Gillis Delaney Lawyers

GD NEWS / JULY 2020

IN THIS EDITION

Editors:

David Newey

Amanda Bond

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

Insurance Cover for WHS Fines in NSW is Illegal from 10 June 2020

Insurance for WHS penalties is banned in NSW.

On 10 June 2020 the Work Health and Safety Amendment (Review) Act 2020 received assent. This Act amends the Work Health Safety Act 2011(NSW) and insurance for WHS Fines in NSW is prohibited for penalties for incidents occurring after 10 June 2020.

A new offence has been added to the Work Health Safety Act 2011(NSW) prohibiting insurance and indemnity arrangements for work health and safety penalties. It is now an offence for a person to enter into, provide, or benefit from insurance or indemnity arrangements for liability for a monetary penalty for a work health and safety offence. If a company commits an offence, its officers may also be liable.

The prohibition cuts both ways and applies to entities offering insurance and or indemnity arrangements and those entering into an agreement to benefit from the insurance or indemnity. It applies to insurers and businesses that take out insurance. It applies to management liability and statutory fines insurance currently in place as well as currently offered by insurers. It applies to employees and employers.

At the moment most policies of insurance that are in place that offer insurance cover for WHS fines contain a provision stipulating cover is available to the extent permitted by law. Current polices and renewals or new policies containing these provisos do not fall foul of the new prohibition however any promise to pay fines falls away as it is no longer legal to insure fines for incidents occurring after 10 June 2020. The promise to pay fines becomes illusory for fines in NSW in respect of offences occurring after 10 June 2020.

However it is still permissible to insure legal and investigation costs that will be incurred in Safework investigations and the defence of WHS prosecutions.

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

- a decline in interest in these insurance products;

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

The prohibition is not retrospective. It does not make insurance policies and indemnity agreements in place illegal. However existing insurance and indemnity agreements are impacted and it is an offence if a party under these existing agreements provide cover for penalties arising from incidents that occur after 10 June 2020.

An insurance policy or indemnity agreement covering WHS fines in place before 10 June 2020 will still provide insurance or indemnity cover for monetary penalties arising from incidents before 10 June 2020.

The new legislation also addresses the Government's concern that Category 1 prosecutions under the WHS Act have been hampered because the fault element of the offence—recklessness—is too difficult to prove. To establish recklessness a prosecutor must establish actual knowledge of a risk and deliberate disregard for that risk.

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

Businesses in NSW can no longer take out insurance to cover fines which can run to hundreds of thousands of dollars for breaches of the WH&S Act and directors and employees will no longer have the comfort of insurance or an indemnity from the business for any fines imposed on them. 10 June 2020 is a milestone date for the shift of responsibility for WHS fines to the person or entity that commits the offence.

David Newey
dtn@gdlaw.com.au

Builders, Engineers and Insurers May Be Smashed by Claims with NSW Legislation that Commenced on 10 June 2020

Recovery of compensation for defective building works from building practitioners in NSW has become much easier with the commencement of the Design and Building Practitioners Act 2020 on 10 June 2020.

The expansive reforms are designed to protect consumers from economic loss where building works are defective. The Act imposes a duty of care on building practitioners to protect those that buy property against economic loss. The first owner and all subsequent owners will be owed that duty. Owners Corporations and commercial and residential property owners will be owed that duty. Even better for those owners the duty will be imposed retrospectively to building work undertaken before the Act commenced.

A builder's insurance will become a focus for consumers suffering economic loss from defective building works and insurers will need to carefully review the terms of their exclusions that carve out the cost of repairing defective work, and perhaps expand the exclusions to carve out losses such as diminution in the value of property due to defects.

The Design and Building Practitioners Act 2020 is sure to raise alarms amongst builders, building designers and insurers that provide construction industry professional indemnity and liability insurance.

Insurance premiums for the construction industry in NSW will rise and the industry may find that some building practitioners find it difficult to arrange insurance.

Increased insurance costs will be passed on to consumers and building costs will escalate.

However there will be statutory rights to pursue builders to recover losses from defective works.

There is a staged commencement of the provisions in the Design and Building Practitioners Act 2020. Some commence from 10 June, others from 1 July 2021 and others on dates that will be proclaimed in the future. However the critical provisions that create a statutory duty of care to avoid economic loss commence on 10 June 2020 and will apply to work before and after that date.

Not only are there new rights to bring claims for compensation, the Building Commissioner now has power to order a building practitioner to remedy defects under the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 which received assent on 10 June 2020 and will commence on 1 September 2020. That Act complements the Design and Building Practitioners Act 2020.

Under the process set out in the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020:

- The developer (who is defined to include the builder) must notify the Secretary of the NSW Department of Customer Service 6 to 12 months prior to the construction work being completed.
- If there is any change to the anticipated completion date, the developer is required to notify the Secretary of this change within 7 days of itself becoming aware of it.
- The Secretary and its authorised representatives are empowered to investigate the construction work and to make orders requiring the rectification of any defects in the work.

- If the Secretary is satisfied that a "serious defect" in the work exists, or if the developer has failed to comply with a building work order or a development control order, then the Secretary has the power to prohibit the certifier (whether the local council or a private certifier) from issuing an occupation certificate.

So what else is there in the Design and Building Practitioners Act 2020 The Act introduces from 1 July 2021 the concepts of:

- regulated designs;
- the introduction of a registration régime to be created by Regulations made pursuant to the legislation together with a disciplinary régime for registered practitioners that include design and building practitioners;
- certification by registered design practitioners that a building is constructed in accordance with a regulated design and complies with the Building Code of Australia.

Regulated designs will be identified by the Regulations for building work (including building elements) such as:

- the fire safety systems for a building;
- waterproofing;
- internal or external load bearing components of a building essential to its stability (including but not limited to foundations and footings, floors, walls, roofs, columns and beams);
- a component of a building that is part of a building enclosure;
- anything else prescribed by the Regulations.

Registered design practitioners will be required to prepare regulated designs.

A registration scheme for design practitioners, principal design practitioners and building practitioners driven by Regulations made pursuant to the legislation will be created.

The Secretary of the Department of Customer Service NSW will be able to take disciplinary action against practitioners that must be registered and do one or more of the following:

- caution or reprimand practitioners;
- make a determination requiring the practitioner to pay to the Secretary as a penalty an amount not exceeding $220,000 for a body corporate or $110,000 for an individual within a specified time;
- impose a condition on the registration of the practitioner including a condition requiring the practitioner to undertake specified education or training relating to a particular type of work or business practice within a specified time;
- suspend or cancel registration of a practitioner;
- disqualify the practitioner either temporarily or permanently from being registered or being registered in a particular class.

Disciplinary action will be available where:

- a practitioner's conduct falls short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent practitioner; or
- where the practitioner has contravened a law or with respect to the preparation of regulated designs or the carrying out of building work or the provision of Design Compliance Declarations; or
- registration breaches; or
- where the building practitioner has failed to comply with a statutory or other duty or contractual obligation; or
- fraud or dishonesty.

These wide reaching powers are sure to give real teeth to the registration scheme to be implemented.

A registered design practitioner will be required to provide a Design Compliance Declaration for regulated designs but can only do so if they are adequately insured with respect to the declaration for the design work. The terms of the insurance required will be prescribed in the Regulations made under the legislation (which are yet to made).

Registered design practitioners will need to look to the Regulations to determine what insurance they require and ensure they meet the minimum requirements specified in the Regulations.

A registered design practitioner who provides a Design Compliance Declaration and does not have the necessary insurance will be liable for a penalty of up to 300 penalty units ($33,000) in the case of a body corporate or 100 penalty units ($11,000) in the case of an individual.

A registered design practitioner or any person that makes a Design Compliance Declaration knowing the declaration to be false or misleading in a material particular will be liable for a penalty of up to $220,000 and/or two years imprisonment or both.

However the most pressing issue for builders and insurers is that from 10 June 2020 a statutory duty of care is owed to not only the owner of land (who engages the building practitioner) but also successors in title including Owners Corporations and subsequent purchasers of property and that duty applies to work in the past and in the future.

A person who carries out construction of work now owes a duty to exercise reasonable care to avoid economic loss caused by defects.

The duty of care is owed to each owner of the land in relation to which the construction work is carried out including subsequent owners.

A breach of that duty will give rise to an entitlement to damages.

The duty is owed to an owner whether or not they engaged the practitioner to carry out the work.

An owner's corporation will be taken to have suffered economic loss if it is required to bear the cost of rectifying defects.

The duty of care cannot be delegated.

The statutory duty is imposed in addition to statutory warranties for residential construction works under the *Home Building Act 1989* and does not limit those warranties.

Interestingly, Section 7 of the Design and Building Practitioners Act 2020 provides that if more than one person agrees to do building work, the entity who is the principal contractor for the work is taken to do the building work. This creates a liability for the principal contractor for acts and omissions of its contractors. This is sure to enliven the interest of insurers that do not always extend professional indemnity or liability cover to subcontractors of a principal. Interesting times lie ahead for insurers who will find the builder is liable in negligence for acts of contractors. And that duty extends to works in the past.

Further the NSW Government is intent on collecting information from insurers about the availability of insurance and claims development over time.

The legislation gives power to the Secretary of the Department of Customer Service NSW to demand from insurers of design practitioners and building practitioners the following:

- the terms of policies;
- the premiums payable;
- the number of policies issued;
- the registered practitioners to whom policies have been issued;
- the number and value of claims made under the policies;
- any other information prescribed by the Regulations.

Interesting times lie ahead for the construction industry and insurers involved with all participants in the construction industry.

David Newey
dtn@gdlaw.com.au

A new Registration Regime for NSW Certifiers from 1 July 2020 will bring Challenges for Insurers as well as Certifiers

On 1 July 2020 the world for building certifiers in NSW will change with the commencement of the *Building and Development Certifiers Act 2018* (the "Act") which was passed by the NSW parliament in late 2018 with commencement of the Act deferred, and the *Building and Development Certifiers Regulation 2020* which will come into effect when the Act commences.

The Act and Regulation will replace the *Building Professionals Act 2005* and the *Building Professionals Regulation 2007* and introduces a registration regime for individuals that undertake certification work with applicants being required to have successfully completed recognised training.

Local councils must ensure that certification work is carried out on behalf of the local council by a registered individual whose registration authorises the individual to carry out that certification work.

The Building Professionals Board is dissolved on 1 July 2020 with the Commissioner for Fair Trading becoming responsible for the new regime including registration and disciplining of certifiers.

An existing certificate of accreditation under the Building Professionals Act 2005 that is in force immediately before 1 July 2020 is taken to be registration granted under the Act, and continues, unless it is surrendered by the holder or suspended or revoked under the Act, in force for the unexpired portion of its term, and cannot be renewed. The certifier will need to apply for registration under the Act once their term of accreditation under the repealed legislation expires.

The Act clarifies the role of certifiers and imposes obligations on registered certifiers to be independent and comply with a new Code of Conduct found in the Regulations.

Complaint handling and disciplinary procedures are addressed in the Act and Regulations and disciplinary action can be taken by the Commissioner for Fair Trading for a breach of the Act which can result in:

- a caution or reprimand,
- a determination requiring the registered certifier to pay to Fair Trading, as a penalty, an amount not exceeding $220,000 (in the case of a corporation) or $110,000 (in the case of an individual) within a specified time,
- the imposition of a condition on the registration of the registered certifier, including a condition requiring the registered certifier to undertake specified education or training relating to a particular type of work or business practice within a specified time,
- suspension or cancellation of registration,
- disqualification (temporarily or permanently), from being registered or being registered in a particular class.

A breach of the Code constitutes an offence, with a maximum penalty of $11,000 for individuals and $22,000 for corporations.

If a corporation contravenes any provision of the Act or the Regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention and to have committed an offence.

The Act also stipulates insurance requirements for registered certifiers and businesses supplying certification services through registered individuals.

The compulsory insurance regime for individuals, corporations and partnerships which provide certification services is driven by the number of registered certifiers engaged in providing certification work for a business.

When it comes to the terms of the insurance required, a registered certifier must be indemnified under a professional indemnity policy that complies with the Regulations. A registered individual must ensure that all certification work carried out by the individual is indemnified under a professional indemnity policy that complies with the Regulation.

The insurance industry will be looking on with interest with new duties for certifiers created and statutory obligations mandating insurance requirements including the terms of cover required, minimum limits of cover for each claim and in the aggregate, and unacceptable exclusions identified.

Insurance can be arranged on a claims made basis and is required to extend to all liability of the registered individual incurred at any time after the registered individual first became a registered certifier. The insurance does not need to cover liability incurred after the policy's expiry date.

The terms of the professional indemnity insurance must for individuals, corporations and partnerships have a maximum limit of liability for each claim which is not less than $1,000,000 plus 20% of that amount for relevant expenses (legal costs).

In addition the insurance must:

- for individuals:
    - have a maximum limit in the aggregate which is not less than $1,000,000 excluding relevant expenses (legal costs), or $2,000,000 including relevant expenses (legal costs).
- for corporations:
    - have maximum yearly limit for all claims must not be less than whichever of the following is the lesser—
        - $20,000,000,
        - the maximum yearly limit for a professional indemnity policy issued to an individual multiplied by the number of registered directors and registered employees of the corporation on the date on which the policy is issued (however, if the policy is the fourth or subsequent policy issued to the corporation, whether by the same or another insurer, the average number of registered directors and registered employees of the body corporate during the previous 3 years).
- for partnerships:
    - have maximum yearly limit for all claims must not be less than whichever of the following is the lesser—
        - $20,000,000,
        - the maximum yearly limit for a professional indemnity policy issued to an individual multiplied by the number of registered partners and registered employees of the partnership on the date on which the policy is issued (however if the policy is the fourth or subsequent policy issued to the partnership, whether by the same or another insurer, the average number of registered partners and registered employees of the partnership during the previous 3 years)

The Government has recognised the difficulties that certifiers will face when it comes to securing insurance cover for cladding claims and provided a policy is taken out before 30 June 2021 and is for a period of insurance of no more than 12 months the policy will comply with the Regulations where it has a cladding exclusion that excludes cover in relation to:

- cladding that does not comply with the requirements of the Building Code of Australia, an Australian Standard or an Act or other law of the Commonwealth, this State or any other State or Territory to the extent that it applies to cladding, or
- cladding that is used, installed or applied to a building in a manner that does not comply with the requirements of the Building Code of Australia, an Australian Standard or an Act or other law of the Commonwealth, this State or any other State or Territory to the extent that it applies to the use, installation or application of cladding, or
- cladding that is used, installed or applied to a building in a manner that does not comply with the manufacturer's conditions of use of the cladding.

Policies of insurance arranged after 30 June 2021 will not comply with the Regulations if they seek to exclude cladding claims, unless we see a change of heart and amendments to the Regulations.

The insurance policy will be permitted to contain an exclusion for any claim made against the insured person in relation to building work on a building in respect of which no occupation certificate within the meaning of the Environmental Planning and

Assessment Act 1979 has been issued unless the claim is made against the insured person, and notified to the insurer, before the expiration of 10 years from—

- the last date on which the building work was inspected by a registered certifier, or
- if no such inspection has been conducted, the date on which that part of the building in relation to which the building work was carried out is first occupied or used.

The right to incorporate a 10 year stop loss exclusion in a policy goes a small way to limiting liability of insurers arising from certifiers acts in the past.

An insurance policy that was taken out before the commencement of the Regulation and that complied with the requirements of section 63 of the *Building Professionals Act 2005* immediately before 1 July 2020 is taken to satisfy the requirements of the *Building and Development Certifiers Act 2018*.

Certifiers will be obliged to give details about their insurer and their insurance to their clients.

The Commissioner for Fair Trading has power to direct a person that issues an insurance policy to a registered certifier with respect to certification work (a certifier policy), to provide any of the following information about certifier policies or particular classes of certifier policies:

- the terms of the policies,
- the premiums payable,
- the number of policies issued,
- the registered certifiers to whom policies have been issued,
- the number and value of claims made under the policies,
- information about the policy schedule and any endorsements,
- details of applications made and any disclosures,
- details of completed claims,
- details of legal proceedings that relate to a claim,
- details of any amounts paid out in relation to a claim.

Big brother will be watching insurers.

Turning to the registration regime, there will be classes of certification work and a registered certifier must only carry out work authorised by the class of registration granted. Each class has specified recognised training requirements. The classes are:

- building inspector,
- building surveyor—unrestricted,
- building surveyor—restricted (all classes of building),
- building surveyor—restricted (class 1 and 10 buildings),
- certifier—acoustic,
- certifier—energy management,
- certifier—fire safety,
- certifier—hydraulic (building),
- certifier—hydraulic (speciality),
- certifier—hydraulic (stormwater),
- certifier—location of works,
- certifier—road and drainage,
- certifier—stormwater,
- certifier—strata,
- certifier—subdivision,
- engineer—electrical,
- engineer—geotechnical,
- engineer—mechanical,
- engineer—structural,
- swimming pool inspector.

Certifiers must use written contracts for any certification services which must incorporate the following particulars:

- the date on which the contract is made,
- the registered certifier's name, registration number, address and a telephone number and email address for contacting the registered certifier,
- in the case of a contract between a person and the employer of a registered certifier, the name, registration number (if applicable) and address of the employer's place of business, and the name and registration number (if applicable) of any employee who it is proposed will carry out certification work under the contract, and a telephone number and email address for contacting the employer,
- the name, address and contact details of the person for whom the certification work is to be carried out,
- if any registered certifier named in the contract is required to be covered by insurance under the Act:
    - the name of each insurer by whom that registered certifier is currently covered, and
    - the identifying number of the insurance contract, and
    - the dates between which the indemnity provided by the insurance contract has effect,
- particulars of the certification work to be carried

out under the contract,

- in a case where the certification work that is the subject of the contract involves the carrying out of functions under the Environmental Planning and Assessment Act 1979 and relates to particular development—
    - a description of the development, and
    - the address, and formal particulars of title, of the site of the development, and
    - identifying particulars for any related development consent granted under the Environmental Planning and Assessment Act 1979 or any related certificate issued under Part 6 of that Act (including the name of the applicable consent authority or registered certifier, the date on which the consent or certificate was granted or issued and any registered number of the consent or certificate),
    - identifying particulars of any plans, specifications or other documents relating to the subject of any related development consent or any related certificate issued under Part 6 of the Environmental Planning and Assessment Act 1979, and
    - identifying particulars of any individuals who it is proposed, at the date of the contract, will undertake any inspections required to be carried out under the Environmental Planning and Assessment Act 1979 in connection with the certification work (including any applicable registration numbers of those individuals),
- the fees and charges to be paid for certification work under the contract and, in the case of fees and charges that may be payable for work arising as a result of unforeseen contingencies, the basis on which those fees and charges are to be calculated.

The Act stipulates that a registered certifier is required to comply with the Code of Conduct. The Code imposes duties on registered certifiers who must:

- act in the public interest.
- take all reasonable steps to ensure that the registered certifier does not adversely affect—
    - the health or safety of a person, or
    - the safety of a person's property.
- not adversely affect the amenity of a person's property to an unreasonable extent.
- not act improperly for private benefit to the registered certifier or any other person.
- apply all relevant building laws, regulations, safety standards and guidelines reasonably and without favour.
- must act with honesty, integrity and impartially.
- must not unreasonably discriminate against any person or organisation.
- must exercise reasonable care and attention.
- not carry out certification work that is not authorised by the registered certifier's registration or is beyond the registered certifier's competence and expertise.
- seek and properly consider specialist advice if an aspect of certification work is beyond the registered certifier's competence and expertise.
- not carry out certification work negligently.
- ensure that the registered certifier remains informed of developments in building design and practice, business management principles, and the law relevant to performing the registered certifier's functions.
- be objective, impartial and free of any conflict of interest.
- not improperly use their status, position, powers or duties for the purpose of obtaining, either directly or indirectly, any personal benefit or benefit for a relative or close associate.
- not solicit or accept an improper benefit.
- take all reasonable steps to ensure that a relative or close associate of the registered certifier does not solicit or accept any improper benefit.
- take all reasonable steps to manage and avoid conflicts of interest.
- not misinform or mislead any person or body about any matter relating to the carrying out of certification work.
- not misrepresent the registered certifier's qualifications, experience or expertise to any person or body.
- take all reasonable steps to ensure that a person who engages the registered certifier to carry out certification work is made aware of any matter affecting the registered certifier's registration that may impact on the carrying out of the certification work.
- take all reasonable steps to obtain and document all available facts relevant to the carrying out of certification work.
- take all reasonable steps to ensure that the decisions and actions of the registered certifier are based on the consideration of all relevant facts that are available to the registered certifier.
- maintain clearly documented reasons for decisions made when carrying out certification work that set out the following—
    - the decision made,

- the reasons for making the decision,
- the findings of fact that the reasons were based upon,
- the evidence for those findings.

- ensure that—
  - a person does not carry out certification work under the supervision of the registered certifier unless the registered certifier's registration authorises the supervision, and
  - any certification work carried out under supervision is carried out competently.

The Code of Conduct will not only regulate the professional it will inform the duty that the professional owes to its client, the building owners. Insurers will need to be mindful that in any claim against a certifier based on a breach of the certifier's duty of care, a breach of the Code is likely to be evidence of a breach of that duty. As can be seen from the crafting of the Code the duties owed by Certifiers are very wide.

With:

- Fair Trading NSW having responsibility for the registration and disciplining of registered certifiers,
- a new Code of Conduct regulating conduct and informing the duty of care owed by certifiers; and
- compulsory insurance for certifiers with details of insurance being provided to a certifier's client and possibly Fair Trading where it demands that an insurer supply information about the terms of insurance they provide and premiums and claims and litigation that eventuates;

we are sure to see challenges for certifiers as they grapple with their duties and the challenges they will face when they look to arrange insurance that complies with the Act.

The *Building and Development Certifiers Act 2018* and the *Building and Development Certifiers Regulation 2020* will add a further layer of regulation and complexity to the oversight of the building industry in NSW.

Recovery of compensation for defective building works in NSW will become much easier with the commencement of:

- the *Design and Building Practitioners Act 2020* on 10 June 2020;
- the *Building and Development Certifiers Act 2018* and the *Building and Development Certifiers Regulation 2020* on 1 July 2020; and
- the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* on 1 September 2020.

The expansive reforms brought by these 3 Acts will help to protect consumers from economic loss where building works are defective or those engaged in the design and certification processes for the works fail to meet the standards expected from these professionals.

David Newey
dtn@gdlaw.com.au

Owner/Builder Found Liable for Injury to Contractor

The holder of an Owner/Builder Licence will usually engage various contractors including engineers, carpenters and other qualified tradesmen to carry out construction works.

In those circumstances, there are several concurrent duties of care owed by various parties to each other to prevent the risk of personal injury at the construction site.

Sometimes the holder of an Owner/Builder Licence will delegate the whole of the construction work to the various contractors. However there are occasions when the owner/builder will also participate in the works.

In that scenario, interesting issues arise with respect to the scope and content of the owner/builder's duty of care to the contractors at the construction site, particularly if one of those contractors is injured in consequence of equipment operated by the owner/builder.

These issues were recently considered by his Honour Justice Campbell of the NSW Supreme Court in *Coulthurst v Miles*.

Neville Miles was the registered owner of a 320 acre property on the NSW North Coast. Miles was a co-director of Ballyshaw Pty Limited which conducted a Macadamia orchard and beef cattle grazing enterprise on the property.

Miles held an Owner/Builder Licence for the construction of a new home at the property. He engaged Roger Coulthurst to work as a subcontractor on the construction of the new home. Coulthurst was a carpenter with many years experience in home building work.

Miles engaged another carpenter (Mr McCaffrey) as a subcontractor to assist Coulthurst in works which involved placing a steel beam upon two upright steel columns to complete the portal for a proposed steel sliding door.

Although Miles was a chartered accountant by profession with a background in investment banking he had also acquired approximately 600 hours of experience operating an excavator despite having no formal qualifications in the operation of that equipment.

Coulthurst and McCaffrey each climbed a stepladder at either end of the door opening to apply temporary supports to hold the beam in place until it was welded

into position by steel fabricators at a later time.

McCaffrey's end of the beam went into position first without incident. The situation was different at Coulthurst's end.

After McCaffrey's end was in put place. Miles drove the excavator forward slightly to position the beam at Coulthurst's end. Coulthurst moved his ladder closer to the beam to fix cleats and clamps into place and after completing that task, he moved the stepladder back to its original position to get out from underneath the beam before it was lowered onto the prop.

Both carpenters gave each other hand signals to assist Miles in his operation of the excavator during the lift.

The accident occurred when a hand signal was given to Miles to lower the beam a very small distance. When the beam moved, the cleats and clamps were released, causing the beam to swing outwards towards Coulthurst causing him to fall from the ladder and land awkwardly.

He sustained a serious fracture to the left leg and a back injury.

Coulthurst sued Miles and Ballyshaw.

Due to complications arising from Coulthurst's medical treatment the matter proceeded to a hearing before his Honour Justice Campbell to determine liability as a separate issue.

The claim against Miles was framed in negligence on two bases:

- Miles' negligence due to a breach of his duty of care as occupier of the premises by reason of him being the owner/builder of the construction works; and
- Miles' negligence due to a breach of his duty of care as the operator of equipment at the construction site.

Miles disputed he owed Coulthurst a duty of care as occupier. Whilst he accepted the second proposition that he owed a duty of care in respect of his operation of the equipment, he argued that he did not breach his duty. Moreover, it was alleged by Miles that Coulthurst was the person who designed the system of work such that Coulthurst was the author of his own demise.

The claim against Ballyshaw was also in negligence on the basis that Ballyshaw was the owner of the equipment, that it paid all contractors and also by reason of its vicarious liability for the negligent acts of its employee, Miles, in the operation of the excavator.

Ultimately when the matter proceeded to hearing the claim against Ballyshaw was not pressed. In any event, Justice Campbell held that Ballyshaw was not vicariously liable for the acts of Miles noting he was a director of the company and there was no evidence to establish he was also an employee.

Campbell J rejected the argument that Miles owed Coulthurst a duty of care as occupier by reason of Miles being the owner/builder of the property. His Honour observed Coulthurst was an independent contractor with long experience in the work he was engaged to perform and that Coutlhurst determined what work he did, when and in what order without instructions from Miles.

Further, Miles did not exercise supervisory power or to prescribe the respective areas of responsibility for independent contractors. Here, Coulthurst and McCaffrey, both experienced carpenter/builders, were working together as a team. There was, in those circumstances, no need for any supervision from Miles and accordingly no duty of care arose as occupier.

However, Justice Campbell agreed that Miles owed Coulthurst a duty to exercise reasonable care in the operation of the excavator to avoid unnecessary risk of personal injury arising out of the movement of the machine or its load.

Justice Campbell noted Miles' lack of qualifications and relative lack of experience compared to a professional operator did not alter, attenuate or reduce the standard of care required to discharge his duty. The standard, his Honour observed, was that of the reasonable plant operator. Even knowledge, inexperience or lack of qualifications on the part of the person to whom the duty is owed is not a sufficient basis on which to found a different standard of care.

Whilst his Honour accepted Coulthurst designed the system involving the lowering of the beam by liaising directly with the engineers, it was the negligent operation of the excavator by Miles which caused the injury and not as a result of any defect in the system designed by Coulthurst.

Justice Campbell held the accident occurred by reason of Miles having failed to engage the quick release mechanism on the excavator to eliminate the downward arcing trajectory of the operation of the dipper arm and that such breach caused the injury.

In that regard, Miles gave evidence which suggested he was unfamiliar with this mechanism. His Honour held a reasonable plant operator would have engaged the mechanism and likely would have avoided the accident.

Miles also argued Coulthurst was guilty of contributory negligence but this was rejected by Justice Campbell.

The outcome was that Justice Campbell found Miles liable to pay damages that are to be assessed at a later time without any discount for contributory negligence.

This decision is interesting as it illustrates the dual role played by an owner/builder as occupier of the construction site who also participates directly in the construction work, even where a duty of care as occupier of the premises did not arise in the circumstances.

Here, the fact of the owner/builder being unqualified and relatively inexperienced to operate the excavator was not determinative of the issues regarding breach of duty of care and causation. However, his lack of familiarity with the equipment was a pivotal consideration for the Court's determination of liability in favour of the injured plaintiff.

His status as owner/builder was ultimately not relevant and the outcome was achieved by the Court applying the relevant standard of care of a reasonable plant operator in the circumstances.

Darren King
dwk@gdlaw.com.au

The War on Phoenixing

Background

Illegal phoenixing has plagued Australia's economy for quite some time.

Up until recently, existing legislation had failed to adequately deter and disrupt illegal phoenix activity.

The much anticipated *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* (Cth) (the "**Act**") came into force on 18 February 2020.

The reforms are aimed at curbing illegal phoenixing.

What is illegal phoenixing?

According to the government's 'Action Against Fraudulent Phoenix Activity' proposal paper, illegal phoenixing occurs when a company that carries on a business, accumulates debts and liquidates the company to avoid repayment. The assets of the company will often be stripped and transferred into a new company prior to liquidation, allowing the same person or group of individuals to continue the business of the company in a new company.

Generally, a company will also be intentionally structured in a way that allows directors to avoid paying its debts, including taxes, creditors and employee entitlements.

What reforms have been made?

The Act amends the *Corporations Act 2001* (Cth), *A New Tax System (Goods and Services Tax) Act 1999* (Cth) *and Taxation Administration Act 1953* (Cth) to:

- introduce new criminal offences and civil penalty provisions for company officers that fail to prevent the company from making creditor-defeating dispositions and other persons that facilitate a company making a creditor-defeating disposition. Company officers include directors, persons who make decisions that affect the whole, or substantial, part of the business or company, or have the capacity to affect significantly the company's financial standing, and shadow directors. The penalties include imprisonment for up to 10 years;
- allow liquidators to apply for a court order in relation to a voidable creditor-defeating disposition;
- enable the Australian Securities and Investments Commission to make orders to recover, for the benefit of a company's creditors, company property disposed of or benefits received under a voidable creditor-defeating disposition;
- prevent directors from improperly backdating resignations or ceasing to be a director when this would leave a company with no directors;
- enable the Commissioner of Taxation to collect estimates of anticipated goods and services tax (GST) liabilities and make company directors personally liable for their company's GST liabilities in certain circumstances; and
- authorise the commissioner to retain tax refunds where a taxpayer has failed to lodge a return or provide other information that may affect the amount of a refund.

"Creditor-defeating dispositions"

The Act introduces the term "*creditor-defeating disposition*", which refers to property transfers where:

- the consideration payable for the property was less than the market value of the property or the best price that was reasonably obtainable for the property; and
- the disposition has the effect of preventing, hindering, or significantly delaying, the process of making the property available for the benefit of the company's creditors in the winding-up of the company.

Are creditor-defeating dispositions voidable?

The Act provides that a creditor-defeating disposition will be voidable if at least one of the following applies:

- the transaction was entered into, or an act was done for the purposes of giving effect to it, when the company was insolvent;
- the company became insolvent because of the transaction or an act done for the purposes of giving effect to the transaction;
- less than 12 months after the transaction or an act done for the purposes of giving effect to the transaction, the company entered external administration as a direct or indirect result of the transaction or act; and

the transaction, or the act done for the purpose of giving effect to it, was not entered into, or done:

- under a compromise or arrangement approved by a Court under section 411; or

- under a deed of company arrangement executed by the company; or
- by an administrator of the company; or
- by a liquidator of the company; or
- by a provisional liquidator of the company.

Director Identification Numbers

To support the Phoenixing laws the Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020 was passed which will introduce a registration regime for Directors and Director Identification Numbers("DIN"). The registration scheme will commence on a date the Government proclaims and at the latest two years after Royal Assent of the Act.

There will be a new Commonwealth business registry regime which will consolidate registries under the Corporations Act, the ABN Act, the Business Names Act, the Credit Act, and the SIS Act.

Under the new directors registration regime, a person intending to be a director must apply to the registrar for a DIN. The DIN will be a unique identifier for each person. The person will keep that unique identifier permanently, even if they cease to be a director.

The DIN will provide traceability of a director's relationships across companies, enabling better tracking of directors of failed companies and will prevent the use of fictitious identities.

There are civil and criminal penalties for directors that fail to apply for a DIN.

Key takeaways

Directors ought to ensure they do not:

- backdate resignations or cease to be a director of a company where the company could be left without a director; and/or
- dispose of property of the company where:
  - the consideration payable for the consideration payable for the property was less than the market value of the property or the best price that was reasonably obtainable for the property; and
  - the disposition has the effect of preventing, hindering, or significantly delaying, the process of making the property available for the benefit of the company's creditors in the winding-up of the company;
- be aware the big brother will be watching once the DIN registration scheme begins.

Jack Tasker
jwt@gdlaw.com.au

Expert Reports and the Expert Code of Conduct -Pitfalls

It is rare that there is a Court case without expert evidence where questions of fact in the proceedings involve matters of a technical nature.

An expert's function in court has been stated as "to provide the judge (or jury) with a ready-made conclusion which the judge is unable to reach themselves due to the technical nature of the facts before the court".

In our May 2020 newsletter we discussed expert evidence in the context of personal injury proceedings arising out of a slip and fall in a shopping centre and a site inspection by an expert engaged to carry out floor testing to determine its slip resistance characteristics.

Our examination of the need for cogent expert evidence continues by looking at a recent decision in the Supreme Court of NSW in *Jones v Murrumbidgee Irrigation Limited [2019] NSWSC 1228* which examined the formal requirements for expert reports.

Legislative requirements in New South Wales

In NSW, expert evidence must satisfy relevant provisions of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR) which includes schedule 7 of the UCPR.

Schedule 7 of the UCPR prescribes an expert witness code of conduct that must be adopted by experts that give evidence in Court and annexed to an expert's report.

The expert report must also satisfy section 135 of the Evidence Act 1995 (NSW) which provides:

> *General discretion to exclude evidence*
>
> *The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might--*
>
> *(a) be unfairly prejudicial to a party, or*
>
> *(b) be misleading or confusing, or*
>
> *(c) cause or result in undue waste of time*.

The Court in Jones v Murrumbidgee Irrigation Limited was asked to rule on the admissibility of expert evidence commenting on possible sources of crop damage and livestock losses.

Environment Analysis Laboratory at Southern Cross University ("EAL") had prepared a report at the request of Jones addressing the sources of damage and commenting on the location, process of obtaining and handling of the samples.

The defendant objected to Jones relying on the report. It sought to have the report excluded due to non-compliance with the legislative requirements in NSW

pertaining to expert evidence.

The defendant argued the report was inadmissible pursuant to UCPR r 31.23 (3) and that the court ought not to 'otherwise order' that the report be admitted.

UCPR r 31.23(3) provides:

> *"Unless the court otherwise orders, an expert's report may not be admitted in evidence unless the report contains an acknowledgment by the expert witness by whom it was prepared that he or she has read the code of conduct and agrees to be bound by it."*

According to the decision given by Wright J, the following considerations were considered relevant in determining the admissibility (or inadmissibility) of EAL's report:

- The report contained a disclaimer that its intention was for the exclusive use of the defendant and not any third party including a Court.
- The lack of any acknowledgment in the report by its authors that they had read or complied with the UCPR code of conduct.
- None of the authors gave evidence they had read and complied with the code of conduct.
- The report was not signed or subsequently adopted by any of the authors.
- There were incomplete statements provided as to the authors' expert qualifications.
- The report was expressly described as preliminary.
- There was no explanation given as to why a compliant expert's report relating to the subject matter of the final report was not provided.

The report was ruled inadmissible by the Court pursuant to the UCPR and s135 of the Evidence Act.

Wright J observed that *Hodder Rook & Associates Pty Ltd v Genworth Financial Mortgage Insurance Pty Ltd [2011] NSWCA 279* reflects the applicable legal position in NSW and for expert evidence to be admissible the expert must, in accordance with UCPR r 31.23, comply with the code of conduct and explicitly state in their report that:

- they have been provided with a copy of the code of conduct by the party who has engaged their expert opinion;
- they have read the code of conduct; and
- they have agreed to be bound by the terms set out by the code of conduct.

Hodder is also authority for the proposition that an expert report may also be inadmissible if its 'probative value is substantially outweighed' by the possibility that the evidence might be 'unfairly prejudicial' or 'misleading or confusing', pursuant to s 135 of the Evidence Act.

Conclusions

Experts satisfy a vital need in litigation. They assist the court by providing unbiased technical evidence. The expert code of conduct has been developed to inform experts of the role they play in litigation and their duty to the Court and experts must understand the code and adopt its otherwise the work they do and the reports they prepare may be of no value as they will not be able to be used in litigation.

Michael Twemlow
mkt@gdlaw.com.au

CONSTRUCTION ROUNDUP

The New Residential Apartments Act – The Solution or More of a Problem?

When a person considers buying a newly built apartment in Sydney (or elsewhere in Australia), one of their main concerns is whether the construction of the apartment building was defective in some way.

We have all seen the dramatic media reports about the effects of the structural defects in Opal Tower and Mascot Towers, with the occupants of those buildings forced to vacate their apartments with little or no notice.

A less dramatic but perhaps more problematic defect is where a building's waterproof membrane fails – often resulting in damp conditions and mouldy walls and floors. Sometimes rainwater can actually enter the apartments and ruin the flooring, carpets and furniture.

Defects such as these are likely to lead to significantly increased costs for the owners, and wretched living conditions for the occupants.

In most cases, the owners look to the builder and/or developer (if they are still operational) to satisfy their obligations under the statutory warranties prescribed by the *Home Building Act 1989* (NSW).

In order to address the prevalence of defective construction work in the residential apartment sector, and to increase public confidence in the industry, on 4 June 2020 the NSW Government passed the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 which received assent on 10 June 2020 and the provisions will commence from 1 September 2020.

This new Act is intended to stop defective apartment buildings being released to an unsuspecting public, by giving the NSW Building Commissioner the power to issue stop work and rectification orders, and to prevent occupation certificates from being issued unless and until defective work is rectified.

On the surface, the Act appears to provide a solution

to the current problem. However, upon deeper examination it becomes evident that there is a real risk that it will simply force many dodgy builders into insolvency, which will result in the owners of those defective apartments having to foot the bill themselves for the rectification work – which is precisely what the new legislation is aimed at preventing.

The provisions of the new Act

The new Act is to commence from 1 September 2020, with a review of its effectiveness to be undertaken in the period from March to June 2022.

It applies to all Class 2 buildings in New South Wales. Class 2 buildings are those "containing two or more sole-occupancy units each being a separate dwelling". While clearly covering multi-level apartment buildings, this definition also includes townhouses and single level dwellings which share a basement or car park below.

The Act will apply to all residential apartment building work that has not yet been completed and, importantly, work that was completed up to ten years before the commencement of the Act.

Under the process set out in the Act:

- The developer (who is defined to include the builder) must notify the Secretary of the NSW Department of Customer Service 6 to 12 months prior to the construction work being completed.
- If there is any change to the anticipated completion date, the developer is required to notify the Secretary of this change within 7 days of itself becoming aware of it.
- The Secretary and its authorised representatives are empowered to investigate the construction work and to make orders requiring the rectification of any defects in the work.
- If the Secretary is satisfied that a "serious defect" in the work exists, or if the developer has failed to comply with a building work order or a development control order, then the Secretary has the power to prohibit the certifier (whether the local council or a private certifier) from issuing an occupation certificate.

A failure to follow the timings or processes set out in the Act can attract a fine of $22,000 for an individual or $110,000 for a corporation. Ignoring a stop work or rectification order may cost the developer even more - $33,000 for an individual (and $11,000 for each additional day) or $330,000 for a corporation (and $33,000 for each additional day).

Similarly, a certifier that issues an occupation certificate notwithstanding the Secretary's prohibition will be liable for a fine of $22,000 for an individual or $110,000 for a corporation.

"Serious Defect"

A "serious defect" is defined in the new Act to include:

- a defect in a building element that is attributable to a failure to comply with the performance requirements of the BCA; or
- a defect in a building product or building element that is attributable to defective design, defective or faulty workmanship or defective materials which threatens the structural integrity of the building.

The inclusion in this definition of <u>any</u> failure to comply with the BCA means that the scope of a "serious defect" is considerably wider than the current definition of "major defect" in the Home Building Act.

Under the Home Building Act, in order to be a "major defect", the defect must threaten the collapse or destruction of the building or affect the ability to use the building for its intended purpose.

The lack of consistency between the two Acts is likely to confuse many owners corporations, who are likely to assume that they have six years within which to commence court proceedings to pursue rectification of a "serious defect" identified by the Secretary. But this is not so. Under the Home Building Act, any claim in respect of any defect which is <u>not</u> a "major defect" must be commenced within two years. Therefore, where a defect is a technical breach of the BCA's performance requirements but does not affect habitability of the building, the owners corporation must still commence court proceedings within two years.

The likely reactions of builders and developers

Traditionally, builders and developers have often sought the early issuing of occupation certificates in order to trigger settlement of sales off the plan, thus freeing up cash flow to complete the development.

The possible prohibition of an occupation certificate being issued is likely to force builders and developers to rethink their business models and the way that they finance their developments – which is good news for consumers.

However, the retrospective effect of the Act may mean that a builder or developer now faces being issued a costly rectification order on recently completed work. Builders and developers with multiple projects may now face costly rectification orders which could lead to financial stress including insolvencies.

While there is no question that the loss of "dodgy builders" from the NSW residential construction sector will be applauded by the general public, those owners corporations that are currently prosecuting (or who still have the right to prosecute) builders for breach of their warranties under the Home Building Act face the risk that those builders will now become insolvent as orders to rectify defects overwhelm builders and developers who have failed to deliver quality builds. Owners corporations may find they are left with no one to sue, and in some cases significant legal costs that have already been incurred seeking compensation which will not be reimbursed.

The true impact of the Act will not be known until its ten year retrospective effect expires.

Gillis Delaney Lawyers can provide specialist expert advice on the effect of the new Act. We can also assist construction contractors and developers with navigating their way around the processes of the new legislation.

Linda Holland
lmh@gdlaw.com.au

Likely impact of COVID-19 on supply of materials and labour for construction projects

The construction industry contributes approximately 10% to Australia's GDP. It employs 1.2 million workers nationwide, and indirectly supports another 440,000. It has the largest number of full time workers than any other industry, and the highest number of apprentices.

During the shutdown of many businesses due to the COVID-19 pandemic, the construction industry was considered too important to stop (albeit that social distancing protocols on the worksite were still implemented).

Now that restrictions on social interactions are being eased, the Federal and State Governments have been looking to the construction industry to stimulate the economy and create jobs.

On 28 April 2020 the NSW Government announced a new Planning System Acceleration Program. The first tranche of this program includes 24 projects involving the construction of 4,400 new homes and the delivery of more than 325,000 square metres of open space. These projects are anticipated to contribute $7.54 billion to the State's economy and create almost 9,500 new jobs.

But the construction industry will face many challenges in the months (and maybe years) to come as a consequence of COVID-19, which are likely to affect its performance as a major contributor to the country's economy.

In this article we look at the problems that will likely lie ahead with respect to supply chains on construction projects and the likely increased prices.

Following the World Health Organisation's declaration on 30 January 2020 that the coronavirus outbreak in Wuhan, China, was a Public Health Emergency of International Concern, the majority of countries around the world reacted swiftly by closing their borders – initially to those arriving from China and then to all foreign nationals.

Domestic lockdowns and the compulsory quarantining of all visitors and returning citizens soon followed, and stricter standards of hygiene and cleanliness in public areas were implemented. Similarly, aircraft and shipping vessels arriving in Australian territories have been undergoing fumigation and sanitisation before being allowed back into service.

Recently, the Australian Government has been instrumental in calling for an international inquiry into the COVID-19 outbreak. As a consequence, the Chinese Government has announced significant increases in tariffs applicable to certain exports from Australia.

So what does this all mean for the construction industry?

Higher demand, short supply and higher prices

When lockdowns are no longer implemented and people are back at work, many projects that had been suspended during the COVID-19 crisis will recommence.

Simultaneously, there will be significant pressure to fast track the newly announced projects in an effort to stimulate the economy.

As a consequence, it is likely that there will be extremely high demand for materials and labour.

During the stimulus packages initiatives arising from the global financial crisis in the first decade of this century, many contractors found that the limits in supply to meet the higher demand for construction materials and labour led to some trades charging significantly increased prices – in some cases tripling or more. It can be assumed that there will be a similar cost increase to meet the higher demand for trade labour.

However, border closures and restrictions may have an impact on the labour that is available. The construction industry is one of the largest industries that employ migrants to Australia. Restrictions on overseas travel and sponsored visas may lead to difficulties in obtaining sufficient resources for work sites.

A further issue is the reluctance of trades to return to a project for a limited time to finish minor work affected by a delay (eg due to a redesign of that work) when a more lucrative project has become available to them in the meantime.

The time taken to complete projects is also likely to be affected – particularly if social distancing measures limiting the numbers of people per four square metres are implemented for some time.

Materials sourced from overseas

It is likely that there will be increased demand for materials to complete current and new projects.

Many materials incorporated into construction projects are currently sourced from overseas – particularly China.

With lower prices traditionally being charged for products manufactured with the use of cheaper labour, the market has seen many local manufacturers close.

However, a trade war being China and Australia is likely to lead to significant price rises in those materials.

In addition, with shipping affected by border closures and sanitation procedures, the time required to source materials from overseas will increase, resulting in delays to completion (and increased costs for all concerned).

Consequently, contractors will be forced to raise their tender prices, and the projects will be more expensive to complete.

What can the parties to a project do to protect themselves?

Construction contractors submitting tenders for new jobs should allow contingencies in their prices to cover these likely increased costs, and further time to complete the projects. This increased cost will ultimately be borne by the project's principal, meaning that construction will now be more expensive in Australia.

Contractors should also try to lock in their subcontractors early, to avoid losing those subcontractors to competitors, and to reduce the risk of increased prices between tender and the time that the work is actually carried out.

If it appears that the progress of the project may be affected by a difficulty in sourcing materials or labour, the parties should work together to try to overcome the problem. However, all parties should carefully document the issues and steps that they are taking so that if a dispute over the contract price arises down the track, they have the evidence to support their position.

If you have concerns over how COVID-19 may impact your project, you should seek legal advice at the earliest opportunity. Pre-emptive advice on how to protect yourself from unforeseen price rises and delays can save considerable costs of resolving a dispute down the track.

Linda Holland
lmh@gdlaw.com.au

The Never Ending Saga of the Requirements Under the Security of Payments Act

Knowledge is power and understanding the requirements of the Security of Payments Act is no different. The Act, whilst relatively concise (for us lawyers anyway), contains a number of intricacies which are consistently the subject of court rulings each month. Developing a solid understanding of the requirements of the Act can therefore be difficult to maintain. However in order to prevent disputes arising or to change the power dynamic between parties where a dispute does arise (as they often do), it is necessary to fully appreciate these requirements.

In May this year, the NSW Court of Appeal handed down the decision of *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 93. In the initial proceeding last year (see our November 2019 newsletter) Decon sought and obtained a summary judgment for the sum of $6,355,352.46 (incl. GST), being the amount claimed under Progress Claim 10 which they submitted to TFM on 3 June 2019.

The NSW Court of Appeal unanimously dismissed the appeal and provided clarification on two important aspects of the Act in their reasons, namely:

- whether a claim for payment for variations to the contract is considered to be a claim under the contract; and
- whether a payment claim is considered invalid where it is not accompanied by a supporting statement in accordance with s 13(7) of the Act.

Was it a valid payment claim?

On appeal TFM contended that the payment claim was invalid. They argued that it was a claim for payment in respect of variations to the contract rather than claims under the construction contract. They suggested that the claims were actually made for reasonable remuneration not otherwise provided for under the contract, but not a claim for damages for breach of contract (i.e. a *quantum meruit* claim).

Section 8 of the Act provides an entitlement to progress payments for work done "under a construction contract". The language of the Act does not permit a claim by way of *quantum meruit*.

The court held that it was possible that the amounts claimed for variations did not properly arise under the contract because, for example, relevant procedural steps had not been followed. However, to pursue that issue TFM should have done so by way of a payment schedule provided pursuant to s. 14 of the Act. The schedule should have indicated the claimed items intended to be paid and the reason for non-payment of any item not accepted. TFM had failed to do so.

Where the respondent (in this case TFM) fails to provide a payment schedule within the time allowed under the contract and fails to pay the whole or part of the claimed amount by the due date they are not entitled to:

- bring a cross claim against the claimant; or
- raise any defence in relation to matters arising under the contract,

(Section 15(4) of the Act).

Therefore it is essential that:

- a payment schedule is submitted within the timeframe prescribed under the contract; and

- the payment schedule identifies any possible grounds for dispute in relation to a specific progress claim.

Even in circumstances where the payment claim submitted appears invalid, parties should identify the reasons upon which they regard the payment claim as invalid. An adjudicator can then make a determination on the matters raised.

Did the exclusion of a compliant supporting statement invalidate the payment claim?

TFM further submitted that the payment claim had not been validly served because it was not accompanied by a support statement in accordance with s 13(7) of the Act.

Relevantly s. 13 of the Act provides:

(7) A head contractor must not serve a payment claim on the principal unless the claim is accompanied by a supporting statement that indicates that it relates to that payment claim.

Maximum penalty: 200 penalty units.

(8) A head contractor must not serve a payment claim on the principal accompanied by a supporting statement knowing that the statement is false or misleading in a material particular in the particular circumstances.

Maximum penalty: 200 penalty units or 3 months imprisonment, or both.

(9) In this section:

***supporting statement** means a statement that is in the form prescribed by the regulations and (without limitation) that includes a declaration to the effect that all subcontractors, if any, have been paid all amounts that have become due and payable in relation to the construction work concerned.*

The court held that whether or not the payment claim was accompanied by a supporting statement (as outlined above) did not form a sufficient basis to invalidate the payment claim. The subsections itself provide its own remedy for a breach of the prohibition.

The purpose of ss. (7) – (9) of the Act was not to invalidate the payment claim, or service thereof, but to impose a penalty which was hoped would be more readily enforceable and therefore a more powerful deterrent than that found in standard form contracts.

The court held that the purpose of the subsection is ancillary to the principal purpose of the legislation, namely to ensure a timely flow of money to contractors.

Key takeaways:

- Take the time to understand the requirements of the Security of Payments legislation and if in doubt seek specialised legal advice;
- Always ensure that a payment schedule is prepared and served within the required timeframe. Even where it is disputed that a valid payment claim has been served, identify the reasons why the payment claim is invalid in the payment schedule; and
- Whilst the exclusion of a supporting schedule, as set out in s. 13(7) of the Act, may not invalidate a payment claim, it still carries a penalty for non compliance.

Minal Chelliah
mdc@gdlaw.com.au

EMPLOYMENT ROUNDUP

Wage Theft – Victoria Moves Against Defaulting Employers

The concept of "wage theft" is more and more a topic of discussion recently. Some commentators say that it is endemic in Australia.

Broadly, "wage theft" refers to the practice of employers who deliberately withhold wages and other employee entitlements. The targets of such activity are often temporary residents of Australia, persons from a non- English speaking background, and other vulnerable groups.

In an effort to combat the harm which wage theft causes, the Victorian parliament has passed laws establishing criminal penalties for employers who deliberately underpay or don't pay their workers wages and other employee entitlements. This is a first for Australia.

In addition, the reforms:

- introduce new record-keeping offences for employers who falsify or fail to keep records for the purposes of concealing underpayments;
- establish a government agency - Wage Inspectorate Victoria - to investigate and enforce the legislation.

Under the *Wage Theft Bill 2020*, employers who dishonestly authorise or permit another person to withhold an employee entitlement owed by the employer to the employee, will face fines of up to $198,264 for individuals, $991,320 for companies and up to 10 years' gaol.

An employee entitlement includes wages, superannuation, allowances, annual leave, long service leave and any other amount payable or any other benefit payable or attributable by an employer to, or in respect of, an employee.

An employment entitlement is withheld if it is not paid or distributed to the employee, or the employee is otherwise deprived of it. This would cover requiring an employee to pay back a portion of their wages to their employer and misrepresenting an employment relationship as an independent contract to avoid paying the entitlements owed.

It will be irrelevant whether the employee agreed to his or her entitlement being reduced to less than the minimum amount or benefit required under the relevant laws.

According to Victorian Attorney-General Jill Hennessy:

> *"Employers who steal money and entitlements from their workers deserve to face the full force of the law."*

Her department is working on reforms which will provide a simpler and more streamlined avenue for recovery of amounts withheld through the Victorian Magistrates Court.

The legislation will come into effect on 1 July 2021.

All amounts due to an employee under the minimum wages and employment conditions of the *Fair Work Act 2009* (Cth), awards and enterprise agreements made under the *Fair Work Act*, as well as entitlements due under employment contracts appear to be caught by the reforms.

There are very wide grounds under which an employer may become liable:

- by one of its officers authorising or permitting the withholding
- by the board of directors expressly or impliedly giving the authorisation or permission
- where a corporate culture exists that directed, encouraged, tolerated or led to the relevant conduct being carried out

Senior officers of an employer may also be guilty if:

- they are directly involved in the withholding of entitlements;
- they falsify an employee entitlement record with a view to dishonestly obtaining a financial advantage for the employer or another person;
- prevent the exposure of a financial advantage obtained by the employer or another person; or
- they fail to keep proper records with a view to dishonestly obtaining a financial advantage.

However, it is a defence if the employer can prove that it exercised due diligence to prevent the authorisation or permission. A higher standard will be applied when considering what is reasonable for a large body corporate than for a small business.

Officers of employers will also have a defence if they prove they exercised due diligence to pay or attribute the employee entitlements to the employee

In addition there are penalties for persons who assist, encourage or direct the commission of the offence. This might cover, for example, franchisors that allow or condone franchisees to dishonestly withhold employee entitlements.

The legislation gives Inspectors of Wage Inspectorate Victoria wide powers to investigate potential offences.

It is clear that there are many, many employers who do not pay employees exactly what they are owed. Most of this is simply the result of mistake.

Sometimes, however, underpaying is done deliberately or at least in a reckless way. This legislation is designed to deter such activity.

All employers should take active steps to ensure that their entire workforce is properly paid at all times. That way, there will be no need to worry about 10 years in gaol.

David Collinge
dec@gdlaw.com.au

WORKERS COMPENSATION ROUNDUP

Greater than 20% Impairment? Then section 39 does not apply to you

The NSW Court of Appeal has recently determined that the cap of 260 weeks on weekly benefits does not apply to a worker who has been assessed as having sustained a greater than 20% whole person impairment, regardless of when that threshold is achieved (*Hochbaum v RSM Building Services Pty Limited; Whitton v Technical & Further Education Commission t/as TAFE NSW*).

On 19 June 2012 the *Workers Compensation Act 1987* was amended to provide that a worker has no entitlement to weekly payments of compensation after an aggregate period of 260 weeks, whether or not consecutive, in respect of which a weekly payment has been paid or is payable. Section 39(2) of that legislation however provides that the section, and therefore the cap, does not apply to an injured worker whose injury results in permanent impairment if the degree of permanent impairment resulting from the injury is more than 20%.

The Court of Appeal was called on to consider considered the entitlements of a worker where they had received 260 weeks of weekly compensation and after weekly compensation had been terminated they established whether their degree of permanent impairment from injury was more than 20%.

In the first case, the worker sustained injury to his right leg on 1 September 2000. He made a claim for weekly payments and lump sum compensation and a

complying agreement was entered into in July 2004 for lump sum compensation totalling $8,750.00. As at 1 October 2012, when the new regime commenced, the worker was an "existing recipient" of weekly payments. On 2 April 2013 a work capacity decision was issued on the basis the worker had no current work capacity. On 7 February 2017 the worker was advised that on 25 December 2017 he would reach the 260 week limit. Weekly payments ceased on 25 December 2017. Subsequently, on 3 April 2018 Dr Patrick assessed a 49% permanent impairment although the impairment was not wholly related to the work injury. The employer did not concede a greater than 20% assessment. Ultimately, on 16 July 2018, a medical assessment certificate was issued by an Approved Medical Specialist certifying the worker as having sustained 21% whole person impairment.

Similarly, in the second case the worker's weekly payments ceased on 25 December 2017 and recommenced following an assessment of 32% whole person impairment by an Approved Medical Specialist on 18 June 2018.

In the case of both of these workers, their employer's insurers had ceased paying weekly compensation on 26 December 2017, which was 260 weeks after 1 January 2013. After that time, both of the workers were assessed as having a degree of permanent impairment as a consequence of their work injuries in excess of 20%. After that assessment was achieved weekly payments resumed. The workers however sought weekly payments between 26 December 2017 and the date of the assessments of greater than 20% whole person impairment.

The matters were heard together. Initially the arbitrator in the Workers Compensation Commission held that the workers were entitled to weekly payments for that period. The employers appealed and the decisions were overturned on appeal by the President of the Workers Compensation Commission. The President determined the effect of Section 39(2) displaced Section 39(1) only from the time that a worker was found to have a degree of permanent impairment of more than 20%. The effect of this was that the workers were only entitled to the recommencement of weekly compensation after the assessment of whole person impairment of greater than 20%.

The workers successfully appealed from this decision to the Court of Appeal.

The Court of Appeal determined that when Section 39 is properly considered, the 260 week limit does not apply to a worker whose degree of permanent impairment resulting from the injury exceeds 20% regardless of when that threshold is crossed.

Justice White in his judgment stated:

"In some cases the worker's degree of permanent impairment will date from the injury. But in others the ultimately assessed degree of permanent impairment would have been occasioned by later events, such as adverse results of surgery or psychological sequelae, that did not exist earlier. Although there is a temporal element in each of Sections 36, 37, 38 and 59A, and arguably Section 38A when applied to those provisions, there is no temporal element in Section 39(2). The inquiry directed by Section 39(2) is whether the injury "results in" permanent impairment where the degree of permanent impairment "resulting from the injury" is more than 20%. The only question under Section 39(2) is what degree of permanent impairment resulted from the injury. It is unnecessary to enquire whether the impairment resulting from the injury was always present or was present at the expiry of the 260 week period referred to in Section 39(1), to the degree of the permanent impairment as ultimately assessed. The date from which the injured worker's degree of permanent impairment arose is not a relevant consideration for the purposes of Section 39. ...

Where the degree of permanent impairment resulting from the injury has not been ascertained after 260 weeks by an assessment under Part 7 of Chapter 7 of the 1998 Act it does not follow that the worker is to be taken as not having had a 20% or greater degree of permanent impairment resulting from the injury. If the insurer and the worker are agreed that the worker has suffered that degree of permanent impairment resulting from the injury, then there is no need for an assessment. If they are not agreed, then there will be a medical dispute that can be determined under Part 7 of Chapter 7 of the 1998 Act. If the degree of permanent impairment cannot then be ascertained, then Section 39 does not provide for the continuation of payment of weekly benefits, although Clause 28 of the Workers Compensation Regulation 2016 does. If the worker's degree of permanent impairment is later assessed to be more than 20% then it will have been ascertained that the worker was always entitled to the confirmation of weekly benefits. Even if the worker did not suffer a degree of impairment of 20% or more at the expiry of the 260 week period in Section 39(1) such a later assessment will have determined the degree of permanent impairment resulting from the injury was more than 20%."

Justice Brereton in his judgment considered in detail the words of Section 39 of the legislation. In Justice Brereton's opinion, Section 39(2) poses a question as to the degree of permanent impairment that results from the injury and if that degree is greater than 20%, then the worker is in the exempt class and Section 39 does not apply to him or her. In his Honour's opinion the function of Section 39(3) is not to make an assessment of pre-condition for the engagement of Section 39(2) rather, a mechanism for resolving a dispute about whether a worker is in the exempt class.

The end result therefore is that payments may cease at 260 weeks under Section 39(1) if a worker's level of permanent impairment has not been assessed or

agreed at more than 20% whole person impairment. If however a worker has obtained an assessment greater than 20% then Section 39 does not apply and a worker is not subject to the 260 week limit on weekly payments. A worker will be entitled to weekly payments during all periods of incapacity.

It is therefore likely that given the decision there will now be an influx of claims for "back payment" of weekly compensation where there have been subsequent assessments of whole person impairment of greater than 20%.

Amanda Bond
asb@gdlaw.com.au

NSW Workers Compensation Commission Goes Back to the Future

In the June edition of GD News we reviewed the procedural changes implemented by the Workers Compensation Commission ("WCC") in response to the current public health crisis.

In particular, we considered the decision of President Judge Phillips to suspend face to face conciliation/arbitration hearings, mediations and medical assessments and the impact social distancing measures were having on injured workers, employers and their insurers alike.

What's New

The WCC has issued a Bulletin advising stakeholders that they can expect further procedural changes as the WCC attempts to transition from the current teleconference based process to a greater reliance on virtual technology.

From 22 June 2020 to 21 August 2020 the Commission will pilot the use of the online platform (*"Modron Spaces"*) to conduct arbitrations. In so doing the Commission will partner with the Australian Disputes Centre ("ADC") to deliver the pilot.

The stated aim of the pilot is to achieve great efficiency at personalisation of the virtual process which will include:

- a concierge service to participants including pre-event familiarisation;
- the connection of participants;
- the inclusion of pre-event familiarisation;
- connecting participants and support during the event.

According to the Commission, the above platform has been selected on the basis it is both easy to use and more closely replicates the physical spaces with which stakeholders are traditionally familiar when participating in conciliation/arbitration hearings and mediations.

Implementation of Modron Spaces

The Commission has advised all participants including arbitrators will receive training and support throughout the course of the pilot.

Noteworthy, depending on the outcome of the pilot the Commission proposes establishing a process to move the pilot to an ongoing program.

The Future & Beyond

The WCC has signalled the return of in-person hearings in the WCC although cautioned such hearings will only be held by exception and only on successful application to the President.

Consistent with the *COVID-19 Legislation Amendment (Emergency Measures - Attorney General) Act 2020*, strict protocol will apply to persons attending the Commission.

The Commission's Security Officers will now be empowered to implement and enforce a screening procedure which will include the following:

- obtaining the name and contact details of all those attending the Commission;
- temperature testing;
- implementation of a COVID-19 symptoms questionnaire;
- power to decline entry to any person who reports flu-like symptoms or refuses to undergo temperature testing or complete the requisite questionnaire;
- enforcement of social distancing principles in hearing and meeting rooms with entry into and out of such spaces strictly controlled.

The recent Bulletins issued by the President confirm that change is the new norm in regard to proceedings before the Commission.

This serves as a timely reminder in the current climate that employers, insurers and their legal representatives need to ensure a collaborative approach to preparation of matters before the Commission.

Brad Quillan
bfq@gdlaw.com.au

Employer Challenges in the Post Lockdown Environment

As the NSW economy emerges from enforced hibernation the question which now arises is how do employers manage this transition and restore profitability whilst attempting to ensure a physically and psychologically supportive workplace?

According to icare, NSW employers face unprecedented challenges in managing a returning workforce made psychologically fragile from the effects

of prolonged social isolation, the persisting stress of financial hardship and job insecurity.

In support of employers, icare has issued Part 1 of a "COVID-19 Recovery Employer Toolkit" directed to the pre-return phase to ensure NSW employers prepare and plan for the return of their staff and to assist, implement and monitor employee health and safety practices within the workplace.

In anticipation of facing employees suffering heightened emotional states, icare has identified the following principles as key to assisting employers manage employee risk perception:

- good leadership;
- clear communication; and
- best practice support.

Key to the process is the requirement that workplace leaders understand the effects of COVID-19 and the impact of Governmental policies on their employees.

According to icare, employees in the post pandemic period may experience psychological symptoms due to their perceived risk to their health and safety posed by returning to the conventional workplace.

Whilst the prevention of workplace psychological injury is a priority, employers can anticipate some employees may react adversely to returning to their workplace.

Accordingly, it is timely to briefly revisit some fundamental principles relating to the compensability of psychological conditions pursuant to the NSW Workers Compensation Scheme.

Has the worker suffered a psychological injury?

Section 11A (3) of the *Workers Compensation Act 1987* ("1987 Act") provides that a psychological injury for the purpose of the legislation is a psychological or psychiatric disorder.

The term extends to include the physiological effect of such a disorder on the nervous system.

To prove that a psychological injury has occurred, a worker must prove either that the nervous system was so affected that a physiological effect was induced or that there has been an aggravation, acceleration, exacerbation, or deterioration of a pre existing psychiatric condition.

The case law has long confirmed that a mere emotional impulse such as fear, apprehension and emotional upset will not constitute a psychological injury so as to potentially give rise to an entitlement to compensation: *Stewart v State of New South Wales (1998) 17 NSWCCR 202.*

Causation

Section 4 of the 1987 Act defines "injury" as follows:

(a) means personal injury arising out of or in the course of employment;

(b) includes a disease injury which means:

(i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease; and

(ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease.

..."

A diagnosable psychological or psychiatric disorder is generally considered a "disease" injury for the purposes of the 1987 Act.

Accordingly, a worker seeking to assert he or she has suffered a compensable psychological injury bears the onus of establishing employment was the main contributing factor to either the contraction or aggravation, acceleration, exacerbation or deterioration of the disease before liability will arise on the part of the employer.

This in turn requires a careful consideration by employers and their insurers as to whether the evidence supports the conclusion that work represents the main contribution to the psychological condition thereby satisfying the causal test or alternatively the condition is based on causes extraneous to the workplace including the delusional fear of contracting a disease based on developments in the wider community: *NSW Police Force v Gurnhill [2009] NSWCCPD 154.*

Incapacity

A worker will not be entitled to payments of weekly compensation unless it is established he or she suffers total or partial incapacity for work which results from an injury so as to satisfy the requirements of Section 33 of the 1987 Act.

It follows an employee who is apprehensive or fears attending the workplace, perceiving they are at risk of contracting a disease is not incapacitated by reason of a work related injury for the purpose of the 1987 Act.

Medical and related treatment expenses.

An employer's liability extends to the payment of reasonably necessary medical and related treatment expenses.

A liability in relation to such expenses will only arise however if the treatment concerned arises in respect of a work related injury in accordance with section 60 of the 1987 Act.

It follows from our comments above that a worker who is unable to establish that he or she has sustained a diagnosable psychiatric or psychological disorder to which employment is the main contributing factor has

no entitlement to the payment of treatment under the 1987 Act.

Employers can reasonably anticipate that discussion in the wider community regarding post lockdown vulnerability may encourage some employees to attempt to attribute their emotional difficulties to their employment.

Whilst employers must be mindful of individual perceptions of risk and implement measures designed to eliminate or reduce that risk, it is essential that should a claim ensue that the question of liability be reviewed on its merits.

This approach requires not only a consideration of the objectives of the Regulator but also the requirements of the applicable Workers Compensation Legislation.

Brad Quillan
bfq@gdlaw.com.au

Aggregation to Determine Whole Person Impairment - Disease Injuries Revisited

The 2012 amendments to the worker's compensation legislation in New South Wales instituted a number of whole person impairment thresholds as a precondition to entitlement to ongoing weekly benefits beyond 260 weeks (20%) and ongoing entitlement to medical expenses (30%) in addition to the existing thresholds of 10% for lump sum compensation and 15% for work injury damages claims. As a consequence legal representatives of injured workers have become inventive in their attempts to obtain medical evidence supportive of their clients having attained the relevant thresholds. Over the past year or two, an increased reliance upon "nature and conditions" of employment claims has become prevalent as a means of aggregating various smaller impairments of different body parts to attain the thresholds to greater benefits under the Scheme.

The applicable principles in such claims were recently the subject of determination in an appeal from an arbitrator's decision in *Anshaw v Woolstar Pty Ltd* [2020] NSWWCCPD 184.

The worker was employed as a picker and packer from 2006 to 2017. He reported injury to his right shoulder and neck on around 24 April 2013 and he underwent arthroscopic surgery to his right shoulder. When he resumed work he returned to manual picking of confectionary which was less heavy than some of the other products. The worker claims this was repetitive and made his shoulder worse.

Claim documents confirmed reports of injury on multiple occasions from 2011 to 2017 involving the right shoulder, neck and low back.

Following a slip and fall at work on 4 November 2017 it was recommended the claimant undergo cervical discectomy and fusion at C5/6. The insurer's neurosurgeon agreed surgery was appropriate and recommended decompression at C6 and C7 accompanied by a two level fusion. Although the insurer accepted liability for the cost of the surgery the worker decided against it as there was only a 30-40% chance of improvement.

The worker's solicitors made a claim for lump sum compensation in respect of 26% whole person impairment (15% cervical spine, 5% lumbar spine and 8% right upper extremity).

The insurer disputed the impairment to the worker's cervical spine, lumbar spine and right upper extremity which resulted from various injurious events, could be combined and it disputed the quantum of the assessment.

At first instance an arbitrator found the injuries could not be aggregated and entered an award for the employer on the basis the injuries to the worker's neck and right shoulder were not the same pathology as injury to the lumbar spine. He was not satisfied the injuries "could be lumped together" on the date of claim.

The claim went on appeal and Deputy President Snell considered the provisions of Sections 65 and 322 of the 1987 and 1998 Acts which relevantly provide:

- Section 65(2) - If a worker receives more than one injury arising out of the same incident, those injuries are to be treated as one injury for the purposes of this Division.

  Note. The injuries are to be compensated together, not as separate injuries. Section 322 of the 1998 Act requires impairments that result from those injuries to be assessed together.

- Section 322(2) - Impairments that result from the same injury are to be assessed together to assess the degree of permanent impairment of the injured worker.

- Section 322(3) - Impairments that result from more than one injury arising out of the same incident are to be assessed together to assess the degree of permanent impairment of the injured worker.

The Deputy President considered the decision in *Edmed* where a worker suffered injury to his right wrist on two separate dates. At issue was the aggregation of the permanent impairment from the two injuries. There, reference was made to the decision of Judge Neilson in *Lyons* where it was acknowledged in Section 322(3) reference to impairments that result from more than one injury arising out of the same incident could only mean the pathology that had resulted from the relevant work incident or injurious event. For example where a worker fell and suffered a broken leg and separate and distinct nerve injuries in the arm, he had suffered more than one pathology as a

result of the one incident or injurious event, and those injuries could be assessed together.

The Deputy President acknowledged there was difficulty where a worker suffered one pathology (injury) as a result of several independent incidents or injurious events. That situation was partly addressed in Section 322(2) in that impairments resulting from the same injury were to be assessed together to assess the degree of impairment of the injured worker.

The worker submitted the arbitrator failed to provide adequate reasons for rejecting his claim that injury to the cervical spine, lumbar spine and right upper extremity was established on the basis of Section 4(b)(2) of the 1987 Act, the so called disease provisions. It was noted the injury pleading was amended at the arbitration hearing to include nature and conditions of employment in addition to the specific claim for the injury that occurred in the fall on 4 November 2017.

The Deputy President noted that findings of "injury" on the basis of "injury" simpliciter and the "disease" provisions are not mutually exclusive. The Deputy President considered a finding on the basis of the "disease" provisions could be made on the whole of the evidence and did not depend on medical evidence specifically implying the term "disease". He stated such findings were not prevented because injury resulted from the "nature and conditions" of employment.

The Deputy President determined the arbitrator did not engage in a rational analysis as to whether injury was established on the basis of a disease provision. It was also determined the arbitrator failed to afford the parties procedural fairness and missed the distinction drawn between Section 322(2) and Section 322(3) because it was not the worker's argument that the injuries to the neck, right shoulder and lumbar spine all involved the same pathology. Rather it was the worker's case the impairments resulted from more than one injury arising out of the same incident, being the nature and conditions of the claimant's employment and therefore it was appropriate to assess the degree of permanent impairment of the injured worker to the various parts of the injured worker's body.

In those circumstances the Deputy President concluded:

> *"The appropriate course, in my view, is that the matter be remitted to another Arbitrator for re-determination. The pleading of injury in this matter is not without complexity, and it is desirable, before a further arbitration, that consideration be given to the allegations to be made, and the precise nature of the aggregation that is being sought, including the extent to which allegations are made in the alternative. The topic of aggregation pursuant to s 322 of the 1998 Act, in the context of 'disease' allegations, was dealt with by Roche DP in Department of Ageing, Disability and Home Care v Findlay. To the extent to which aggregation is sought in the context of different injurious events, it also may be helpful to have regard to the decision in Warwar v Speedy Courier (Australia) Pty Ltd"*

On another front in the recent decision of C*ahir v Coles Supermarkets Pty Limited* [2020] NSWWCC 170, Arbitrator Burge dealt with a claim where the worker injured his left wrist working as a baker for Coles from 2002 until 2018. It was not disputed the injury was in the nature of a disease process caused by the nature and conditions of employment or an aggravation of a disease. The claimant then commenced work as a baker at Woolworths and then complained of symptoms in both wrists and arms.

The worker claimed his employment with Woolworths was lighter and therefore he made no claim against Woolworths. The worker sought compensation under Section 66 for injury to his left wrist whilst employed by Coles. Coles disputed the claim and asserted the injuries to each wrist were diseases due to the worker's later employment with Woolworths as either an injury or an aggravation of a disease process.

The arbitrator dealt with the meaning of the phrase in Sections 15 and 16 of "employment to the nature of which" a disease injury was due, finding the sections were directed towards simplifying assignment of liability and they were not directed towards "true causation, finding it was enough if the disease was "incidental to that class of employment so that it can be attributed to service therein".

Based upon the worker's history that his duties with each employer were essentially the same, albeit less strenuous in nature, the arbitrator accepted employment with Woolworths aggravated the disease process and thus his claim against Coles failed, confirming that in section 66 claims for disease injuries, the relevant date of injury is the date on which the claim is made.

The decisions highlight the need for a careful analysis of the factual evidence in nature and conditions claims when considering the application of Section 322 before aggregation of impairments of various body parts can be undertaken to achieve a single impairment for the purposes of attaining the various thresholds in the amended legislation.

Belinda Brown
bjb@gdlaw.com.au

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.