar's "gatekeeper" role under Section 327(4) which requires satisfaction that at least one of the four grounds for appeal has been made out.

The worker argued that the Delegate, rather than looking to whether the appeal grounds were capable of being made out, proceeded to determine the appeal.

Analysis of the Delegate's language lent strong support to this submission on the basis that the Delegate's decision indicated she was not satisfied the AMS had made the assessment based on incorrect criteria or demonstrable error. Their Honours agreed this expressed a tone of final determination.

All the Delegate is required to do is assess the nominated grounds of appeal and if satisfied there is an argument to support the nominated ground, the argument passes the gatekeeper and goes to the expert Appeal Panel. This process does not involve an assessment of the correctness of the appellant's argument. Therefore the primary judge should have found the Delegate's decision was infected by jurisdictional error.

The second ground of appeal was that the Delegate had conflated "scales" and "classes" in the Guidelines and thus misunderstood the process an AMS was required to go through in making his or her assessment of WPI. As a result the Delegate could not give proper consideration to the worker's argument.

The worker argued that Dr Hong's reasons for the particular rating of "2" assigned to "social and recreational activities" took into account matters that fell for assessment such as "travel" and "social functioning" and did not bear upon the area identified as social and recreational activities because that scale was directed to activities that involved interactions with other people.

Their Honours observed: *"the nomenclature employed in the Guidelines is apt to confuse. The word "scales" is used in the Guidelines to describe areas or categories of functional impairment, even though the word "scale" is not a natural synonym for either of those concepts. The word "classes" is actually closer in ordinary English meaning to "categories", but is used in the Guidelines to mean degrees of impairment. The Guidelines moreover allow for the assignment of a range of impairment from 1-5 which may be thought of in terms of "a scale" in its ordinary English sense. It is not difficult to understand how, therefore confusion may arise."*

Their Honours considered the Delegate's decision showed on a number of occasions she conflated these concepts and therefore they rejected the primary judge's conclusion that it was clear the Delegate was referring to scales or functional areas and not classes within them when she referred to PIRS Categories. The Court observed the Delegate was wrong to speak in the language of "discretion" as the scales are fixed and are treated by the Guidelines as distinct from each other. *"The structure of the Guidelines, and the mandated use of a standardised form on which an AMS must specify the "class" he or she assigns to each "scale" and give his or her reasons for doing so, are designed to add transparency and rigour to the exercise of WPI assessment."*

Their Honours held that even if there be overlap between some of the categories or scales, particular conduct fits within one or other of the scales which calls for the correct characterisation of the conduct. If conduct is wrongly assigned to one scale this results in an AMS taking account of irrelevant considerations when assigning a class to each of the distinct scales.

In relation to "Social and recreational activities" scale, their Honours found that this looks to the injured worker's degree of participation in such activities. It was plainly arguable in their opinion it was directed towards assessment of an injured worker's interaction with other people and not a solitary activity such as

gambling and poker machines, and thus the requisite level of a satisfaction under Section 327(4) should have been held by the Delegate to have been met.

His Honour Acting Justice Emmett also agreed that the appeal should be allowed because the approach of the Registrar in effect pre-empted the right of appeal. The Registrar's function was simply to determine whether on the face of the document the grounds were within the provisions of Section 327, which he considered they clearly were. It was not for the Registrar to form a view as to the possible merits of the grounds of appeal.

Whilst the Court of Appeal's judgment was primarily concerned with the issue of the Delegate's error in failing to find the AMS erred in his application of the PIRS by pre-empting the right of appeal, the discussion of the Delegate's conflation of scales and classes provides valuable insight into the application of the scales to the worker's particular circumstances prior to determining the class in which the worker's impairment fell, for those assessing the potential grounds for appeal from a MAC to an Appeal Panel.

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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.