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Liability for Personal Injuries Arising from Dangerous Recreational Activities

The NSW Court of Appeal has recently confirmed that the defence of dangerous recreational activity is alive and well.

In *Singh BHNF Ambu Kanwar v Lynch*, five Court of Appeal Justices considered whether professional horse racing was a dangerous recreational activity within the meaning of the *Civil Liability Act* 2002.

Section 5L of the legislation provides that a defendant is not liable in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity.

Section 5K provides that a recreational activity includes any sport, whether or not the sport is an organised activity, any pursuit or activity engaged in for enjoyment, relaxation or leisure and any pursuit or activity engaged in at a place where people ordinarily engage in sport or activities for enjoyment, relaxation or leisure.

A dangerous recreational activity is a recreational activity that involves a significant risk of physical harm.

Hari Singh was a professional jockey who sustained serious injury in August 2012 when his horse fell during a race meeting at Tamworth Racecourse. The fall was caused as a consequence of a fellow jockey, Glen Lynch, riding his horse so as to push the horse alongside him into the path of Singh's horse. Singh sued Lynch in negligence.

The matter was initially heard before Fagan J in the Supreme Court. Singh was unsuccessful. Fagan J dismissed the proceedings, finding that Lynch did not breach his duty of care to Singh and also that the injury was caused by materialisation of an obvious risk that arose in the course of a dangerous recreational activity.

Singh appealed. One of the arguments by Singh on appeal was that his involvement in the race as a professional did not constitute participation in a recreational activity. As this involved a challenge to a

previous Court of Appeal decision in *Goode v Angland*, five judges sat on the Court of Appeal.

The Court of Appeal also considered whether or not the injury was as a consequence of materialisation of an obvious risk that occurred during the course of a dangerous recreational activity and also whether or not Lynch breached the duty of care owed to the other participants in the race.

Ultimately Singh was unsuccessful in his appeal with a 3 to 2 majority finding in Lynch's favour.

The Court unanimously determined that professional sport including professional sport racing is a recreational activity within the meaning of section 5K of the *Civil Liability Act*.

The Court was however divided as to whether the Singh's injury was caused by materialisation of an obvious risk, given that Lynch was charged with careless riding following the race.

Leeming J in his judgment stated:

> *"The obviousness of a risk is a question of fact. The premise of horseracing is that jockeys will compete and ride their horses aggressively. The primary judge reproduced inherently plausible evidence that jockeys regularly "push"[ed] the boundaries" in order to give themselves the best chance of winning, and that the statistics for frequency of careless riding charges reflected "the circumstances that jockeys are trying to do the best they can and push up at least to the edge of what's permissible". The respondent's riding, although it led to a finding of guilt to a charge of careless riding, was relatively commonplace. Hundreds of jockeys were found guilty of careless riding each year, as the primary judge noted, by reference to the evidence ... All this must have been known to all professional jockeys ...*
>
> *The fact that the defendant "recklessly" or even "deliberately" caused his horse to come into contact with a competitor does not alter its obviousness ...*
>
> *I see no reason to doubt that the risk of a fall from a horse which came into contact with another horse following the careless riding of another jockey answers the description of the materialisation of an obvious risk of competing in a race. True it is that one might invoke notions of "gross negligence" or recklessness or even deliberateness to describe the respondent's riding, but the issue posed by Section 5L turns not so much on the range of ways by which the risk might be characterised, but whether the risk of a fall as a result of another jockey's careless riding, constituted by deliberately making contact with another horse, and contrary to the rules of racing, was the materialisation of an obvious risk. I think it is. I see no reason to doubt the findings, based on testimonial evidence and statistics, made by the primary judge."*
>
> *Payne JA agreed that although the riding by Lynch was "unexpected, unreasonable and also unnecessary it did not change the obviousness of the risk.*

McCallum JA and Simpson AJA in dissent were however of the opinion that Lynch's conduct was not obvious so as to give rise to a defence under section 5L of the Civil Liability 2002.

All 5 judges were in agreement that Lynch had breached the duty of care owed to the other participants in the race however given that section 5L was engaged and provides an exemption from liability the appeal was ultimately unsuccessful.

That decision was shortly followed by a further decision of the NSW Court of Appeal relating to dangerous recreational activities, *Carter v Hastings River Greyhound Racing Club*. In that decision, Carter sustained injury to his leg at a greyhound racing track where he was voluntarily assisting the Club by operating a catching pen gate during some of the races. Carter had to let a lure pass through a gap between the inside rail on the gate and then close the gate so to divert the dogs into the catching pen. However, during the course of the race, Carter was distracted by one of the dogs that fell, recovered and continued to run. Whilst Carter was distracted, he was struck in the leg by the lure which was travelling at around 70 kph. Not surprisingly Carter sustained injury as a consequence.

Carter originally commenced proceedings in the Supreme Court. He was initially unsuccessful before the primary judge as a consequence of Section 5L of the *Civil Liability Act 2002*. Carter also failed to establish a breach of duty of care.

Carter appealed. On appeal, Carter argued that he was not engaged in a dangerous recreational activity in operating the catching pen and the Club did in fact breach its duty of care. Carter also argued that in the event liability was established the finding of 50% for contributory negligence ought to be reduced.

The appeal was heard before Gleeson JA, White JA and Simpson AJA.

Carter argued that operating the catch pen gate could not be a dangerous recreational activity as it did not fall within the definition of recreational activity. However, the Court did not agree and found that as the activity carried a significant risk of harm, it was a dangerous recreational activity. Carter's argument that because he was a volunteer the provisions did not apply to him was also rejected.

The Court also upheld the primary judge's finding that there was no breach of duty of care and, if there had been a breach, there would have been no change to the contributory negligence percentage.

There have been a number of decisions of the Court of Appeal this year relating to dangerous recreational activities. As well as in *Singh* and *Carter* the Court of Appeal in *Menz v Wagga Wagga Show Society Inc* upheld the defence. It does not matter if a person is a

professional (in NSW) or a volunteer, the defence will be equally effective if the harm suffered is as a result of the materialisation of an obvious risk of a dangerous recreational activity.

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Application to Join Insurer: Whether Insurer was Entitled to Disclaim Liability

Pursuant to Section 4 of the *Civil Liability (Third Party* Claims Against Insurers) Act 2017 (NSW) a party can sue the insurer of another party in certain circumstances.

Section 5 of the Act provides that the Court must grant leave for proceedings to be brought or continued against an insurer under Section 4. Further, the application for leave may be made before or after proceedings under Section 4 have been commenced.

Subsection 5(4) of the Act states that the Court must refuse leave if the insurer is entitled to disclaim liability under the contract of insurance or under any Act or law. It is common for an insurer to seek to rely upon one or more policy exclusions which, if made out, would defeat the claim such that leave to join the insurer ought be refused.

However, this is often a difficult hurdle for an insurer to overcome. How the Court should interpret relevant policy exclusions in a contract of insurance is often determined after all of the evidence is presented at a final hearing and findings of fact are made by the trial judge.

These difficulties were recently illustrated in a decision of his Honour Justice Ball of the NSW Supreme Court in Giabal Pty Limited v Gunns Plantations Limited (in liquidation). The substantive proceedings involved a claim by Giabal and another plaintiff against 11 defendants comprising the Gunns Group of Companies, its directors and auditors with respect to alleged losses said to arise from failed managed investment schemes involving hard wood and soft wood forest products.

The plaintiffs filed a Motion seeking leave under Section 5 of the Act to join Catlin Australia Pty Limited (now AXA XL) and Chubb Insurance Australia Limited (formerly ACE Limited).

Catlin and Chubb respectively provided first and third excess layer investment management insurance to the Gunns Group of Companies and its directors on terms that were set out in the primary policy issued by Chartis Australia Insurance Limited. Cover under the primary layer was exhausted. The second and fourth excess layer insurers had agreed to follow the coverage position of Catlin and Chubb who opposed the Application for Leave.

The Application for Leave was brought after the Court revoked an earlier grant of leave to continue the proceedings against the Gunns Group of Companies despite their liquidated status with receivers and managers appointed.

The primary policy issued by Chartis was a claims made and notified policy in which Chartis and the excess layer insurers including Catlin and Chubb agreed to pay loss incurred by an insured arising out of a claim first made and notified during the relevant policy period with respect to certain wrongful acts as defined in the policy.

The central issues concerned the meaning of a "Claim" and whether the insurer could rely upon the conflict of interest exclusion or the lenders liability exclusion.

The policy defined "Claim" as follows:

> *"(i) a written demand or civil, regulatory or arbitration proceeding or Investigation seeking compensation for a Specified wrongful Professional Act;*
>
> *(ii) a written demand or civil, criminal, administrative, regulatory or arbitration proceeding or Investigation seeking compensation or other legal remedy for a Specified Wrongful Managerial Act; or*
>
> *(iii) an Investigation in which no Wrongful Professional Act or Wrongful Managerial Act has been specified.*
>
> *Any Claim arising out of, based upon or attributable to continuous, repeated or related Wrongful Professional Acts and/or Wrongful Managerial Acts shall be considered a single Claim."*

For the purpose of this article it is unnecessary to analyse the definitions of "Wrongful Professional Act" or "Wrongful Managerial Act".

The conflict of interest exclusion clause stated:

> *"The Insurer shall not be liable to make any payment under any Cover or Extension in connection with any Claim made against an Insured arising out of, based upon, attributable to or in any way connected with any actual or alleged conflicts of interest (including but not limited to the failure of an Insured Person to disclose any actual or alleged conflicts of interest)."*

Suffice to say the pivotal element which the Court was called upon to decide was what constituted a "Claim" and whether there was a single Claim for which the insurers were entitled to disclaim liability.

Catlin and Chubb accepted that in order to succeed they bore the onus of satisfying the Court that their entitlement to disclaim liability was "beyond argument" although the insurers maintained that test would be met if the Court was satisfied the exclusions on their correct construction applied. The hearing of the Application for Leave proceeded on that basis. The insurers presented two main arguments.

First, it was submitted the "Claim" was set out in the Further Amended Commercial List Statement ("FACLS") which the plaintiffs sought leave to file. Properly characterised, the FACLS was a Claim that was in some way connected with an alleged conflict of interest.

Second, the FACLS contained allegations that were sufficient to engage the exclusion such that the whole of the claim ought be excluded, thereby entitling the insurers to disclaim liability.

Justice Ball observed that in respect of the first argument it was central to the insurer's position that there was only one claim. On that issue the insurers submitted the exclusion applies in respect of any claim and Claim was relevantly defined to mean a civil proceeding. Here, there was only one proceeding and the character of that proceeding was determined by what was set out in the FACLS.

In support of the second argument, the insurers argued the situation was analogous to the principle established in Wayne Tank & Pump Co Limited v Employers Liability Assurance Corporation Limited. His Honour noted the Wayne Tank principle operated to exclude indemnity where two causes gave rise to loss, one of which was covered under the policy and the other was excluded. By analogy, the insurers contended that where part of the "Claim" falls within the cover and part of it falls within the exclusion, the exclusion takes priority and the whole Claim is not covered.

Justice Ball rejected both arguments by the insurers.

On the first submission that there was only one Claim, Ball J held the expression "any Claim" at the beginning of the final paragraph of the policy definition of "Claim" was to be read as identifying the character of the subject of the sentence (i.e. something which is a written demand or proceeding) and not its number. That point, according to his Honour, was reinforced by another policy clause which stated that the singular included the plural and vice versa.

Similarly, when applying the conflict of interest exclusion, his Honour held that the clause excluded liability in respect of a claim which had the requisite character and not liability in respect of other claims which did not.

Justice Ball stated:

> *"But plainly in the case of a single proceeding that makes disparate allegations, it makes no sense to aggregate those disparate allegations into one Claim and ask whether that Claim has a particular character for the purposes of the application of the exclusion. And equally it makes no sense to apply the exclusion to a set of allegations that have nothing to do with conflicts of interest simply because it can be said that another set of allegations do and the two sets of allegations are made in the same proceedings. Such a conclusion would go beyond the purpose of the exclusion and invite manipulation of the result by the commencement of multiple proceedings. Instead, what is necessary is a careful examination of the allegations that are made. To the extent that they have the required character, the exclusion applies. To the extent that they do not, it does not." (emphasis added).*

On the second submission, his Honour rejected the insurer's reliance upon the Wayne Tank principle as being analogous to the current circumstances. His Honour held there is no reason why the parties would have intended the exclusion to apply to allegations that did not have the character by reference to which it operated.

Justice Ball held that the question whether the policy exclusions applied to the whole of the claims made in the FACLS was better done once those claims had been fully developed at hearing. It was, according to his Honour, sufficient for present purposes to observe that the FACLS appeared to contain allegations that did not fall within the exclusions.

The Court also held the insurers' reliance upon the lender's liability exclusion was not entirely clear.

Justice Ball was not satisfied the insurers were entitled to disclaim liability and accordingly leave was granted for Catlin and Chubb to be joined to the proceedings as separate defendants.

This decision provides another example of the Courts granting leave to sue an insurer directly where the interpretation of policy wording, particularly the application of relevant policy exclusions, were considered to be matters best left for the trial judge.

The focus in this application was the interpretation of a claims made and notified policy with particular emphasis on what may constitute a Claim within the policy definitions and the character of a civil proceeding containing some allegations which if proven would be excluded by the policy where other allegations would not.

It was noteworthy to observe the insurers' attempts to rely on the *Wayne Tank* principle to the question what constitutes a Claim albeit unsuccessfully. It will be interesting to see if the insurers seek to raise the same or similar arguments when the matter proceeds to trial.

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The Importance of Establishing When Cover Begins Under an Insurance Policy

Property damage insurance policies generally provide cover to an insured regarding loss or damage to property insured under the policy where the loss or damage occurs within a specified period of insurance.

Where the property is to be transported from one location to another the insurance policy may provide cover for the duration of the voyage or transportation of the property rather than a specified period of insurance. Regardless of whether a policy of insurance provides cover for loss occurring during a defined period of insurance or otherwise it is incumbent on the insured, when loss or damage to property is sustained, to establish an entitlement to indemnity by bringing the claim within the insuring clause of the policy.

These fundamental principles of insurance were recently considered in the context of a single transit policy issued by an insurer to an insured who purchased a helicopter that sustained damage whilst in transit from the USA to Australia.

In *Swashplate Pty Limited v Liberty Mutual Insurance Company t/as Liberty International Underwriters*, the Full Court of the Federal Court of Australia overturned a first instance decision of Chief Justice Allsop who found the insured was not entitled to indemnity for damage to the helicopter.

Austbrokers arranged an insurance facility with Liberty whereby Liberty agreed to issue single transit insurance for helicopters to insureds represented by Austbrokers. The terms of the Facility were recorded in a master placement slip which incorporated a policy wording and certain specified conditions and exclusions.

Swashplate was an insured represented by Austbrokers, who purchased a helicopter in Picayune, Mississippi in the USA. Under the purchase agreement, the helicopter was delivered to Swashplate at Picayune in May 2018. Swashplate made arrangements to ship the helicopter to Sunshine Coast Airport in Queensland, Australia and in the course of those arrangements it requested Austbrokers to arrange insurance for the transit of the helicopter.

Austbrokers issued a placement slip to Liberty in terms which reflected the master slip. The placement slip was accepted by Liberty.

The helicopter was damaged in transit. It was common ground that the cause of the damage was insufficiency or unsuitability in the way the helicopter was packed for transit. Swashplate made a claim under the terms of insurance which had been arranged by Austbrokers. Liberty denied liability to indemnify Swashplate under the policy.

The question whether Swashplate was entitled to indemnity was stated for determination as a separate question which proceeded before Chief Justice Allsop in the Federal Court. The Chief Justice held Swashplate was not entitled to indemnity. Swashplate appealed that decision to the Full Court of the Federal Court.

Liberty's position in the appeal was that the insurance took effect from a point in time that commenced after the transit was underway because of a provision in the placement slip which said the period of insurance was from 19 May 2018. Liberty relied upon an exclusion clause which provided that loss or damage caused by an insufficiency or unsuitability in packing, carried out before the attachment of the insurance, was excluded.

Swashplate contended the insurance applied to the whole of the transit and, in addition, by a "Static Cover" extension for a further period of up to five days before loading. As the packing was within that period, Swashplate maintained the defective packing occurred after the risk attached and therefore the insurance responded to the claim.

At first instance the Chief Justice held that the insurance cover commenced on 19 May 2018 as specified in the placement slip. Swashplate contended in the appeal that the primary judge should have found the coverage was for the whole of the transit plus the period of the Static Cover.

The Court was called upon to consider three issues:

- the terms of the "Facility" as specified in the master slip;
- the terms of the Institute Cargo Clauses (A) 2009 ("ICC(A)) that were incorporated into the master slip;
- the terms of the placement slip and whether they differed from the master slip.

The master slip specified the policy wording, conditions, exclusions, extension and premium payable on which Austbrokers could obtain single transit insurance during the term of the Facility it recorded.

There was no insurance unless and until a placement slip for a specific contract of carriage was arranged under the Facility.

The duration of the Facility specified in the master slip was expressed in the following terms:

> *Period of Insurance and risks attaching during the period;*
>
> *From: 23 May 2017*
>
> *To: 22 May 2018 both dates inclusive LST*

The reference to LST was to local standard time, however that issue did not feature in the appeal.

Relevantly, the master slip described insurance in terms which incorporated the ICC(A) which described the circumstances in which the insurance would attach in the following way:

- the insurance attaches from the time the subject matter insured is first moved in the warehouse or at the place of storage for the purpose of the immediate loading into or onto the carrying vehicle or other conveyance for the commencement of transit;

- the insurance continues during the ordinary course of transit and terminates upon the earliest of certain specified events;
- the insured shall be entitled to recover for insured loss occurring during the period covered by this insurance notwithstanding that the loss occurred before the contract of insurance was concluded unless the insured was aware of the loss and the insurers were not.

The Full Court noted that under the ICC(A) the commencement of cover was not determined by the time of entry into the contract of insurance. Rather, it may start before that time by occurrence of the first movement of the goods for immediate loading. The master slip also included an extension which confirmed that coverage was extended to include Static Cover for up to five days prior to loading. The term Static Cover was not otherwise defined.

It was accepted by Liberty that the Static Cover extension had the effect of extending the whole of the transit coverage described in the master slip to include a period of up to five days for which the helicopter was static prior to loading.

The main dispute between the parties was whether the placement slip provided cover for the period of the voyage plus the period of the Static Cover extension or whether it only covered that part of the voyage which occurred from and after 19 May 2018.

The central focus of the appeal was the proper construction of the insurance contract comprising the terms of the master slip, the placement slip and the ICC(A) to give effect to the parties' intentions.

The Full Court held that what was described in the placement slip by reference to the commencement of a period of insurance could not be inconsistent with the terms of the ICC(A) which described when the relevant insurance attached.

As the Full Court observed:

"... the scope of the Facility was defined on the basis that the insurance that would be arranged would attach in the manner provided for in the ICC(A). A construction of the placement slip that resulted in the risk attaching by reference to a specific date was not insurance of the kind contemplated by the Facility."

The Full Court also gave weight to the inception of the ICC(A) in January 2009 as standard industry work which covered all risks for a single transit. Such industry practice had been in place for nearly 10 years when this insurance was effected and always provided for risk to "attach" from when the subject matter insured was first moved for the purpose of immediate loading.

Further, the Full Court noted the ICC(A) expressly allowed for the possibility that the insurance might be arranged after risk had attached.

In this instance, the relevant Facility arranged by Austbrokers not only incorporated the terms of the ICC(A) but also provided an extension for Static Cover of up to five days before loading. The Full Court held the Facility provided insurance for risk attaching between specified dates and importantly, the Facility did not contemplate cover that commenced from a nominated date.

The Full Court rejected Liberty's argument, stating the interpretation contended for by the insurer would fundamentally alter the nature of the cover under the Facility that was agreed with Austbrokers.

Accordingly, the Full Court overturned the Chief Justice's decision at first instance and held that Swashplate was entitled to indemnity under the Liberty policy for the damage occasioned to the helicopter.

Although this case considered an insured's entitlement to indemnity under a single transit policy of insurance, the fundamental principles regarding the proper construction of an insurance contract still applied.

The starting point was to consider all of the relevant documents comprising the contract of insurance and their proper construction to give effect to the parties' intentions. The ICC(A) terms were given significant weight by the Full Court instead of the more narrow approach for which Liberty unsuccessfully contended which focused on the content of the placing slip in isolation without having regard to the ICC(A) terms.

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A One Stop Shop: Establishment of the NSW Personal Injury Commission

On 11 August 2020 Legislation passed in the New South Wales Parliament to establish the Personal Injury Commission (PIC), a one-stop shop in NSW to manage disputes for individuals injured whilst at work or on the road.

The PIC is intended to simplify the dispute resolution system for workers seeking compensation for injuries suffered in the context of their employment and for injured road users.

At present, dispute resolution services are managed by:

- the Workers Compensation Commission (the WCC); and
- the State Insurance Regulatory Authority (SIRA)

The WCC was established under the Workplace Injury Management and Workers Compensation Act 1998, and exercises functions under workers compensation legislation.

SIRA, established by the State Insurance and Care Governance Act 2015, provides various dedicated dispute resolution services under motor accidents legislation in NSW.

SIRA manages the Dispute Resolution Service, the Motor Accidents Claims Assessment and Resolution Service, and the Motor Accidents Medical Assessment Service.

The belief is that the net result of this system is functions are duplicated, especially concerning medical assessments, leading to inefficiencies and delay.

From 1 March 2021 the functions of these multiple dispute resolution bodies will be transferred to the PIC and will be merged into one independent tribunal.

The PIC will have two specialist divisions to deal with workers' compensation and motor accidents with an independent judicial head.

Key features of the PIC include:

- Provision of a central and common registry matters under both the workers compensation legislation and motor accidents legislation.
- Medical assessors for both workers compensation legislation and motor accidents legislation will be appointed by the President of the PIC.
- It will carry out dispute resolution functions in relation to motor accidents currently carried out by SIRA.
- Injured persons will be able to take their complaints at first instance to an independent tribunal rather than to government officials.
- It will consist of the President (who must be a judge), Deputy Presidents, principal members, senior members, and general members.

The object of the new model is to provide a streamlined mechanism to facilitate resolution of personal injury disputes in NSW.

Given the inefficiencies identified with the existing system, compounded by the Covid-19 pandemic, the establishment of the PIC represents good news for injured persons, insurers and other stakeholders.

GD news will keep our clients updated with developments relating to the PIC and changes in the personal injury dispute resolution process in NSW generally in coming editions.

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Watchdog Looms On Loans: ASIC Takes Action Against Small Business Loan Provider

Background

In recent years, unfair contract terms (particularly those terms contained in small business loan contracts) have attracted the attention of regulators and industry bodies.

The recent Federal Court decision of *Australian Securities and Investments Commission (ASIC) v Bendigo and Adelaide Bank Limited [2020] FCA 716* ("**ASIC v Bendigo and Adelaide Bank**") has affirmed ASIC's willingness to take enforcement action against lenders.

The Court found that certain clauses in the Bank's standard form loan contracts with small business borrowers were unfair within the meaning of section 12BG(1) of the *Australian Securities and Investments Commission Act 2001 (Cth)* (the "ASIC Act") and declared them void.

The Court's decision is particularly relevant to banks and other financial institutions that enter into standard form contracts with small businesses.

What is an unfair contract term?

Section 12BG(1) provides that a contractual term is unfair if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- the term is not reasonably necessary to protect the legitimate interests of the party that would benefit from its inclusion; and
- the term would cause financial or other detriment (e.g. delay) to a small business if it were to be applied or relied on.

In determining whether a term is unfair, a court must consider the extent to which the term is transparent and the contract as a whole.

If a term is found to be unfair, the court may make orders declaring that the term is void, vary the term or refuse to enforce the term.

What contracts are covered by the ASIC Act?

Section 12BF(4) of the *ASIC Act* will apply to standard form contracts for the supply of financial products (e.g. loans) or services (e.g. financial advice or dealing with a loan) where:

- at least one party is a business with less than 20 employees; and
- the upfront price payable under the contract does not exceed $300,000.00, or the contract has a duration of more than 12 months and the upfront price payable does not exceed $1,000,000.

What terms were found to be unfair in ASIC v Bendigo and Adelaide Bank?

In *ASIC v Bendigo* and Adelaide Bank, the Court found that clauses which fell within the following categories were unfair:

- **indemnification** – where the customer was

required to compensate the Bank in relation to circumstances which were not of material risk to the Bank, not within the customer's control and could have been mitigated by the Bank;

- **events of default** – where the Bank could unilaterally call a default for circumstances which would not pose any credit risk to the Bank (e.g. a director's date of birth being incorrect) and take disproportionate action such as cancelling the loan facility without permitting the customer to remedy the default;
- **unilateral variation and termination** – where the Bank could unilaterally vary the loan facility and cancel it if the customer did not accept the new varied terms even though the customer complied with the contract; and
- **conclusive evidence** – terms which place an evidential burden on the customer in circumstances where the Bank was better positioned to provide evidence.

The Court mainly relied on the following criteria for determining that clauses were unfair:

- whether the term would cause a significant imbalance in the parties' rights and obligations;
- whether the term would cause detriment (e.g. delay) to a party if it were to be applied or relied on; and
- whether the terms were transparent (noting the Court made comments regarding the complexity of cross-references, clause locations and catch-all drafting).

Key takeaways

This case has significant impacts for banks and other financial institutions with similar clauses in their standard small business loan contracts. As a result, those institutions should immediately review their standard form loan contracts with small business borrowers and take advice as to whether they comply with the unfair contract terms regime (regardless of whether the clauses are frequently used or relied upon). If any terms do not comply, institutions should obtain advice as to suitable replacement provisions.

Please do not hesitate to contact us if you would like to discuss your small business loan contract.

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The Introduction of the Director Identification Number Regime

Background

The passing of the *Treasury Laws Amendment (Registries Modernisation and Other Measures) Act 2020* (Cth) (**Act**) has cast light on the Government's increasing scrutiny of corporate governance and illegal phoenix activity.

As part of the reforms, directors and companies will now be subject to the Director Identification Number (**DIN**) regime.

The registration scheme will commence on a date the Government proclaims and will be at latest, two years after 22 June 2020 (i.e. 22 June 2022).

Prior to the reforms, directors could have had fictitious identities or multiple records with minor variations of their name (e.g. with or without a middle name), address and/or other personal details.

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.

Registration Regime

The regime will be administered by a registrar who will have the power to record, cancel and re-issue a DIN.

Once the Minister appoints a registrar of the DIN regime (**Commencement Date**), the Act will require:

- directors who are appointed after the Commencement Date to apply for a DIN prior to their appointment.
- as a transitional measure, directors who are appointed within 12 months of the Commencement Date may apply for a DIN within 28 days of their appointment; and
- existing directors to apply for a DIN during a grace period (which is yet to be determined).

It remains to be seen how the DIN regime will accommodate the appointment of a new director where it is urgently required.

Penalties

There will be criminal and civil penalties for contravention of DIN requirements. For example, a director could face 12 months imprisonment if he or she knowingly applies for multiple DIN's or misrepresents a DIN to a government body or registered body.

Key takeaways

- All directors will need to apply for a DIN.
- All directors will be issued with a unique identifier that they will keep forever whether or not they continue to be a director.
- There will be criminal and civil penalties for contravention of DIN requirements.
- Companies should begin educating themselves and obtain advice on the implications of the DIN regime on existing and new directors.
- For directors who do not have a DIN, the need to apply for one and go through the process of

verification of identity will mean that the incorporation of companies can take more time.

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Administrators Trading on in Premises and Lessors Rights in the Event of Liquidation

Background

On 21 July 2020, the Federal Court delivered its decision in the matter of *The PAS Group Limited (Administrators Appointed) v Scentre Management Limited* [2020] FCA 1023.

The issue in question was whether as a result of the administrators' conduct, the rent incurred by the tenant company during a standstill period ought to be a debt or claim which was entitled to priority under section 556(1) of the *Corporations Act 2001* (Cth) (**Act**) in any subsequent winding up.

The facts

On 9 June 2020, the administrators obtained an order to extend the administrators' "no personal liability" period. The period between 29 May 2020 and 22 June 2020 was determined to be the "standstill period".

Since the commencement of the administration, including the standstill period, the administrators continued to occupy and use five non-retail leased premises and continued to trade from all but eight of its retail stores.

On 19 June 2020, the administrators sought a declaration that rent and any other amounts payable under any lease agreement by the tenant company during the standstill period constituted an unsecured debt or claim in the tenant companies' administrations, and was not entitled to priority over other debts or claims as an expense of the tenant companies' administrators pursuant to section 556(1).

Section 556 relevantly provides:

> *(1) Subject to this Division, in the winding up of a company the following debts and claims must be paid in priority to all other unsecured debts and claims:*
>
> *(a) first, expenses (except deferred expenses) properly incurred by a relevant authority in preserving, realising or getting in property of the company, or in carrying on the company's business;*
>
> *…*
>
> *(dd) next, any other expenses (except deferred expenses) properly incurred by a relevant authority …*

"Relevant authority" is defined in section 556(2) to include in any case "a liquidator or provisional liquidator of the company" or "an administrator of the company".

Points of Contention

The administrators relied on sections 443A and 443B of the Act concerning their liability for the debts of the administration. The administrators argued that:

- the landlord's claim for rent under the pre-appointment lease was, without more, an ordinary unsecured claim against the tenant company; and
- they were only personally liable for amounts payable in respect of the period commencing after the standstill period had ended. As a result, the rent payable during the standstill period was not a debt within section 556(1) of the Act.

Scentre Management argued that the rent incurred by the administrators during the standstill period was an expense properly incurred within the meaning of s556(1) and therefore attracted priority in any subsequent winding up.

Decision

The Court found that it was self-evident that the administrators elected to cause the company to continue to occupy the premises for the purposes of the administration. As a result, it was found that the rent payable as an expense of the administration was properly incurred in the carrying on of the company's business pursuant to section 556(1) of the Act.

Key takeaways

If an administrator makes an election to actively trade and occupy leased premises throughout an administration and any standstill period, the rent payable by the tenant company during the standstill period will be an expense properly incurred within the meaning of section 556 and entitled to priority in any subsequent winding up.

Although the decision dealt with the liability of administrator to premises lessors, the decision has the potential to apply to amounts due to lessors and hirers of equipment and liabilities under contracts for goods and services during a standstill period.

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CONSTRUCTION ROUNDUP

Confirmation That Biowood On High Rise Apartments Is Not Compliant With BCA

One of the most serious issues currently facing building owners, local authorities and State and Commonwealth Governments is the presence of combustible cladding on the outside of buildings - particularly high rise apartment and commercial office blocks.

The gravity of the issue was brought home by the Lacrosse Tower fire in Melbourne in 2104, the tragic Grenfell Tower fire in London in 2017, and the later Neo 200 Tower fire (also in Melbourne).

Governments around Australia and the world have reacted quickly, banning the use of any cladding which either assists the spread of fire, or is detrimental to the fire retardant properties of other materials used in the construction of the building. As part of this legislative action, the Building Code of Australia has been amended, to specifically address the installation of cladding that may be potentially combustible.

There are also governmental and local authority processes underway to force owners to either replace combustible cladding, or to demonstrate that they have implemented other measures to prevent the spread of fire (eg by installing fire sprinklers on balconies). Since the replacement of cladding on a multi-storey apartment building can cost several million dollars, this clearly creates a serious financial burden for the owners of the individual apartments.

It is therefore vital that designers, builders, and owners have clarity on whether a cladding material is compliant with the current version of the BCA, and whether cladding installed on an existing building was compliant with the previous version of the BCA.

The most well-known type of combustible cladding is aluminium composite panelling (ACPs) containing a polyethylene core. A polyethylene core in excess of 30% is now prohibited under the Government's ban. However, it is important to note that the amendment to the BCA focuses on the combustibility of the proposed cladding material, rather than on any one specific type of cladding. Therefore, there is the potential for other forms of cladding besides ACPs to also be non-compliant.

The application of the BCA to a different type of cladding has been examined in a decision of the NSW Commercial and Administrative Tribunal, and in a subsequent appeal.

Taylor Construction Group Pty Limited was the builder of an apartment building in Ryde, NSW, with an occupation certificate having been issued in October 2016. A form of cladding known as "Biowood" had been installed on the outside of the building. The Biowood was made from 70% reconstituted timber and 23% polyvinyl chloride (PVC).

The owners corporation of the apartment building sued Taylor and the developer of the building for breach of the statutory warranties owed to them pursuant to section 18B of the *Home Building Act 1989* (NSW). One of these warranties was that the completed building would comply with the HBA "and any other law". Other warranties were that the building would be fit for its intended purpose, and that it would result in a habitable dwelling.

The owners corporation claimed that the Biowood was a combustible form of cladding which did not comply with the 2014 version of the BCA and as a consequence the building did not comply with the development consents or the *Environmental Planning and Assessment Act 1979*, and as a consequence of the fire risk the building was not habitable or fit for its intended purpose.

Clause C1.10(a) of the 2014 version of the BCA provided that the fire hazard properties of buildings in Classes 2 – 9 (which include high rise residential apartments) was required to comply with Specification C1.10. However, clause C1.10(c) provided that these requirements did not apply in certain circumstances including "in respect of any other material that does not significantly increase the hazards of fire".

Specification C1.1 clause 3.1(b) required that the building have external walls that were not combustible. However, by clause 2.4 of Specification C1.1 a combustible material was permitted to be used as an attachment to a building element (such as an external wall) if the material was exempted under clause C1.10, or if it complied with the fire hazard properties specified in Specification C1.1, or did not otherwise constitute an undue risk of fire spread via the façade of the building.

NCAT approved and applied the earlier reasoning of the Victorian Civil & Administrative Tribunal in the 2019 Lacrosse Tower decision and held that:

- The opinions of the CSIRO on the combustible nature of Biowood and which Australian Standard was to be applied in assessing combustibility was persuasive evidence accepted by the Tribunal.
- Even if the cladding passed the relevant tests to be prima facie compliant with the BCA, the presence of the cladding on otherwise non-combustible walls of an apartment building constituted an undue risk of the spread of fire. In this regard, it was necessary to consider the type of building (high/medium rise apartment building) to assess the level of risk.
- Since the cladding did not comply with the BCA, the builder and the developer had breached their statutory warranties to the owners corporation, and the owners were therefore entitled to be

compensated for the cost of replacing the cladding and associated costs, as well as their legal costs of the NCAT proceeding.

In other words, even if the form of cladding otherwise passed the fire resistance tests of the relevant Australian Standard, if the cladding was installed on a Type A construction such as a high rise apartment building it was likely to present an undue risk of fire spread, and thus not be compliant with the BCA.

The builder and the developer appealed the decision to the NCAT Appeal Panel.

They argued (amongst other things) that the Tribunal had applied too strict a test on whether the Biowood complied with the BCA, and its conclusions had not been based solely on the available evidence. In particular, they criticised the Tribunal for accepting the opinions of the owners corporation's expert, Mr Nathan Halstead, over the builder's and developer's own experts, stating that there was no direct evidence that the Biowood would be likely to cause the spread of fire.

They also submitted that the Tribunal had erred in holding that *any* risk of fire was an undue risk, and had further erred in reversing the onus of proof by requiring the builder and developer to prove that there was no undue risk of fire (rather than requiring the owners corporation to prove that there *was* an undue risk).

The Appeal Panel, however, dismissed the appeal.

They noted that Mr Halstead's opinion had been based upon the combustible nature of the Biowood, its location as cladding to external walls, its extent over a number of storeys and the possibility of the Biowood, if ignited, allowing fire spread into the building via windows and balconies.

The builder's and developer's experts, on the other hand, had focused on the material qualities of the Biowood, and whether those materials complied with the fire rating requirements of the relevant Australian Standards and thus (in their view) complied with the BCA.

The Appeal Panel stated its view that clause 2.4(i) and (iii) of the BCA were to be construed such that if an attachment constitutes an undue risk of fire spread via the façade, then it may not be used even if the attachment is exempted under Specification C1.10 or complies with the fire hazard properties described in C1.10. In this regard, an attachment may have Spread of Flame Index of 0 under the test determined by AS/NZS 1530.3, but may still constitute an undue risk of flame spread because of how the material is constructed or due to its location on the building.

In this regard, the Appeal Panel noted that Mr Halstead had pointed out that the spread of flame test in AS/NZS1530.3 is a test in respect of fires inside a building and is not relevant to external cladding.

Further, the Appeal Panel stated that it was misconceived to interpret the decision handed down at first instance as requiring that there be *no* risk of fire spread. Instead, the Tribunal had accepted Mr Halstead's opinion that the fire spread applying to Biowood would allow further fire spread into the building, and that this opinion was held notwithstanding Mr Halstead's view that burning Biowood would not of itself give off sufficient heat to ignite adjacent Biowood.

Accordingly, there was a risk of fire spread which, in the Tribunal's view, was an undue risk.

This is one of the first judgments handed down in NSW directly relevant to combustible cladding. However, an NCAT decision (even on appeal) is fairly low level in the NSW judicial system.

There are several cases currently before the NSW Supreme Court in which owners corporations are claiming the cost of replacing combustible cladding.

There are also a number of class actions against cladding manufacturers being pursued in the Federal Court.

It will be interesting to see how the judges of the Supreme and Federal Courts will approach the question of how the BCA should be interpreted, and whether they agree with the conclusions of NCAT on this matter.

Gillis Delaney Lawyers can provide specialist expert advice and assistance on combustible cladding claims, including (if necessary) making a claim against those who designed, built or certified the building in order to recover the rectification costs. Similarly, if you have received a claim with respect to work you have carried out on a building with combustible cladding, we can provide legal advice and representation in your management and defence of the claim.

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The Hands Of Adjudicators Bound By The Security Of Payments Act

The *Building and Construction Industry Security of Payment Act 1999* (NSW) confers a narrow set of duties and obligations upon adjudicators. Adjudicators can only make determinations on a discrete set of issues. Any act beyond these limitations may amount to a jurisdictional error and invalidate the determination. This similarly applies where an adjudicator fails to do something that they are required to do. Where a jurisdictional error is found parties may commence court proceedings to challenge the validity of the determination and have it declared void.

The validity of adjudication applications is therefore regularly the subject of numerous court proceedings each month. In March this year, the Supreme Court of NSW handed down the decision of *Parrwood Pty Ltd v Trinity Constructions (Aust) Pty Ltd* [2020] NSWSC 208 (see our April 2020 newsletter) in which Parrwood

sought a declaration that an adjudication determination in favour of Trinity Constructions in the sum of $401,109.73 was void. This decision has since been examined by the Court of Appeal.

Parrwood was the developer of a residential development known as the Affinity Project in Caringbah, NSW. Trinity was the design and construct contractor.

Around July 2019 a dispute arose between the Parrwood and Trinity following which Parrwood served notices to show reasonable cause on 23 July and 5 August 2019. Following what it contended was a failure by Trinity to show cause, Parrwood exercised its right under the contract on 3 September 2019 to take the work out of Trinity's hands. Parrwood did not purport to terminate the contract.

On 6 September 2019, Trinity served a payment claim. Parrwood responded with a payment schedule stating the scheduled amount as "NIL". There ensued two applications for adjudication.

The first adjudication application was made by Trinity on 4 October 2019 to Adjudicate Today Pty Ltd, who nominated Mr John O'Brien. On 19 November 2019, he issued a determination which stated that he was satisfied that he had jurisdiction to determine the adjudication application. However, he declined to determine the amount of the progress payment.

Mr O'Brien instead determined that Parrwood was entitled to rely on the terms of the contract to "suspend payment" and therefore could postpone any potential payment to Trinity until such time as the works were completed and the superintendent had assessed Trinity's entitlements, if any, pursuant to the contract. He thus concluded that any adjudication determination would be premature where the parties' entitlements would not be fully crystallised until completion of the final reckoning by the superintendent.

Following the First Adjudication Determination, on 22 November 2019, Trinity purported to withdraw the adjudication application by notice served on Adjudication Today and Mr O'Brien, and made a new application to AAE Nominations Pty Ltd, which nominated Ms Helen Durham to adjudicate the same payment claim. Ms Durham took the view that the first adjudicator had failed to perform his statutory function because he had declined to determine the amount of the progress payment. She proceeded to issue a determination on 20 January 2020, in the amount of $401,109.73.

The Supreme Court dismissed the proceedings brought by Parrwood and declared that the First Adjudication Determination of Mr O'Brien was null and void. Subsequently, the sum of $401,109.73 as determined in the Second Adjudication Determination was paid to Trinity.

Parrwood appealed from this decision. It contended that:

- the primary judge erred in finding that the First Determination was void on the basis that to the extent there was any error made, it fell short of jurisdictional error; and
- alternatively, assuming that the first determination was void, that the second determination should have been declared void, because Trinity had proceeded to obtain a further determination without first approaching a court for declaratory relief. This was said to give rise to a binding election or an abuse of process.

Did the primary judge err in finding that the first determination was void?

The Court of Appeal agreed with the primary judge and concluded that the First Determination was void.

In their reasoning the Court of Appeal held that:

- the obligation imposed by the Act upon the first adjudicator was to determine the amount of the progress payment (if any) to be paid by Parrwood to Trinity (s. 22(1)(a));
- the first adjudicator declined to determine the adjudicated amount because he was satisfied that:
  - Parrwood had validly exercised its right to take the work out of Trinity's hands under the terms of the contract; and
  - the rights conferred on Parrwood under the contract did not contravene the s. 34 of the Act which prohibits parties from contracting out of their obligations under the Act,

  that had the effect that Trinity was not entitled under the contract to payment of any monies claimed in the payment claim until a final reckoning at been completed at the end of the project. However, that view did not entitle him to disregard the requirement in s 22(1)(a) of the Act to determine the amount of the progress payment (if any);
- the mere fact that his reasons disclosed an error of law did not vitiate the determination. However, this error of law led to the adjudicator not doing the very thing he was required by s 22(1)(a) to do.

Was Trinity precluded from applying for the second determination?

In the alternative, Parrwood had submitted that on the assumption that the first adjudicator had committed a jurisdictional error and the First Adjudication Determination was void, Trinity was obliged to go to court and obtain a declaration to the effect that the determination was void before it was entitled to make a new application for adjudication.

The Court of Appeal dismissed Parrwood's submissions in this respect. Instead they held that a court's determination is a *possible* solution to the problem where there is a dispute as to whether a

purported determination was void, however it was not *necessary* to go to court before applying for a second adjudication.

The Court of Appeal noted that the premise of this ground was that the first adjudication was liable to be declared void by jurisdictional error. If the determination would in any event have been declared void, they questioned how there could be an abuse of process in making a second adjudication application.

Thus, the Court of Appeal again agreed with the decision and reasoning of the primary judge and dismissed the appeal proceedings.

Key Takeaways:

This case highlights how narrow the powers conferred to adjudicators are in relation to payment disputes in the construction industry.

When engaging in the adjudication process it is important to recognise the restrictions placed on adjudicators and understand the reasoning adopted by the adjudicator in making their determination.

A specialised construction lawyer can assist in reviewing an adjudication determination to identify whether any jurisdictional errors have been made which may warrant the commencement of court proceedings to have the determination declared void.

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EMPLOYMENT ROUNDUP

High Court Clarifies Personal Leave Entitlements

Employers across Australia will be sighing in relief following the delivery of the High Court's decision in *Mondelez Australia Pty Ltd v AMWU & Ors* [2020] HCA 29 recently.

The decision sets out a binding ruling regarding the proper method of accruing and taking paid personal/carer's leave under the National Employment Standards.

Section 96 of the *Fair Work Act 2009* (Cth) establishes the entitlement of employees to paid personal/carer's leave and sets out the rate of accrual of such leave:

96 Entitlement to paid personal/carer's leave

Amount of leave

(1) For each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave.

Accrual of leave

(2) An employee's entitlement to paid ersonal/carer's leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.

The litigation arose in relation to the entitlement to personal and paid carer's leave of employees of Mondelez, particularly those working shift arrangements.

What is a day?

Essentially, the employer and the union representing the employees disagreed over what a "day" is.

The union argued that "day" in s 96(1) of the FW Act has its ordinary meaning of a "calendar day", or a 24 hour period, and that it allows every employee to be absent from work without loss of pay on 10 calendar days per year.

The employer argued that the entitlement to "10 days of paid personal/carer's leave" in s 96(1) must be construed according to the "industrial meaning" of the word "day". That meaning was said to be a "notional day", consisting of an employee's average daily ordinary hours based on an assumed five-day working week—that is, average weekly ordinary hours divided by five.

The arguments give different outcomes – especially for workers who work shifts.

For example, Mondelez' employees each work 36 ordinary hours per week. Some work 7.2 hours per day, five days per week. Others work 12 hours per day, three days per week.

On the employer's argument, under s 96(1) of the Act, each employee is entitled to accrue 72 hours of paid personal/carer's leave over a year; but a 7.2-hour employee's entitlement will be used up over ten calendar days, whereas a 12-hour employee's entitlement will be used up over six calendar days.

On that construction, a 12-hour employee who is unable to work after the sixth day would lose income, whereas a 7.2-hour employee would not.

In contrast, on the union's argument, the 12-hour employee is entitled to more hours of paid personal/carer's leave than the 7.2-hour employee, but neither would lose income over a period of ten calendar days.

In other words a five day employee would get 72 hours paid leave per year, but a three day shift employee would get 120 hours leave per year.

Previously the Full Bench of the Federal Court had rejected the employers argument as to the meaning of a "day", and determined that personal/carer's leave was calculated in working days, not hours. This led to a situation where many employers had potentially underpaid staff in respect of leave taken.

Clarification

The High Court of Australia has now clarified that:

- the entitlement to 10 days of personal/carer's leave under the National Employment Standards is calculated based on an employee's ordinary hours of work, not working days; and
- 10 days of personal/carer's leave can be calculated as 1/26 of an employee's ordinary hours of work in a year

An employer representative said after the decision was handed down:

"The High Court's judgment preserves widespread industry practice. If the Federal Court's interpretation …had been upheld, there would have been major cost implications for a very large number of businesses. In addition, a major barrier would have been imposed on employers agreeing to part-time employment arrangements, including for employees returning from parental leave.

The interpretation adopted by the High Court ensures that all employees are entitled to take up to two weeks off work each year for personal/carer's leave regardless of how many ordinary hours an employee works in that two-week period. A full-time employee who works 38 ordinary hours per week is entitled to 76 hours of personal/carer's leave per year and a part-time employee who works 20 hours per week is entitled to 40 hours of personal/carer's leave per year. The Court's judgment ensures equity amongst full-time and part-time employees, and amongst 8-hour and 12-hour shift workers."

For the time being then, the union movement's success in enhancing benefits available to workers has suffered a set-back. But there will undoubtedly be others. The Australian industrial landscape is ever changing.

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.WORKERS COMPENSATION ROUNDUP

A Work Trip Injury Found Not To Be "In The Course Of Employment"

Dring v Telstra Corporation Limited [2020] FCA 69

Background

Ms Dring ("the appellant") was employed by Telstra ("the respondent") as a Senior Manager and was flown to Melbourne by the respondent to attend a series of workshops. The decision noted that Telstra arranged and paid for her airfares to and from Melbourne and her accommodation at Novotel Hotel in Melbourne.

On 14 April 2016 at 2:30 am, the appellant slipped and fell on wet tiles in the main foyer on the sixth floor of the Novotel Hotel.

In September 2016, the appellant sought compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (SRC Act) in respect of the injuries she sustained as a consequence of the fall. She contended that as the incident occurred at the hotel in which she was staying for the purpose of work-related travel, her injury arose out of, or in the course of her employment.

Telstra rejected the appellant's application for compensation. The appellant applied to the Administrative Appeals Tribunal (AAT) for review of Telstra's decision and Telstra's decision was upheld by the Tribunal. In September 2018, Ms Dring appealed the AAT decision to the Federal Court of Australia.

The Question of Law

The SRC Act establishes a framework for the payment of workers' compensation in respect of injuries sustained by employees of the Commonwealth, Commonwealth authorities and "licensed corporation[s]".

As defined in s5A of the SRC Act, the relevant definition of injury is:

> *"An injury (other than a disease) suffered by an employee, that is a physical or mental injury arising out of, or in the course of, the employee's employment."*

The question was whether the Tribunal correctly applied the statutory expression *"arising out of, or in the course of, the employee's employment".* i.e. did the appellant's injury occur arising out of, or in the course of, the appellant's employment.

The Law

In *Hatzimanolis v ANI Corporation* (1992) 173 CLR 473, the High Court found *"…an interval or interlude in an overall period or episode of work will ordinarily be seen as being part of the course of employment if the employer expressly or impliedly induced or encouraged the employee to spend the interval or interlude at a particular place or in a particular way".*

The case of *Comcare v PVYW* (2013) 250 CLR 246 is said to have '*refined'* Hatzimanolis. Their Honours noted *"… for an injury occurring in an interval in a period of work to be in the course of employment, the circumstance in which an employee is injured must be connected to the inducement or encouragement of the employer. An inducement or encouragement to be at a particular place does not provide the necessary connection to employment merely because an employee is injured whilst engaged in an activity at that place."*

Federal Court Finding

The Federal Court dismissed the appeal and found that the injury was not one that arose out of, or in the course of, the appellant's employment with Telstra.

The incident occurred at 2:30 am after eight and a half hours of weeknight socialising. The appellant was in no way induced or encouraged to be in the hotel foyer at that time. The Court found that *"the extent and duration of her personal activity resulted in a broken nexus with her employment".*

If the appellant had fallen in the moments after leaving the final workshop for the day or even at 10:30pm instead of 2:30 am, this would be a different case and it may well be that a different outcome would have been warranted.

Implication

The judgment gives direction as to the required connection to employment in overnight work trips when workers compensation claims are made.

If the employee's injury is unconnected with the *"place"* or *"activity"* the employer encouraged or induced, the injury may not have been acquired in the course of employment.

Although the employer was successful in this matter, it is a reminder that employers expose themselves to liability when encouraging and/or inducing workers to be at a specific place or to participate in an activity.

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