GD NEWS / DECEMBER 2020

IN THIS EDITION

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Test Case: Insurers Fail in Their Bid to Exclude BI Cover for Covid-19 Losses Where ISR Policies Reference Repealed Legislation

In our October edition of GD News we summarised a UK test case on business interruption policy coverage for losses arising from the COVID-19 pandemic. Those policies containing "disease clauses" where an outbreak of the pandemic was detected within a 20 mile or other geographical radius of the insured's business premises were generally successful for insureds.

Insurance polices in Australia providing BI cover generally contain similar provisions for losses arising from a notifiable disease within a specified radius of the insured's business premises. However, the policies commonly exclude cover for notifiable diseases declared to be a quarantinable disease under the *Quarantine Act 1908* (Cth) or the *Biosecurity Act2015* (Cth) which was enacted after the *Quarantine Act* was repealed. Not all ISR policies had been updated to reference the new legislation that applied to communicable diseases.

The problem for many insurers is that their policies were not updated, at the time of the COVID-19 outbreak, to refer to the legislation which replaced the *Quarantine Act* when it was repealed in 2016.

The NSW Court of Appeal recently handed down its judgment in a test case concerning whether insurers could rely upon an exclusion clause referring to the repealed legislation and, if so, whether COVID-19 was a quarantinable disease within the meaning of the *Quarantine* Act.

The reasons for the Court's decision are set out in *HDI Global Specialty SE v Wonkana No. 3 Pty Limited* and the result is not good news for insurers.

Wonkana No. 3 Pty Limited t/as Austin Tourist Park conducted a tourist park business in Tamworth, NSW.

Key Holding & Investments Pty Limited ATF Key Nutrition Unit Trust t/as Thrive Health & Nutrition conducted a health and nutrition business in Maribyrnong in Victoria.

Austin Tourist Park and Thrive Health & Nutrition respectively held a policy of insurance with HDI Global Specialty SE and Hollard Insurance which provided business interruption cover arising from the outbreak of a notifiable human infectious or contagious disease occurring within the 20km radius of the location of the business.

The HDI policy and the Hollard policy each contained an exclusion clause under which cover was excluded for any disease declared to be a quarantinable disease under the *Quarantine Act 1980* (Cth) and subsequent amendments.

On 16 June 2016 the *Quarantine Act* was repealed and replaced by the *Biosecurity Act*.

The HDI policy and Hollard policy were issued to each of the respective insureds long after the *Quarantine Act* was repealed.

However, the policies were not updated to make reference to the *Biosecurity Act* in the exclusion clause.

Under the *Quarantine Act*, a quarantinable disease was declared by the Governor General by proclamation. However, under the *Biosecurity Act*, the Director of Human Biosecurity (defined in the legislation to be the Commonwealth Chief Medical Officer) may determine that a human disease is a listed human disease if the Director considers the disease may be communicable and cause significant harm to human health.

The *Biosecurity Act* made no reference to a quarantinable disease.

The exclusion clauses in the relevant insurance policies also made no reference to a "listed human disease" under the *Biosecurity Act*.

As at the date of the repeal of the *Quarantine Act*, COVID-19 was not listed as a notifiable quarantinable disease.

There was no disputing that on 21 January 2020, COVID-19 was determined by the Commonwealth Chief Medical Officer to be a listed human disease within the meaning of the *Biosecurity Act*.

Austin Tourist Park and Thrive Health & Nutrition subsequently made business interruption claims respectively under the HDI and Hollard policies.

On 7 May 2020, HDI declined indemnity to Austin Tourist Park.

On 10 July 2020, Hollard declined indemnity to Thrive Health & Nutrition.

The insureds each brought claims at the Australian Financial Complaints Authority ("AFCA"). However, in light of the potential ramification for the insurance industry concerning the interpretation of the wording in the exclusion clauses, the Insurance Council of Australia stepped in and filed proceedings in the name of the insurers at the NSW Supreme Court seeking declarations regarding the proper construction of the insuring clauses and whether the insurers were entitled to rely upon the exclusion clause despite its reference to repealed legislation.

The matter came before Justice Hammerschlag who removed the case to the NSW Court of Appeal in light of its significance.

The Court of Appeal comprised Bathurst CJ, Bell P, Meagher JA, Hammerschlag and Ball JJ.

Justice Hammerschlag wrote the leading judgment regarding the principal issues for the Court's determination, namely:

- whether COVID-19 was a quarantinable disease within the meaning of the Quarantine Act 1908 or as subsequently amended to enliven the exclusion clauses in the HDI and Hollard policies despite that legislation having been repealed; and
- if not, whether the proper construction of the policy allowed the Court to construe the words "or as subsequently *amended"* to include a reference to the *Biosecurity Act*.

His Honour rejected the insurers' arguments. In a separate judgment, Meagher JA and Ball J agreed with Justice Hammerschlag. In a further judgment, Bathurst CJ and Bell P also agreed.

The insurers contended that each exclusion clause referred to notifiable diseases declared to be a quarantinable disease under the *Quarantine Act* and subsequent amendments. It followed, so it was argued, that the *Biosecurity Act* was a subsequent amendment to the *Quarantine Act*.

It was also contended by the insurers that to construe a reference to subsequent amendments to the *Quarantine Act* as a reference to that Act only, and amendments to it, would create an absurdity because the parties self evidently intended the policies to refer to the operative legislation in force at the time of the policies and during the cover periods which dealt with quarantinable diseases.

The insureds contended that the wording of each exclusion clause provided a mechanism that mirrored the wording in the *Quarantine Act* regarding what constituted a quarantinable disease and how such a disease was declared by the Governor General.

However, COVID-19 was declared by the Chief Medical Officer to be a listed human disease under the *Biosecurity Act.* As such, the current legislation contained a completely different mechanism to declare a "listed human disease" which the exclusion clauses did not contemplate.

Justice Hammerschlag agreed with the insureds' interpretation of the exclusion clauses. According to his Honour, the correct constructional choice was that those words did not comprehend a reference to an entirely new replacement enactment. Rather, they

were intended to be a reference to the *Quarantine Act* as it stood from time to time.

His Honour stated:

> *"Whilst, it seems to me, it would have made better commercial sense for the parties to have referred to a current Act rather than one repealed four years earlier, to have excluded diseases identified under the current Act, and to have chosen words to allow for the exclusion of serious diseases which break out during the cover period, what they did agree is not a clear mistake and, if it is, it does not rise to the level of absurdity."*

Justice Hammerschlag noted that insurers had not sought to rectify a mistake in the policy wording, rather they endeavoured to persuade the Court that the exclusion clauses were enlivened by reason of the proper construction of the wording of the policy.

They failed.

Meagher JA and Ball J agreed that as each exclusion clause adopted a specific mechanism under the *Quarantine Act*, for the insurers to suggest that the words "and subsequent amendments" included the enactment of the *Biosecurity Act* was held to be many steps too far.

Bathurst CJ and Bell P provided brief observations agreeing in the decision of their fellow judges.

The importance of this decision cannot be overstated for the insurance industry. Many insurers would have priced their policies on the basis that pandemics were not covered in BI claims even though insurers had not updated their policy wordings to refer to the *Biosecurity Act*.

Exclusion clauses which refer to the repealed *Quarantine Act* will have no effect. This is likely to lead to a large influx of BI claims arising from the COVID-19 pandemic for which the Australian insurance market has not priced the risk. This could have a devastating flow-on effect in the reinsurance market and even more so for insurers who may have opted not to take out reinsurance for pandemic risks.

Recent media coverage following the Court's decision has reported that the Insurance Council of Australia, in consultation with its members and legal representatives, is urgently reviewing the Court's decision with a view to deciding whether or not to seek special leave to appeal to the High Court of Australia.

We await with interest to see if the ICA takes the case further although it will be difficult to obtain special leave from a unanimous decision of five judges of the NSW Court of Appeal.

The Australian test case is a piece in the puzzle for insurers seeking to resist claims arising from business shut downs consequent to COVID-19.

Another piece is the test case judgement in the UK High Court however that judgement is on appeal to the Supreme Court and the hearing of the appeal has concluded and we are now waiting on the judgement.

The High Court judgment was handed down in September finding in favour of the insureds in most but not all of the 21 business interruption policy wordings considered by the court. The key areas to be considered on appeal are:

- When calculating loss caused by prevention of access, should the loss be reduced where one element of an insured peril has caused a reduction in revenue prior to the policy being triggered (shut down orders) by the occurrence of other elements of the peril;
- Whether policies requiring "actions" of a public authority are triggered by instructions or advice of the government, rather than legislation;
- Whether partial closure of a business or premises (rather than total closure) is sufficient for the purposes of wordings requiring "prevention of access" or "inability to use" to trigger a claim;
- The High Court reached a different conclusion in two of the QBE policies in comparison with the other disease clauses put before the Court. The FCA asked the Supreme Court to reverse the High Court's judgment in this respect and to find that loss would be covered under these clauses where Covid-19 is "manifested" within the policy radius (i.e., 25 miles).

These are interesting times for insurers,

The UK Supreme Court has flagged that it will deliver its judgement as quickly as possible but could not commit to a judgement being available before Christmas.

The puzzle is almost complete as insurers are already reviewing BI claims with prevention of access coverage in the wake of the Australian test case and will need to do so again after the UK Supreme Court hands down its appeal judgment.

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Skiing is a Dangerous Activity

In our previous editions of GD News we have discussed recent decisions of the Court of Appeal considering the impact of Sections 5L and 5K of the *Civil Liability Act 2002*, which provides a complete defence to a claim when the injured plaintiff is engaged in a dangerous recreational activity.

In these decisions, including *Menz v Wagga Wagga Show Society Inc, Carter v Hastings River Greyhound Racing Club* and *Singh BHNF Ambu Kanwar v Lynch*

the defendant has successfully relied on the defence, despite the factual situations being very different.

This trend has continued with a recent decision of Cavanagh J in the Supreme Court of NSW.

In *Castle v Perisher Blue Pty Limited*, Deborah Castle was skiing at Perisher on 16 August 2014 when she collided with a ski instructor, Michael Thoms, who was employed by Perisher Blue. At the time of the collision Thoms was within the course of employment although not instructing the plaintiff. Although both were experienced skiers, neither saw the other until immediately prior to the collision.

Castle's argument was that the collision was caused by the negligence of the ski instructor and Perisher Blue was vicariously liable for the actions of their employee. Castle also relied on Section 60 of the *Competition and Consumer Act 2010* and contended that Perisher Blue had failed to provide services with due care and skill.

Perisher Blue agreed that they were vicariously liable for the actions of their employee however contended that the collision was caused by Castle's negligence. Further, Perisher Blue relied on the defence of dangerous recreational activity as outlined in Section 5L of the *Civil Liability Act 2002*. Perisher Blue also argued that the plaintiff had been provided with a risk warning and therefore her claim should fail pursuant to section 5M of the *Civil Liability Act 2002*.

At the time of the collision, Castle was heading towards the Happy Valley T-bar and the ski instructor, Michael Thoms, was heading towards the Sun Valley T-bar. There was however a dispute in relation to the precise location of the collision.

Thoms argued that the collision occurred close to the end of the clump of trees that separated two ski runs and the collision occurred as Castle skied very close to around the end of the trees and appeared unexpectedly in front of Thoms and so he did not have time to avoid her.

This was disputed by Castle.

When the collision occurred, Castle was skiing with a very experienced skier, Paul Evans, whose evidence tended to support her version of events and also the precise location of the collision. Thoms was skiing with a doctor who did not see the collision although his evidence tended to support Thoms' version of events. Steven Wynn, another employee of Perisher Blue, who attended the scene immediately after the accident also gave evidence as to the location.

Ultimately, after considering all of the factual evidence Justice Cavanagh found that the collision was caused by the failure of Thoms to take reasonable care. Although he would not normally have looked around at the particular point where the accident happened, there were eye witnesses who said he did on this particular day and it was the failure to keep a proper lookout at the critical moment that caused the collision.

However, whether or not Thoms caused the collision was not the end of the matter. The defendant was entitled to rely on the defence of Section 5L of the *Civil Liability Act 2002* relating to dangerous recreational activities.

Although Castle argued that skiing is not a dangerous recreational activity, Justice Cavanagh disagreed.

His Honour stated:

> *"There could be no doubt that skiing involves a risk of physical harm. The very nature of the activity involves proceeding down slopes, often steep, often quickly. One of the thrills of the activity is to go fast or as fast as one's level of competence might allow. It might also be said that one of the risks associated with the activity arises because skiers may ski at a speed beyond their level of competence.*
>
> *The risks associated with skiing are sometimes increased by the conditions such as the presence of ice which may not be observable ...*
>
> *"I'm considering whether the recreational activity, which is skiing, involves a significant risk of harm. In my view, it does. Even if the rate of collision per skier is low, the potential harm is high or great. It is not permissible to focus merely on the rate of collisions/accidents or injuries without having regard to the potential consequences. Whatever the rate of injury, it could not be said that both the likelihood of the risk of injury materialising and the nature and extent of the likely potential injury would be trivial. In the circumstances, I consider that skiing is a dangerous recreational activity. In the circumstances, where the accident occurred as a consequence of the obvious risk of a dangerous recreational activity, the defendant was entitled to rely on the defence."*

The other defence relied on by Perisher Blue in relation to risk warning was not successful however this did not matter.

His Honour found that Perisher Blue's risk warning was too general. The particular risk warning stated:

> *"Risk warning: recreational activities (including skiing, snowboarding and snow tubing) involve a significant risk of physical harm or personal injury including permanent disability and/or death to participants. Any such injury or loss may result not only from your actions but from the action, omission or negligence of others. Please read and obey all signs."*

Finally, Castle sought to rely on the Australian Consumer Law. However his Honour Justice Cavanagh found the plaintiff had failed to identify what aspect of services were not rendered with due care and skill. That aspect of the claim failed.

Therefore, although Castle was successful in establishing that the accident was caused by the negligence of Thoms, the claim failed as the Court again found a defendant was entitled to rely on the

defence of dangerous recreational activity.

The defence in Section 5L of the *Civil Liability Act 2002* has yet again proved to be a powerful weapon for defendants. Plaintiffs should carefully consider whether an activity is likely to be categorised as a dangerous recreational activity when bringing a claim in light of the Court's approach.

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Calculating the Policy Deductible Payable for a Hailstorm Event and an Insured's Entitlement to Interest

Annual construction policies of insurance are common in the insurance marketplace. They generally provide cover to a company engaged in the building and construction industry for "Insured Contracts" specified in the policy schedule which refer to various construction projects at different locations.

In a residential development project, there may be several "Insured Contracts" listed in the policy schedule for a policy taken out by a developer or builder which refer to the residential building contracts entered into with each home owner.

If an event such as a hailstorm occurs and causes damage to several residential buildings under construction as part of one development for which cover is available to the insured under such a policy, does the insured have to pay one policy deductible or several policy deductibles in respect of each residential building which sustained damage?

Further, what would a Court consider to be a reasonable period to allow an insurer to investigate the circumstances of a claim and decide whether or not to indemnify its insured such that any unreasonable delay may enliven an entitlement to claim interest under Section 57 of the *Insurance Contracts Act 1984* (Cth)?

These issues were considered by his Honour Justice Henry of the NSW Supreme Court in *Rawson Homes Pty Limited v Allianz Australia Insurance Limited*.

On 18 February 2017 a severe hailstorm passed through Sydney causing damage to parts of a residential development that was being constructed by Rawson Homes, a building company, in Kellyville and Rouse Hill.

Rawson Homes made a claim under its annual construction policy with Allianz for indemnity in respect of losses sustained from the hailstorm including the cost of replacing tiled roofs to 122 partially constructed homes as well as other related costs and economic losses.

There was a dispute between Rawson Homes and Allianz regarding the insured's entitlement to indemnity under the policy. Rawson Homes commenced proceedings at the NSW Supreme Court seeking declarations regarding its entitlement to indemnity.

The matter was listed for hearing before Justice Henry for five days but on Day 2 of the hearing there was an agreement reached between the parties regarding some of the issues about which a dispute had arisen.

That left two issues for the Court's determination, namely whether Rawson Homes was liable to pay a singular deductible under the policy in the amount of $10,000 or, as Allianz contended, a $10,000 deductible for each of the 122 damaged homes.

The second issue was whether Rawson Homes was entitled to claim interest under Section 57 of the ICA and if so, the date from which interest should be paid by Allianz noting the delay by the insurer in reaching an agreement with its insured on Day 2 of the trial.

The Deductible Issue

Rawson Homes argued only one deductible was payable for all claims arising from the one event which, in this case, was the hailstorm.

The insured also relied on the Application of Deductible clause and the definition of Deductible which referred to the deductible being the first payment for all claims arising out of one event or occurrence.

Allianz submitted the policy provided for a deductible to be applied to the Sum Insured in respect of each of the 122 partially constructed houses as the deductible was payable for each claim made in relation to each Insured Contract.

In effect, the insurer contended that Rawson Homes had made 122 separate claims for indemnity as there were as many claims as there were Insured Contracts.

There was no disputing that Rawson Homes had entered into a residential building contract with each of the homeowners of the partially constructed houses and that each building contract was an "Insured Contract" within the meaning of the policy.

However, Justice Henry was not persuaded by the insurer's submission and considered Rawson Homes' interpretation of the policy to be correct.

Henry J noted the wording of the policy stated:

*"**Application of Deductible***

The amount of the Deductible will be subtracted from the amount payable by Us for each event giving rise to a claim under this section."

Further:

*"**Deductible** means either the amount of money specified in the Schedule or stated in the policy for each applicable section or type of loss as specified, that the Insured must contribute as the first payment for all claims arising out of one event or occurrence."*

His Honour observed that for major perils such as the hailstorm, the relevant deductible was $10,000 "any

one event" in the Schedule. Henry J noted the application of deductible clause focused on an "event" and a "claim" but those words were not defined in the policy.

Rawson Homes argued the hailstorm event was one event because it would not be sensible or correct to proceed as if there were a series of different hailstorms starting and finishing at each house. Justice Henry accepted this interpretation and went on to say:

> *"In my view, the characterisation of the hailstorm as the one event that gave rise to Rawson Homes' claim (or claims) conforms to common sense and the ordinary and natural meaning of the word 'event'. The hailstorm cannot be broken up into different storms."*

Further, His Honour stated:

> *"The circumstances that gave rise to Rawson Homes' entitlement to seek indemnity under the policy was the one hailstorm event that caused loss by way of damage to the partially constructed houses. Upon that happening, Rawson Homes had an entitlement to make a claim on Allianz under the policy for indemnity in respect of its losses for multiple Insured Contracts within the limits of the policy."*

His Honour did not consider the language of the insuring clauses and structure of Section 1 of the policy mandated that a claim under Section 1 was limited to a claim in respect of an Insured Contract.

Justice Henry concluded that Rawson Homes was liable to pay one deductible of $10,000 under the policy with respect to damage to the 122 partially constructed houses.

The Interest Issue

Justice Henry considered the circumstances including the insurer's appointment of loss assessors to determine the extent of the cost of repair/replacement of the damaged tiles.

Rawson Homes accepted partial payments from Allianz on two separate occasions.

The dispute, which was resolved by agreement on Day 2 of the hearing before Justice Henry, was whether the insurer was liable to pay repair costs or replacement costs for the damaged roof tiles. The insurer capitulated and agreed to pay replacement costs.

Rawson Homes contended it was entitled to claim interest on the total amount claimed for replacement costs under Section 57 of the ICA by reason of the insurer's delay in making a decision to pay full replacement costs.

Rawson Homes contended that interest should run from the date on which Allianz determined to pay the second partial payment under the policy. At that time it was contended that Allianz had fully investigated and assessed the claim and had no basis to reject its insured's claim for full replacement costs that was subsequently agreed on Day 2 of the trial.

Allianz accepted that interest was payable but that the claim should be limited to only that amount which was subsequently agreed on Day 2 of the trial, being a smaller component of the overall judgment to which Rawson Homes was entitled.

Further, that interest should only run from the date after which that agreement was made during the trial.

Justice Henry decided the issue by considering the applicable legal principles, namely by determining the true position in respect of the claim and allowing for a reasonable period of time for Allianz to investigate the claim and consider its position.

Allianz did not dispute that the tiled roofs to the houses were damaged by hail or that the policy responded to the claim. Rather, as his Honour observed, the issue that required investigation and assessment was the extent of the damage to the tiled roofs to determine whether Rawson Homes should be indemnified under the policy for replacement or repair costs.

The true position, according to Justice Henry, was that the damage to the tiled roofs was extensive enough to warrant indemnity to extend to the cost of replacing them.

His Honour decided that a period of 13 months between the date of the claim and the second and final payment made by the insurer was an objectively reasonable time for Allianz to have investigated those issues and determine its position.

Accordingly, his Honour agreed with the position argued by Rawson Homes that interest under Section 57 of the ICA was payable from the date of that second payment and not limited to the period after an agreement was reached on Day 2 of the trial.

This is an interesting decision which illustrates how a Court will interpret the wording of an annual construction policy of insurance regarding a singular claim made on behalf of an insured covering damage to several construction projects arising from one event.

The Court also provided a useful guide to determine what is a reasonable period for an insurer to investigate a claim and make its decision on indemnity under the policy.

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Civil Penalties On The Horizon For Unfair Contract Terms

On 6 November 2020, the Legislative and Governance Forum on Consumer Affairs agreed to strengthen the existing unfair contract term (**UCT**) protections contained in the Australian Consumer Law.

The move follows the release of the Treasury's Regulation Impact Statement for Enhancements to Unfair Contract Term Protections (**Impact Statement**).

The reforms aim to "reduce the prevalence of unfair terms in small business and consumer standard form contracts, promote a more efficient allocation of risk, and improve small business and consumer confidence when entering into standard form contracts."

No draft legislation has been released to date. However, key reforms proposed by the Impact Statement include:

- making unfair contract terms unlawful and giving courts the power to impose civil penalties;
- increasing eligibility for the protections by expanding the definition of 'small business' and removing requirements for contracts to be below certain monetary thresholds; and
- improving clarity of when the protections apply, including improving clarity around the definition of 'standard form contract'.

Introduction of civil penalties

The Impact Statement identifies shortcomings in the current UCT framework, in that it enables contract-issuing parties to rely on unfair terms in standard form contracts with the risks limited to having a court declare that the term is unfair and therefore void.

One proposed reform includes making unfair contract terms unlawful and granting courts flexibility in determining an appropriate remedy, including the power to apply a civil penalty for contravention where the action is commenced by a regulator.

Currently, there is no indication of the quantum or calculation of these civil penalties. For context, the maximum civil penalties for corporations breaching provisions of the Australian Consumer Law is the higher of:

- $10 million;
- 3 x the value of the benefit received by the business; or
- 10% of annual turnover of the business in the preceding 12 months (if the court cannot determine the benefit obtained).

Expanding the definition of 'small business'

It is also recommended that the current 'small business' monetary thresholds be replaced.

Under the proposed reforms, a 'small business' is to mean a business with:

- fewer than 100 employees; or
- annual turnover of less than $10 million.

This amendment will expand the range of the UCT laws and allow more small businesses to seek redress.

Introduction of rebuttable presumption

Significantly, the Impact Statement recommends that a rebuttable presumption be introduced for unfair contracts terms used in similar circumstances.

For example, a term will be presumed to be unfair if the same or a substantially similar term has been used by the same entity or in the same industry and has already been declared to be unfair. The burden will be placed on a contract-issuing party to produce evidence disproving this presumption.

Clarifying the definition of 'standard form contract'

Although the Australian Consumer Law contains mandatory factors that a Court must consider when determining whether a contract is standard form, there is no definition in the Australian Consumer Law.

The reforms aim to clarify the definition by considering factors such as repeat usage of a contract and clarifying the types of actions that prevent a party from obtaining an effective opportunity to negotiate a contract.

Key takeaways

Businesses should undertake a review of their existing standard form contracts to ensure that they do not fall foul of the proposed new UCT framework and if unsure, seek legal advice.

An explanation of the current UCT framework can be found in our September 2020 newsletter.

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Insolvency Reforms: A win for small business

The Federal Government has released the *Corporations Amendment (Corporate Insolvency Reforms) Bill 2020* (Cth) (**Draft Bill**).

The Draft Bill is intended to reform the current insolvency framework by introducing new processes for eligible small businesses.

It is hoped that the changes will enable more small businesses to restructure rather than wind up. Where restructure is not possible, businesses will be able to wind up faster.

It is intended that the new insolvency regime will come into effect on 1 January 2021, subject to the passing of the Draft Bill.

Key Features

The Draft Bill introduces two key changes to the current insolvency framework:

- a new debt restructuring process for eligible small businesses; and
- a new, simplified liquidation pathway for eligible small businesses.

It is hoped that these features will "*reposition our insolvency system to reduce access costs for small business, to reduce the time they spend during insolvency processes, to ensure greater economic dynamism, and ultimately help more small businesses to survive*".

A new debt restructuring process

A new, simplified restructuring process is proposed for eligible small businesses so that they can restructure their debts and avoid winding up.

The process centres on a 'debtor in possession' model as distinct from a 'creditor in possession' model, enabling owners to maintain control of their business and trade in the ordinary course while a debt restructuring plan is developed and voted on by creditors.

The regime includes the introduction of a small business restructuring practitioner (**SBRP**) appointed by board resolution.

The SBRP will work alongside the company officers to:

- support the business to develop a restructuring plan and review its financial affairs;
- certify the restructuring plan to creditors; and
- manage disbursements once a plan is in place.

The SBRP's role and powers would be streamlined when compared to the role played by an administrator in a voluntary administration.

The plan is circulated to creditors by the SBRP and is approved if more than 50% of the company's creditors vote in favour of the plan.

According to the Government fact sheet, the debt restructuring process will operate as follows:

- The directors of the company approach an SBRP (who must be independent) to discuss its eligibility for the new debt restructuring process and the SBRP's fees for helping the company develop a debt restructuring plan (this must be a flat fee).
- The directors of the company pass a board resolution to appoint the SBRP.
- A notice of commencement if the debt restructuring process is provided to creditors.
- On commencement of the debt restructuring process a moratorium begins: unsecured creditors and some secured creditors are prohibited from taking action against the company; personal guarantees cannot be enforced against the directors or their relatives and there is a restriction on the operation of ipso facto clauses similar to that applying in voluntary administration.
- A plan is then developed by the directors and the SBRP over 20 business days. During this time, the directors retain control of the company and may continue to trade in the ordinary course of business. The SBRP also develops a remuneration proposal to cover the administration of the debt restructuring plan once in place (which operates as a percentage fee of disbursements made under the plan).
- The company must pay any employee entitlements which are due and payable before the restructuring plan can be put to creditors.
- The SBRP circulates the debt restructuring plan and supporting documents to creditors and certifies whether or not the company can meet the proposed repayments under the plan and whether the company has properly disclosed its affairs.
- Creditors have 15 business days to vote on the debt restructuring plan with all creditors voting as one class. Related party creditors are not entitled to vote. The plan is approved if more than 50% of creditors by value vote in favour of the debt restructuring plan. If approved, the plan binds all unsecured creditors and secured creditors to the extent that their debt exceeds the realisable value of their security. The company then continues to trade in the ordinary course of business.
- If the plan is not approved, the debt restructuring process ends and the company may elect to enter voluntary administration or liquidation.

A simplified liquidation pathway

A simplified liquidation pathway would also be available to small businesses that cannot be restructured.

Under the new process, regulatory obligations will be proportionate to the small business's assets, complexity and risk profile. Key modifications include:

- limiting the circumstances in which a liquidator can clawback an unfair preference payment from a creditor that is not related to the company;
- only requiring the liquidator to report to ASIC on potential misconduct where there are reasonable grounds to believe that misconduct has occurred;
- removing requirements to call creditor meetings and the ability to form committees of inspection;
- simplifying the dividend process (where creditors receive a return proportionate to their debt) and the proof of debt process; and
- maximising the use of technology in voting and other communications.

Eligibility

Eligibility requirements for the new processes will be confirmed by accompanying regulations.

Conclusion

The new system would be two-tiered, in that large companies would be required to continue to operate under existing insolvency rules, while small businesses

would have a simpler system.

The reforms are likely to bring welcome changes to many small businesses struggling during the COVID-19 pandemic.

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CONSTRUCTION ROUNDUP

NSW Government offers interest free loans to replace combustible cladding

As part of its 2020 budget, the NSW Government is introducing a new package known as "Project Remediate". This package is designed to help eligible building owners access interest free loans to rectify combustible cladding on Class 2 residential apartment buildings in NSW.

Project Remediate

Project Remediate is a three-year program to help remove combustible cladding on an estimated 225 buildings known to the NSW Cladding Taskforce.

The NSW Cladding Taskforce was established by the NSW Government to identify buildings with potentially combustible cladding and support local councils to address the use of non-compliant cladding materials.

The Taskforce audited 185,000 building records and to date 4127 buildings have been inspected.

Under Project Remediate, the NSW Government will pay for the interest on loans on behalf of apartment owners to enable and fast-track the removal of high-risk cladding. Final details on the program design and loan scheme will be announced in December 2020 and eligible building owners and owners corporations will be contacted directly and invited to register their interest to participate in Project Remediate.

Project assurance service

According to the NSW Government's website, a project assurance service will be established and coordinated through the Office of the NSW Building Commissioner to work with owners corporations to project manage rectification work.

The service is aimed at ensuring that rectification is done to a high standard. This would include assuring and controlling risks, costs and the quality of cladding remediation undertaken on residential apartment buildings.

As part of this service, a managing contractor would be appointed to manage and oversee each individual project, and there would be no cost to building owners for the assurance program.

Eligibility

According to the NSW Government website, to apply for a Project Remediate loan, a building must:

- be a residential apartment building (Class 2) in NSW (which includes multi-use buildings such as the Rise); and
- have been confirmed by the Cladding Taskforce and consent authority to have a high-risk combustible cladding façade that requires remediation.

Applications are expected to open around March 2021.

Key dates

The key dates identified by the NSW Government are as follows:

Program design and loan scheme details announced	Late 2020 - early 2021
Tender process for program assurance managing contractor	February 2021
Applications open for building owners	March 2021

Where rectification works already underway

According to the NSW Government, if remediation works to replace the cladding is already underway, the owners' corporation can still apply for Project Remediate or continue with their own plans.

Retrospective assistance is also being considered by the NSW Government as part of the loan scheme design.

How long will the process take?

The NSW Government states that it expects construction for the first projects to start from mid-2021.

The managing contractor for each project is to advise the owners corporation on the project timeline, which will depend on factors such as the size of the building, the amount of cladding to be remediated and other factors such as building access.

The NSW Government's announcement comes as good news for owners corporations facing hefty bills to replace the cladding on their building. However, it is important to remember that the NSW Government's assistance only extends to relieving owners corporations of the burdens of paying *interest* on their loans – the owners corporations would still need to pay back the loan itself, which would be likely to amount to several million dollars and which would require a significant increase on the levies imposed on the owners of the units at the building over a number of years.

Additionally, the announcement by the NSW Government of this package does not include any mention of compensation for ancillary costs, such as increased insurance premiums, consultant and legal costs, and other costs incurred as a consequence of the presence of combustible cladding.

Accordingly, it is likely that many owners corporations will still need to pursue court proceedings against the builders, consultants and others who participated in the development of their buildings in order to ensure that they are not left out of pocket.

If your building has combustible cladding installed on it, the expert lawyers at Gillis Delaney Lawyers can provide advice on your rights to have the builders, developers etc pay for the replacement of the cladding.

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A first for the NSW Supreme Court: The Mining Exception under SOPA explained

Every month there are numerous judgments handed down which address the various aspects of the *Building and Construction Security of Payment Act 1999* (NSW)("Act") and yet there has never been any consideration of the Mining Exception under s. 5(2)(b) of the Act and only two cases in Queensland have considered that issue in respect of Queensland legislation. That is, until now.

Section 5(1) of the Act provides an extensive framework to define "construction work"; however the Mining Exception in the Act is not prescriptive when it comes to the type of construction work excluded and the Explanatory Note to the Bill and Second Reading Speech when the legislation was considered in Parliament do not assist in providing any intention behind the inclusion of the exception.

Section 5(2)(b) of the Act provides:

> *Despite subsection (1),* ***construction work*** *does not include any of the following work:*
>
> *…*
>
> *(b) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose*
>
> *…*

It would seem obvious that much of the work undertaken in the mining sector would be considered "construction work" for the purposes of the Act. However, there still remains the question at what point does this work cease to be "construction work" and fall into the "mining exception" and therefore no longer trigger the processes and remedies available under the security of payments regime?

The judgment in *Cadia Holdings Pty Ltd v Downer EDI Mining Pty Ltd* [2020] NSWSC 1588 published in November has now clarified the impact of the so-called Mining Exception.

The case concerned the proposed development of a new panel cave at an underground mine in the Cadia Valley, the largest underground mine in Australia with deposits of gold, silver, copper and molybdenum.

On 22 June 2020, an adjudicator appointed under s.19 of the Act determined that Cadia (the operator of the mine) pay Downer (the contractor) $1,017,741.72.

In challenging the adjudication determination Cadia argued that the Contract was not a "construction contract" on the basis that the work performed by Downer was not "construction work" within the meaning of s.5 of the Act by reason of the "mining exception".

The Court ultimately disagreed and held that the Contract did not trigger the Mining Exception.

The project had two phases:

- the 'development phase' in which the mine, or the relevant part of the mine, was constructed by pushing the tunnels in order to provide access to ore body, establishing infrastructure and installing services required for the mining process such as water, compressed air lines, electricity and ventilation; and
- the 'production phase' where, once the mine had been constructed, the valuable minerals were to be extracted in bulk from the ground.

The scope of work under the contract required Downer to perform works associated with the 'development phase', predominantly underground, involving tunnelling, boring and underground construction. It also included various other activities such as, mobilisation to the site, establishing and disestablishing facilities, site clean-up, demobilisation, construction of declines, level and access development, excavations for items of infrastructure plant and other requirements.

Cadia submitted that the "works of the kind carried out by Downer generally serve[d] the purpose of developing tunnels to access the ore body for future production activities." However, the Court held that the work undertaken by Downer did not lead to a situation where the mineral extraction could take place immediately. The project involved five stages. Downer did none of the work described in the second, third, fourth and fifth stages. The object and purpose of the Contract therefore was not to cause Downer to undertake work for the purpose of extracting minerals, but was rather work preparatory to, and in anticipation of the ultimate and later extraction of minerals.

In reaching this conclusion the Court held that:

- the object of the Act is to provide "a speedy and effective means of ensuring cash flow to builders from the parties with whom they contract".

Therefore, the Mining Exception should be construed beneficially to the subcontractor (here Downer); that is, it should be construed narrowly;

- the extension of the usual meaning of "extraction" by inclusion of tunnelling, boring or construction of underground works for that purpose, suggests the need for there to be a close "proximity" between the two;
- in the two Queensland cases it had been held that "extraction" does not include work "associated with" extraction or work "preparatory to" extraction; and
- the Act (and s.5 itself) specifies circumstances where a less proximate connection is required i.e. ss5(1)(e) includes as "construction work" work that is "preparatory" to such work. No such words are used in the Mining Exception. Rather the Mining Exception simply specifies such works "for" the purpose of extraction of minerals which suggests a legislative intention that tunnelling, boring or construction of underground works referred to in the Mining Exception must be for the actual purpose of extracting minerals.

However, the Court did note that:

> *"if there is a contract which contains undertakings to carry out construction work and undertakings to carry out work that is not construction work, the contract remains a construction contract. If a payment claim is submitted under such a contract and the payment claim includes a claim for work that is not construction work, the payment claim is valid, but the adjudicator should not award an amount for work that is not construction work."*

It is evident from this case that in applying the Act, the Court will endeavour to ensure that the overriding purpose of the Act is achieved, that being the quick and effective resolution of payment disputes to ensure the cash flow of builders and subcontractors.

In the case of the Mining Exception, the Court will apply a very narrow interpretation and this exception will only be engaged if the construction work is sufficiently proximate to the very act of extraction.

Cadia Holdings Pty Ltd v Downer EDI Mining Pty Ltd has clarified that in NSW contractors engaged by mine owners and operators to undertake works at a mine to create structures to facilitate extraction of minerals can pursue claims under the security of payment regime.

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The Importance of Good Record Keeping on Construction Projects

Construction projects are the source of many disputes. There are many things that can go wrong – discovery of objects and contaminants below ground, difficulty in sourcing materials and labour, and adverse weather conditions slowing progress. While the participants are usually focused on overcoming the challenges as and when they arise, when the costs are counted at the end of the project it can be extremely difficult to reconstruct what actually happened and establish who was to blame for the extra costs.

This difficulty is illustrated by the issues that were faced by the plaintiff/appellant in *White Constructions Pty Limited v. PBS Holdings Pty Limited* [2019] NSWSC 116; [2020] NSWCA 277 when it tried to establish that a designer should pay for a significant delay to a project due to a late design.

White Constructions was the developer of a subdivision in Kiama, NSW. A precondition for the registration of the subdivision was a certificate being issued by Sydney Water that its requirements with respect to the site's water, wastewater and stormwater services had been met.

In around February 2012, White Constructions engaged Illawarra Water & Sewer Designs Pty Limited (IWS) to provide the sewer design. This design was produced by around 2015 and incorporated two pumping stations.

White Constructions then contracted PBS to facilitate obtaining Sydney Water's approval of the sewer design.

IWS's design was submitted to Sydney Water in February 2015 for its initial comment on feasibility, but the design was rejected outright.

In November 2015 an alternative design utilising a horizontal deep bore main to gravity drain for the site was submitted to Sydney Water. (A gravity-based design would require less maintenance and thus would be preferred by Sydney Water.) Sydney Water considered this design to be feasible and consented to an application for the relevant certificate being made.

As part of the application process, White Constructions, IWS and a water services co-ordinator (SWC) were required to enter into a Developer Works Deed with Sydney Water. This Deed set out the parties' rights and obligations with respect to the sewer design and included several warranties made by the parties to Sydney Water. Separately, IWS and SWC also warranted that they would:

- comply with instructions;
- prepare a design that was fit for purpose;
- prepare the design using due skill and diligence; and

- perform the services under the Deed within a reasonable time.

After some negotiation and rework of the design, Sydney Water finally approved the alternative design in August 2016.

Completion of the project was achieved significantly later than anticipated. White Constructions brought proceedings in the Supreme Court against PBS and IWS alleging breach of contract by each of them and a breach by IWS of its warranties under the Deed with Sydney Water.

IWS and SWC disputed that White Constructions was entitled to rely on the warranties they had provided in the Deed. IWS also pointed to on an instruction which it said that White Constructions' representative, Mr Unicomb, had given to IWS' representative, Mr Edwards, to avoid a gravity-based design. However, Mr Unicomb denied ever giving any such instruction.

In the Supreme Court, Hammerschlag J agreed that the warranties made by IWS and SWC in the Deed were not to White Constructions' benefit. His Honour noted that if White Constructions' contention were to be accepted, extra words would need to be read into the Deed, but those extra words were not necessary for the clause to have some effect.

Hammerschlag J also carefully considered the conflicting evidence of Mr Unicomb and Mr Edwards about whether a specific instruction had been given to IWS to avoid a gravity-based design, and found that such an instruction had indeed been given. In coming to this conclusion, his Honour looked at the respective demeanours of the two witness, describing Mr Unicomb as "demonstrative and dominant" and Mr Edwards as "restrained and less dominant", as well as the objective contemporaneous circumstances and documents. He pointed in particular to one contemporaneous design document which had noted several options, including a gravity-based design. His Honour considered that this drawing must have been created as part of a discussion between Mr Unicomb and Mr Edwards on the type of design to be implemented.

His Honour therefore found that Mr Unicomb had issued the instruction and by doing so had effectively taken control of the design process and the delay to the sewer design had thus been caused by White Constructions' own conduct.

Having held that the defendants had not breached any warranties under the Deed or their obligations under their own contracts, the Court dismissed White Constructions' claim.

Although it was not necessary anymore, Hammerschlag J also examined White Constructions' claim that it had incurred $1.9 million extra costs as a consequence of the delay to the sewer design, including its liability to pay delay costs to its builder and the cost of the disruption to the progress of the project.

To analyse the effect of the delay to the sewer design on the progress of the project, the parties had engaged programming experts who are well-known and highly respected in this field. These experts had used different and competing methods to analyse the delay to the project, with vastly different results.

Since this was a complex and technical matter, the Court engaged its own expert, Mr Ian McIntyre, to advise it on the effect of the delay that resulted from the late sewer design.

White Constructions had sought to rely on the evidence of its builder's site foreman and supervisor about the activities affected by the delay to the design. However, Hammerschlag J commented that the primary source of evidence of what was actually happening on the project was the builder's site diary, and he noted that this diary, while comprehensive, was significant in what it did *not* say about any activities that needed to be reprogrammed due to the delay in the sewer design.

Accordingly, Hammerschlag J held that White Constructions had not established that the delay to progress had been specifically caused by the delay in the sewer design, instead of by any other factor.

White Constructions appealed to the NSW Court of Appeal.

Bell P (with whom the other justices relevantly agreed) looked at the warranties given under the Deed and agreed with Hammerschlag J's reasoning about their construction. His Honour stated that the fact that it was a multi-party deed did not, by reason of that fact alone, mean that every warranty given by one party is given to the benefit of every other party. Further, the context of the Deed being required by Sydney Water was highly relevant, and it made "perfect commercial sense" that the warranties contained in the Deed would be directed to Sydney Water, and be for Sydney Water's benefit. His Honour also pointed out that he would have expected that any warranty for the benefit of White Constructions would have been in IWS's initial engagement, rather than a later Deed.

Next the Court of Appeal considered the question of whether an instruction had been made by White Constructions with respect to the type of design to be implemented, and it refused to interfere with Hammerschlag J's findings in this regard. Relevantly, Bell P cited *Fox v. Percy* and other High Court authority to the effect that an appellate court should be slow to interfere with a trial judge's factual findings on the evidence, since the trial judge has the added advantage of forming impressions during cross-examination of witnesses. This was particularly relevant in the current situation where Mr Unicomb and Mr Edwards gave conflicting evidence of whether the instruction had been given, had each been cross-

examined over several days, and their credibility was a determining factor.

Accordingly, the appeal was dismissed.

The decisions in this case at primary and appeal level together illustrate the importance of good record keeping where a project does not go exactly to plan.

The circumstances of the giving of the instruction became the lynchpin of the case; however there was no clear document recording that the instruction had in fact been given. While the oral evidence ultimately was in IWS's favour, they ran a significant risk that the Court would find that no such instruction had been made, and therefore they had breached their obligations under their engagement.

Similarly, White Constructions would have been better served to have kept comprehensive records of how the project was being delayed as a consequence of the delay to the sewer design, including the specific activities on site that were being affected, and the extra costs that were being incurred. Such contemporaneous evidence would have given White Constructions a significant advantage in the presentation of its case, meaning it would not have needed to rely on an expert's opinion of what *might* have happened.

If you are working on a project and start to encounter difficulties and delays, you should start diarising those events now. It is also prudent to send correspondence to the other parties noting for the record what is happening – in terms of both cause and effect. A carefully worded letter can avoid causing aggravation, but can still provide the necessary protection if a formal claim needs to be made in the future.

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EMPLOYMENT ROUNDUP

Class actions against employers made easier

A recent decision of the Full Federal Court has made it more likely that employers will become the subject of class actions by employees claiming underpayments of benefits.

The decision in *Augusta Ventures Limited v Mt Arthur Coal Pty Ltd* [2020] FCAFC 194 concerned whether it was appropriate for an order to be made in an industrial relations class action requiring, effectively, the applicant (worker) to provide security for costs.

Security for costs

In general litigation, the usual outcome of a case is that the unsuccessful party has to pay the costs of the successful party.

An order for security for costs can be imposed where there is reason to believe that – if the claim was unsuccessful – the party bringing the claim would not be able to meet an order in favour of the defending party that the loser pay the winner's costs. Orders for security for costs are often made where the claimant in proceedings is a corporation which has little paid up capital or otherwise few, if any, assets. Similarly, orders for security can be made where a claimant is a liquidator, or a foreign entity.

When an order to provide security for costs is made, the proceedings are liable to be stayed (or dismissed) if the security is not paid or provided as ordered. In other words, if the security is not provided, the case cannot go ahead.

On the other hand, an order for security for costs is rarely made where the claimant is an individual (resident in Australia) - regardless of what his or her ability may be to meet any costs order made in the proceedings. The reluctance to make a security order against an individual stems from the fundamental premise that citizen members of our society should not be prevented from access to the courts to seek adjudication of their claim.

Class actions

Most class actions are funded by third party litigation funders. Generally, these organisations agree to meet the various costs of running a case in return for a percentage of any pool of money secured through a settlement or judgment.

In addition, it is usually the case that in commercially funded class actions, the applicant – who brings their own claim and the claim on behalf of all other group members – will be ordered to provide security for the respondent's costs.

Such security, when ordered, can be for very significant sums. By and large, it is the litigation funder, rather than the applicant, who actually puts up the security.

Fair Work Act

Section 570 of the Fair Work Act 2009 (Cth) (***FW Act***) alters the normal rules relating to costs. It provides, relevantly:

> *(1) A party to proceedings in a court in relation to a matter arising under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2)*
>
> *(2) The party may be ordered to pay the costs only if:*

(a) *the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or*

(b) *the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs;*

The section operates as a qualification on the general discretionary rule with respect to costs vested in the Court. Instead of the usual rule that costs will "follow the event", s 570 provides that parties in proceedings in relation to matters arising under the FW Act are not, in the absence of some form of unsatisfactory conduct, to be required to pay the costs of another party.

For this reason, proceedings under the FW Act are generally considered to be "no costs" actions. Costs order against claimants are rarely made.

Mt Arthur

How do all the above factors come together in an industrial relations class action funded by a commercial litigation funder?

In Mt Arthur, the claims brought on behalf of group members cover people who, essentially, worked at the Mount Arthur Coal Mine during relevant periods; were covered by a relevant Award or Enterprise Agreement; worked in accordance with the "Mine Roster"; and were treated as casual employees.

The respondents are companies which conducted the mine, and entities which served as 'labour hire' providers to the mine operators.

The representative applicant alleges that he and group members were engaged as "other than casual" employees within the meaning of s 86 of the FW Act, with some being permanent full time employees, and others being permanent part time employees within the meaning of the enterprise agreement and the Award. It is alleged that they were not provided with all of their work entitlements, including accident pay entitlements, and that on termination on the grounds of redundancy, were not paid the entitlements provided for in the enterprise agreement or the Award.

The claims seek orders that the respondents are liable to pay the employees compensation in respect of the loss suffered because the entitlements were not paid, and pecuniary penalties. Additionally, a claim is made against one of the labour hire entities that it made representations that the employees were casual employees, and were not entitled to any entitlements, amounting to misleading representations about the workplace rights of the employees.

Initially, the Federal Court ruled that UK-based Augusta Ventures, the litigation funder in one of the class actions, must pay more than $3 million in security for costs before proceeding.

That decision was the subject of an appeal and was overturned by the Full Federal Court.

Essentially, the Court took the view that it was no a proper exercise of the discretion to order security to be given where the possible effect of such an order – if not complied with – would be that the proceedings could not be continued.

The Court said:

> *"But where the FW Act provides that no party is to be liable for costs, except in circumstances where he, she or it has behaved in a manner worthy of criticism, it would appear wrong to stay, dismiss, or by some order against the funder otherwise impede, a party's ... action, ... seeking to vindicate workplace rights by reason of a failure of a third party to provide security for costs, for which the party will not and cannot be responsible."*

Put another way, if the claim of an individual would be protected from a security order by section 570, then so too should be the claims of all individuals who bring a collective claim – through one representative – in a class action.

It does not matter that an order for security is made – as here – directly against a litigation funder, because the effect is the same – the order involves a possibility of impeding the claims from proceeding.

In light of the decision, the prospect of security for costs being ordered in future industrial class actions seems remote. This will likely lead to an increased appetite for such claims to be made against employers.

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Employer's adverse action against a senior employee results in a judgement of $5.2m

The Federal Court has recently determined an employer had taken adverse action against a long-term employee. The judgment included determining the employer and its Executive Chairman had breached civil penalties provisions of the fair Work Act, 2009.

The employee commenced employment with Technology One as the State Manger for Victoria in July 2006. In 2006 the annual revenue of Technology One was $66m. By 2016 the company had grown significantly and had annual revenue of approximately $250m. The employee's income increased from $208,000 in 2006 to $845,000 in the 2015/16 year. Most of that increase was attributable to incentive payments.

The employee received the Chairman's Award in 2010, 2012, 2013 and 2014 for his performance. It was undisputed, for a great part of his service, the employee's employment was of significant mutual financial benefit to both him and Technology One.

The Executive Chairman gave evidence that in 2014 he began to question whether the employee was the right person to take the business forward. However he conceded that until the events which led him to terminate the employee in 2016, he remained confident the employee had support from other senior executives.

It was uncontentious that from 2010 the employee had to grapple with a self perceived burden of guilt. The employee's daughter in 2010 became seriously ill, requiring hospitalisation. The employee's feelings of guilt stemmed from prioritising his work for Technology One over his daughter's serious illness.

His Honour Justice Kerr was satisfied any depression did not cause material decline in his performance.

The employee was summarily dismissed by the Executive Chairman in May 2016.

As a result of his dismissal, the employee suffered a profound mental breakdown. It was not in dispute that after he was dismissed the employee became and remained incapable of ever working again.

Between 2014 and 2016 the employee came into conflict with several other employees. In April 2016 the employee raised complaints about three senior employees and complained that another two were marginalising him. He raised his complaints with the employer's HR Department and informed HR that he was considering taking legal action. The employee met with HR in April 2016. Following the meeting he was sent an email with a link to Technology One's bullying policy. There was a recommendation by the HR Director that the allegations of bullying against the employee should be investigated. However the Executive Chairman determined he did not want to investigate the complaints and that the employee was to be dismissed after he had concluded a financially significant deal for the company.

The employee's case, other than his contractual claim, was that he was dismissed for the following prohibited reasons, contrary to Section 340 of the *Fair Work Act 2009*:

- seven instances where exercising his workplace rights by making complaints in relation to his employment, in particular, complaints as to his having been bullied;
- his proposed exercise of his right to bring legal proceedings under a workplace law;
- his proposed exercise of a safety net contractual entitlement; and
- having a safety net contractual entitlement.

Sections 340 of the *Fair Work Act 2009* provide as follows:

"340 Protection

(1) a person must not take adverse action against another person:

(a) because the other person:

(i) has a workplace right; or

(ii) has, or has not, exercised the workplace right; or

(iii) proposes or proposes not to, or has at any time proposed not to, exercise workplace rights; or

(b) to prevent the exercise of a workplace right by the other person.

(2) A person must not take adverse action against another person (the second person) because the third person has exercised or proposed to exercise ...."

Section 361 of the *Fair Work Act 2009* provides that if an employee makes an allegation that a person took or is taking an action for a particular reason, it is presumed that action was or is being taken for that reason unless the employer proves otherwise.

It has been decided by the High Court in *"The Board of Bendigo Regional Institute of Technical and Further Education v Barklay* [2012] HCA 32, that the plain purpose of the provision is to throw on the defendant (employer) the onus of proving that which lies peculiarly within its own knowledge.

Ultimately, Technology One had the burden of displacing the statutory presumption provided by Section 361(1) of the FWA assuming the Court found the employee did make the complaints he alleges to the person with authority to address the complaints within Technology One.

Section 361 requires a Court to conclude that the reasons the employee has alleged with his or her employer's reasons for taking adverse action against him or her was in fact the reason for that action, unless the employer can establish that the adverse action was not taken for the alleged prohibited reason.

The Court was satisfied that the Executive Chairman was aware of the employee's previous complaints about being bullied.

The Court made a finding that the Executive Chairman's evidence as to his state of mind cannot be relied on as the truth. His Honour found the Executive Chairman was fully aware of the significance of the employee's exercise of his workplace rights and that the employee's exercise of those rights was a substantial and operative factor in the Executive Chairman's reason for taking adverse action against him.

As such, the Court rejected that Technology One had discharged their onus of rebutting the presumption provided for in Section 361 of the *Fair Work Act 2009*. To the contrary, the Court was satisfied, having regard to the presumption, the employee had established that by dismissing him, Technology One took adverse

action against him because he had exercised, on seven occasions pleaded, a workplace right.

The Court found that Technology One had taken adverse action against the employee for the prohibited reason that he made complaints or enquiries in relation to his employment, being the bullying complaints. The Court determined that the sole decision maker responsible for terminating the employee was the Executive Chairman who was aware of the bullying allegations when terminating the employee. The Court found the Executive Chairman chose the interests of the alleged bullies over the interests of the employee and terminated his employment unlawfully.

The Court hypothesised that had the Executive Chairman taken the advice of HR and undertaken an investigation, this would have likely led to consideration of the conduct of senior staff members including HR and any informal investigation would risk uncovering issues which the Executive Chairman would prefer not to explore.

The employee was awarded $2.825m for his future economic loss, representing over four years of future losses, $756,410 compensation for share options not received and $1.590m in damages for breach of contract and $10,000 in general damages for pain and suffering.

In imposing a pecuniary penalty against Technology One as the employer, the Court noted:

- there was no urgency required with the termination and no attempt was made to raise or resolve the issues with the employee prior to him being dismissed. He was never given a chance to respond to the alleged complaints about his performance behaviour and there was no investigation into the allegations against him.
- It was noted Technology One had not exhibited any contrition.

Given the nature of the conduct and the fact that it was carried out by a publicly listed company, the Court accepted the penalty should be larger rather than smaller. Deterrents both as to general and specific loomed as large factors to determine the appropriate penalty. It was noted the company had not had a previous offence which allowed for a discount from a penalty close to the highest end of the scale. The Court imposed a pecuniary civil penalty of $40,000.

The same factors applied for the Executive Chairman's civil penalty. The Court noted the Executive Chairman twice rejected professional HR advice that it would be unfair to dismiss the employee on the basis of mere allegations. In the end, the Executive Chairman chose to stand with the bullies rather than the bullied.

The Court noted in respect to deterrents, CEO's in a like position to that of the Executive Chairman need to know that such temptation to terminate employees who have made complaints regarding their employment are to be resisted and there will not be an insubstantial price for failing to do so.

The Court imposed a penalty on the Executive Chairman of $7,000.

Pursuant to Section 546(3)(c) of the *Fair Work Act 2009*, those pecuniary penalties were paid to the applicant.

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WORKERS COMPENSATION ROUNDUP

Counting the Cost of Covid-19: The Regulator's Response

The NSW Government and the State Insurance Regulatory Authority ("SIRA") continue to grapple with management of the NSW workers compensation system in the post pandemic period.

Both the Government and the Regulator are now counting the cost of the emergency measures adopted during the height of the COVID-19 crisis and their response will impact all stakeholders.

Proposed Premium Cost Sharing Mechanisms

In May 2020 amendments were made to the *Workers Compensation Act 1987* ("1987 Act") to introduce a rebuttable presumption that workers in "prescribed employment" who contracted COVID-19 did so in the course of their employment so as to satisfy the definition of an "injury" for the purpose of Section 4 of the 1987 Act.

The purpose of the amendments was to rationalise the claims management process for insurers and relieve the usual burden on a worker to establish on the balance of probabilities that they had suffered injury arising out of or in the course of their employment as required by Section 4 of the 1987 Act.

As the State emerges from the grip of the pandemic, SIRA has suggested the burden of the presumptive legislation has been unequally shared and contends there is a "strong public interest case" for all insurers and employers in New South Wales to contribute to the cost of COVID-19 workers compensation claims.

SIRA is proposing a cost sharing mechanism with the purpose of redistributing the costs of COVID-19 claims across the entire workers compensation system.

In the view of the Regulator, this mechanism will prevent individual employers and insurers bearing a disproportionate and inequitable amount of risk which in turn will promote a healthy and competitive workers compensation market in New South Wales.

Noteworthy, SIRA envisages that redistributed costs will be passed predominantly on through employer premiums. In its opinion this will allow all employers in New South Wales to contribute to supporting workers who contract COVID-19 at the workplace.

The Regulator has yet to specify the "mechanism" which will be employed to achieve this outcome.

SIRA has invited consultation from employers and insurers on the proposal with the opportunity for stakeholders to provide feedback closing on 18 December 2020.

No matter what mechanism is adopted, employers in NSW can expect an impact on premiums given the Regulator's desire to impose a "level playing field" regarding financial risk in the post pandemic period.

Calculation of Pre-Injury Average Weekly Earnings ("PIAWE") Post COVID-19

As discussed in our previous edition, the Workers Compensation Amendment (COVID-19 Weekly Payment Compensation) Regulation 2020 commenced on 23 October 2020.

The amendment further complicates the calculation of PIAWE when assessing an injured worker's entitlement to weekly compensation in accordance with the provisions of the 1987 Act.

The amendment is directed to clarifying how JobKeeper payments and other COVID-19 related impacts on an injured worker's earnings are to be considered in calculating weekly payments and pre-injury average weekly earnings.

To ensure that injured workers are not disadvantaged by a financially material reduction to their total earnings during the period prescribed for the calculation of their PIAWE, the amendment allows for an adjustment to exclude the period of reduced renumeration in the calculation of the worker's average weekly earnings.

Further, the amendment provides that only earnings for "work performed" may be included in the calculation of PIAWE however when an insurer comes to calculating the weekly benefits payable, JobKeeper payments are included in the "current weekly earnings" of an injured worker.

The recent amendments to the calculation of PIAWE are designed to ensure that an injured worker's PIAWE is not adversely impacted by matters out of their control though they will likely add a further complication to an already complex process.

The Regulation will no doubt be the subject of further amendment by the NSW Government in response to developments in regard to the pandemic and the position of the Commonwealth Government.

The legacy of the COVID-19 Pandemic in regard to both employer premiums and management of claims promises to represent a challenge to employers and their insurers for some time to come and we will ensure that our readers are kept up to date with developments in these areas.

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Leave to commence proceedings out of time - s151D of the Workers Compensation Act 1987

Donoso v Blacktown City Council [2020] NSWDC 656

Background

The plaintiff commenced employment with the defendant as a cleaner in October 2011.

By his Statement of Claim filed on 27 April 2020, the plaintiff sought work injury damages for an injury which he asserted was suffered during his employment with the defendant on 16 April 2016.

The plaintiff pleaded that he was injured while moving a timber table from a stack of tables stacked vertically against a wall when a table in the stack fell over and struck him.

The episode resulted in injuries to his left wrist, left shoulder, head, and included surgical scarring.

Application for leave

The Statement of Claim was filed outside the three-year limitation period prescribed by s151D (2) of the Workers Compensation Act, 1987 (1987 Act).

The provision states:

> *"A person to whom compensation is payable under this Act is not entitled to commence court proceedings for damages in respect of the injury concerned against the employer liable to pay that compensation more than 3 years after the date on which the injury was received, except with the leave of the court in which the proceedings are to be taken."*

The plaintiff brought an application for leave to commence proceedings, *nunc pro tunc* against the employer under s151D (2) of the *Workers Compensation Act 1987 (NSW).*

Applicable legal principles

In *Gower v State of New South Wales* [2018] NSWCA, the NSW Court of Appeal noted: *"the limits of the discretion to extend limitation periods were marked by the subject matter, scope and purpose of the relevant legislation."*

In *Itex Graphix Pty Ltd v Elliott [2002] NSWCA 104*, the Court of Appeal had approved the formulation that the relevant test was what the *"justice of the case"* required.

The Court noted that the nature of an injury may be such that no proceedings can be bought for years after

the event because the degree of permanent impairment cannot be ascertained.

Further, the Court observed that the proper exercise of discretion for leave to be granted was likely to be influenced by whether the claim in negligence had merit balanced against the degree of prejudice to the defendant caused by the delay in issue.

Submissions – plaintiff

It was submitted on behalf of the plaintiff that steps were taken to notify the defendant of a proposed claim for work injury damages prior to the expiry of the limitation period.

This was identified as something that a worker might do in anticipation and mitigation of an employer's later complaint of prejudice flowing from a lack of notice.

The plaintiff submitted that it could be clearly inferred that the period of delay relied upon was explicable by the circumstance that the plaintiff's medical condition had not yet stabilised to allow an assessment of permanent impairment.

Submissions – defendant

The defendant submitted that the plaintiff had not sufficiently explained the basis for the delay on his part.

Referring to the affidavit in support, the defendant noted a period of nine months that the plaintiff had failed to address. The defendant cited *Holt v Wynter (2000) 49 NSWLR 128* as authority for the proposition that it was necessary for the plaintiff, on an application of this kind, to provide a *"sufficient"* explanation for delay.

Relevant considerations in granting leave

The Court noted that the proceedings were commenced just over a year after the expiration of the limitation period. Having regard to the plaintiff's evidence regarding his injury and subsequent treatment, The Court considered that this was ''not an overly substantial period of delay".

The plaintiff had the onus of establishing that leave ought be granted. The main considerations for the Court were whether an adequate explanation had been given for the delay, whether the limitation period had been deliberately run down, the apparent strength of the case, and the extent of actual prejudice to the defendant.

Given the multiple attendances upon a range of treating doctors in the period of delay identified by the defendant, the Court accepted that there was no deliberate conduct on the part of the plaintiff in running down the limitation period.

The defendant disclaimed any suggestion of actual prejudice. Further, the defendant had been on notice of the plaintiff's medical history since the accident in 2016.

If prejudice were presumed, it would only be slight and would not preclude the defendant from receiving a fair trial.

The message

A decision to grant leave to commence proceedings out of time requires the plaintiff to satisfy a two-limb test.

The Court must first be satisfied that the plaintiff provided an adequate explanation for the delay. If so, then the issue becomes whether the defendant is prejudiced by that delay to the extent of undermining the prospects of a fair trial.

In practise, the case law suggests that the Court will adopt a benevolent position when considering the first limb in circumstances where prejudice does not arise, and the plaintiff's claim has reasonable prospects of succeeding.

As such, in cases where the defendant has not been prejudiced by delay, leave to commence proceedings is generally granted by the Court.

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