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UK Test Case (BI Claims for COVID-19): UK Supreme Court The door remains open for claims.

In our October 2020 edition of GD News we summarised the judgment of the High Court of England and Wales (Commercial Division) in *The Financial Conduct Authority v Arch Insurance (UK) Limited & Ors*. This was a test case brought by the FCA against eight insurers regarding the correct interpretation of various policy wordings with respect to business interruption claims arising from losses due to the COVID-19 pandemic.

The decision at first instance was largely favourable to insureds.

The Court subsequently granted permission for the insurers to "leapfrog" the UK Court of Appeal and proceed with an appeal directly to the UK Supreme Court (equivalent to Australia's High Court). The FCA also filed an appeal in relation to some of the findings made by the UK High Court that were unfavourable to the FCA.

The UK Supreme Court appeal hearing proceeded over four days in November 2020 with judgment reserved.

On 15 January 2021 the Court handed down its 112 page judgment, unanimously dismissing all of the grounds of appeal by the insurers and upholding the grounds of appeals by the FCA subject to certain qualifications.

In many respects, the UK Supreme Court has interpreted the insurance policy wordings more widely than the UK High Court did at first instance.

The Supreme Court dealt with the following issues:

- the correct interpretation to be given to disease clauses, prevention of access/public authority clauses and hybrid clauses;
- causation;
- trends clauses;
- the effect, if any, of "pre-trigger losses";
- whether an earlier decision of the High Court be

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followed or rejected (the "Orient Express" decision).

Disease Clauses

These policies contained provisions which in broad terms provided coverage for business interruption in consequence of, following or arising from the occurrence of a notifiable disease within a specified radius of the insured premises; in most cases that radius was 25 miles.

At first instance, the High Court had interpreted these clauses as covering business interruption losses resulting from COVID-19 provided there had been an occurrence (meaning at least one case) of the disease within the geographical radius.

Interestingly, the Supreme Court did not accept this interpretation and accepted the insurers' arguments that each case of illness sustained by a person as a result of COVID-19 (not merely a diagnosis of the disease) is a separate occurrence and these clauses only cover business interruption losses resulting from cases of illness as a result of the disease which occur within the radius.

However, despite the Supreme Court adopting a more narrow interpretation of the disease clauses, its findings with respect to causation (see below) resulted in the same outcome as the High Court first instance judgment, albeit for different reasons.

Prevention of Access and Hybrid Clauses

These clauses specify a series of requirements which must all be met before the insurer is liable to pay. Some clauses applied only where there were restrictions imposed by a public authority following an occurrence of a notifiable disease.

At first instance, the High Court had held this requirement was satisfied only if a measure was expressed in mandatory terms which had the force of law.

The Supreme Court rejected this interpretation as being too narrow and held that an instruction given by a public authority may amount to a restriction imposed if it carries the imminent threat of legal compulsion or if it is in mandatory and clear terms which indicates that compliance is required without recourse to legal powers.

A further issue in these clauses was whether the policy holder's business interruption loss was caused by an inability to use the insured premises.

At first instance, the High Court had held that this means a complete (and not merely a partial) inability to use the premises.

The Supreme Court agreed that "inability" rather than "hindrance" of use must be established but applied a wider interpretation than the High Court. However, the Supreme Court held that this clause can be satisfied where a policy holder is unable to use:

- the premises for a discrete business activity; or
- a discrete part of the premises for its business activity.

The Supreme Court interpreted clauses requiring "prevention of access" to the premises in a similar manner.

The Supreme Court therefore adopted a much wider interpretation of these clauses in favour of insureds.

Causation

Both the UK High Court (first instance) and the UK Supreme Court accepted the argument that each case of the disease was a separate occurrence. It followed that the measures implemented by UK public authorities in response to the COVID-19 pandemic would involve concurrent or multiple causes of loss.

The insurers contended that the Court should adopt a "but for" test of causation.

They also argued that cases of disease occurring inside and outside the specified radius should be viewed in the aggregate so that the overwhelmingly dominant cause of any Government measures was inevitably the cases of COVID-19 occurring outside the radius.

The Supreme Court rejected these arguments as unreasonable.

The Supreme Court concluded that each individual case of COVID-19 which had occurred at the date of any measure by the UK Government was an equally effective proximate cause of those measures.

It was therefore held sufficient for policy holders to establish that, at the time of any Government measure, there was at least one case of COVID-19 within the relevant policy area.

This meant that, once it applied the principles of causation, the Supreme Court reached the same conclusion as the High Court in relation to the correct interpretation and coverage arising from disease clauses despite the Supreme Court adopting a narrower interpretation of the disease clauses than the High Court had at first instance.

In relation to prevention of access/hybrid clauses, the Supreme Court held that business interruption losses are covered only if they result from all elements of the risk operating in the sequence required by the particular wording and which included at least one case within the relevant geographical area.

Significantly, however, the Supreme Court went further. It held that losses which are also caused by uninsured effects of the COVID-19 pandemic are not excluded from cover.

In reaching these conclusions the Supreme Court considered the *Wayne Tank* principle involving concurrent proximate causes of loss. Under that principle, where one proximate cause is covered under

an insurance policy and the other is excluded, the entire claim is not recoverable.

The insurers sought to rely on the above principle and further relied upon an earlier decision of the UK High Court in the *Orient Express Hotels Limited* decision which involved claims arising from business interruption due to Hurricane Katrina. In that case, the High Court had been asked to consider a claim for BI losses where there had been damage occasioned to the insured premises (a hotel) and other BI losses that had been attributable to the wider impact of the hurricane on the city that were not recoverable.

In *Orient Express* the High Court had held that only those BI losses attributable to the damage to the hotel were recoverable.

The Supreme Court agreed with the FCA that *Orient Express* had been wrongly decided and that it should be overruled.

According to the Supreme Court, where both the insured and uninsured perils operate concurrently and arise from the same underlying cause, and provided that cover for the uninsured risk is not excluded, then loss resulting from both concurrent causes is recoverable.

Applying that principle to the COVID-19 pandemic, the insurers had contended that business interruption losses sustained by policy holders either outside the geographical radius for disease clauses or due to the wider impact of the pandemic upon the insured business (rather than the prevention of access or public authority measures implemented as a result of the disease) were excluded.

The Supreme Court rejected this interpretation, particularly with regard to any losses sustained by more wide-ranging impacts of the pandemic because they arose from the same underlying cause, namely the COVID-19 pandemic.

This is a significant expansion on the principles of causation with respect to "proximate cause" where there are concurrent or multiple causes of loss under an insurance policy.

Trends Clauses

Trends clauses are found in insurance policies which provide cover for business interruption losses and are used when quantifying the insured's loss. Their aim is to identify the financial losses that would have been incurred by a business in any event if the insured peril had not occurred.

The insurers raised arguments similar to those with respect to causation. It was submitted that the trends clauses required the loss payable to insureds to be reduced substantially or that liability should be removed because the wider consequences of the COVID-19 public health measures would have caused the insured's losses in any event.

This argument was rejected by both the UK High Court and the UK Supreme Court.

The Supreme Court emphasised that trends clauses are for quantifying loss. They do not delineate the scope of indemnity which is the function of insuring clauses.

The Supreme Court also stated that trends clauses should, if possible, be constructed consistently with insuring clauses.

Trends clauses therefore only allow insurers to make adjustments to reflect circumstances which are unconnected with COVID-19 and not circumstances which are inextricably linked with the outbreak of the disease.

Pre-Trigger Losses

The Supreme Court adopted the same approach as the trends clauses when considering whether losses were covered for any measurable downturn in the turnover of a business due to COVID-19 but before the insured peril was triggered under the policy.

The Supreme Court held only those circumstances affecting the business which are unrelated to the insured peril and its underlying cause (in this case COVID-19) are permitted to be used when reducing the amount of loss for pre-trigger losses.

Put simply, the measure of indemnity should be calculated by reference to what would have been earned by the business had COVID-19 not occurred and disregarding any revenue drop prior to the implementation of the UK Government measures due to the pandemic.

Conclusion

The Supreme Court decision extends the principles of causation in the context of an insurance contract and makes clear that the "but for" test is not determinative in deciding questions of proximate causation in all cases.

Although the "but for" test remains relevant, the Supreme Court stated that the test will not be appropriate where its application results in a narrowing or removal of cover in circumstances where, based on the interpretation of the policy as a whole, that cannot have been the original intention of the parties.

The Supreme Court's more narrow interpretation of the disease clauses, by focusing upon an illness sustained as a result of COVID-19 rather than establishing that a singular case of COVID-19 did not affect the outcome when the principles of causation were applied. The end result was the same for disease clauses as the decision of the High Court at first instance.

In relation to prevention of access and hybrid clauses, the Supreme Court gave a wider interpretation to confirm that in most cases only a partial closure of the business can be sufficient to establish an entitlement to indemnity. The Court also found it was not necessary for such closure to have been due to

mandatory public orders that had the force of law.

These issues are yet to be tested in Australian Courts but the implications from the UK Supreme Court judgment will be far reaching and immediate.

Several media reports have already described the judgment to be a significant victory for small and medium enterprise insureds in the United Kingdom who can now proceed with BI claims arising from closures resulting from the COVID-19 pandemic.

However, the FCA has been at pains to confirm that each policy must continue to be considered against the detailed Supreme Court judgment to work out what it means for any particular insurance policy.

The test case, according to the FCA, was not intended to encompass all possible disputes but only to resolve some key contractual uncertainties and causation issues to provide clarity for policy holders and insurers.

Some commentators have gone as far as to say that the UK Supreme Court decision with respect to causation may open up coverage for BI claims due to other perils such as storms and floods where cover had previously been unavailable.

The UK Supreme Court is due to issue a set of declarations which will provide further helpful guidance in resolving claims.

The FCA has also stated its intention to publish a set of Q&As to assist policy holders in understanding the test case as well as other guidelines regarding different BI policy types that may cover the pandemic and including recommendations on how to establish the presence of COVID-19 within a relevant geographical area.

The UK test case does not bring an end to the uncertainty about the cover available under insurance policies for COVID-19 Business interruption claims in Australia.

Australian business are waiting on the outcome of an application for special leave to appeal to the High Court on the first Australian COVD-19 business interruption claim test case that decided test case that decided insurers cannot deny claims by insureds for loss caused by business interruption due to COVID-19 by relying on an exclusion which excludes "diseases declared to be quarantinable diseases under the Quarantine Act 1908 (Cth) and subsequent amendments".

We now have a second Australian test case underway. Proceedings are being commenced in the Federal Court promoted by AFCA and concerning policies issued by Allianz, IAG, Chubb, Guild, and SwissRe Corporate Solutions. That case will consider many of the issues considered by the UK Supreme Court and reflect on the way Australia should approach COVID 19 business interruption claims.

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Federal Court Weighs in on BI Cover for COVID-19 Losses

Test cases involving business interruption (BI) claims for losses arising from shutdowns consequent upon orders made by public authorities due to COVID-19 have been handed down in the UK and NSW in recent months.

The UK test case considered various insurance policies involving coverage for disease, prevention of access, partial or total closure and the application of exclusion clauses. When judgment was handed down by the UK High Court in September, the policies containing disease clauses were interpreted favourably for insureds. The matter went on appeal to the UK Supreme Court and judgment was recently handed down (and is discussed later in this newsletter).

The NSW test case involved a consideration of whether an insurer could rely upon an exclusion clause which referred to repealed legislation to exclude a BI claim for COVID-19 losses. In a unanimous decision handed down in November by a bench of five appeal judges, the NSW Court of Appeal found against the insurers, holding that COVID-19 was not a quarantinable disease within the meaning of the *Quarantine Act 1908* (Cth), and the *Biosecurity Act 2015* (Cth) which replaced it was not an "amendment". An application for special leave has been filed with the High Court.

We await with interest the outcome of those appeals and in particular, whether the High Court of Australia decides to grant special leave from the decision of the NSW Court of Appeal.

In the meantime, the Full Court of the Federal Court of Australia recently weighed in on a separate question concerning the application of an exclusion clause under a policy which provided business interruption cover where the exclusion clause referred to the *Biosecurity Act 2015* (Cth) not the *Quarantine Act 1908* (Cth).

In *Rockment Pty Limited t/as Vanilla Lounge v AAI Limited t/as Vero Insurance*, the Full Court (comprising Besanko, Derrington & Colvin JJ) was asked to determine the following question:

> *"Is it sufficient to exclude coverage under the exclusion in Clause 8 in Section 5 of insurance policy SPX015934895 if the claim is for loss or damage that is directly or indirectly caused by or arises from, or is consequence of, or contributed by a human disease specified in a declaration of a human biosecurity emergency under the Biosecurity Act 2015 (Cth)?"*

In a joint judgment the Court answered the question: *"No"*.

It is important at the outset to note that the Full Federal Court was not asked to determine whether the

exclusion clause applied to the particular facts of this case. Rather, the Court's judgment was confined to determining the separate question which was essentially confined to a determination of what constituted the relevant causative trigger under the exclusion clause.

This required the Court to undertake an analysis concerning the correct interpretation of the insurance policy and the exclusion clause.

Rockment was the owner of a café and restaurant which traded under the name "Vanilla Lounge" from premises in Victoria. It held a policy of insurance with Vero for the period 6 June 2019 to 6 June 2020 which included business interruption cover.

The insuring clause under the heading "Infectious Disease, Murder, Suicide" provided cover for:

> *"Loss or damage as a result of the closure or evacuation of the whole or part of the premises by order of a competent Government, public or statutory authority as a result of:*
>
> *(a) infectious or contagious human disease occurring at the premises;*
>
> *...*
>
> *(b) the outbreak of a notifiable human infectious or contagious disease occurring within a twenty (20) km radius of the premises."*

Immediately following the above insuring clause under the heading "What we do not Cover", was the following exclusion clause:

> *"We will not pay any claim that is directly or indirectly caused by or arises from, or is in consequence of or contributed by:*
>
> *(a) cleaning, repairing or checking your premises; or*
>
> *(b) highly pathogenic avian influenza or any biosecurity emergency or human biosecurity emergency declared under the Biosecurity Act 2015 (Cth), its subsequent amendments or successor, irrespective of whether discovered at the premises or the breakout is elsewhere."*

On 21 January 2020 a determination was made under Section 42 of the *Biosecurity Act 2015* (Cth) that human Coronavirus with pandemic potential was a listed human disease within the meaning of the Act.

On 25 January 2020 a case of the 2019 novel Coronavirus was confirmed in a visitor to Victoria who had travelled from China.

On 15 March 2020 the first case of community transmission of COVID-19 in Victoria was detected.

On 16 March 2020 a State of Emergency was declared in Victoria pursuant to the *Public Health and Wellbeing Act 2008* (Vic). That State of Emergency was extended on several occasions.

On 18 March 2020 the Governor General issued the Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 pursuant to Section 475 of the Biosecurity Act declaring that a human biosecurity emergency existed in Australia.

Whilst the making of that declaration enlivened powers under the Biosecurity Act by which the Commonwealth Minister for Health might impose restrictions on human activity, there was no relevant exercise of that power in this case.

The relevant directions limiting human activity across Victoria were made by the Victorian Chief Health Officer under the Victorian Act.

For the purpose of the separate question posed for the Full Federal Court, it was assumed that the effect of the directions by the Victorian Chief Health Officer was that Rockment was required to limit the operations of the Vanilla Lounge and in consequence it suffered a decline in gross profit.

On 14 April 2020, Rockment notified Vero of its intention to make a claim on its business interruption cover. On 4 May 2020, Vero declined indemnity by reason of the exclusion clause.

The Full Federal Court observed that the task for the Court was to identify the causal factor in the exclusion clause.

Was it the declaration made under the Commonwealth Biosecurity Act?

Was it the emergency?

Or, as Vero submitted, was it the listed human disease underlying the emergency?

Vero, as the party with the burden of proof in relation to the application of the exclusion clause, submitted that the relevant trigger was loss caused by the existence of a listed human disease which formed the basis of a declaration of a human biosecurity emergency under the Commonwealth Act.

Alternatively, the insurer advanced a wider submission that the exclusion operated when the claim was caused by the state of affairs which constituted the human biosecurity emergency declared under the Commonwealth Act.

Rockment submitted the trigger was the making of the declaration of a human biosecurity emergency and that the declaration here did not cause the lockdown and the consequent claim. It was contended for Rockment that the emergency necessary to trigger the exclusion existed only once it was declared to be such and it was not distinct from the declaration itself.

The consequence of Rockment's interpretation would be that the exclusion clause operated only where the loss or damage was causally consequential upon the making of the declaration under the Commonwealth Act. Here, it was submitted that Rockment's loss was a consequence of directions made under the Victorian

Act and not a loss consequent on or caused by the declaration under the Commonwealth Act.

Both parties resorted to reliance upon the alleged purpose of the policy and the exclusion in support of their respective submissions. The Court observed:

> *"It must be kept in mind that the purpose or object of a policy or of a particular provision is not some vague and malleable notion to which reference can be made to guide the construction of ambiguous provisions. It must be logically and rationally ascertained from the language used by the parties, the surrounding circumstances, and the general nature of the provision in question. Where there is debate about the meaning of a provision there will, of course, often be attention between the need to consider the words which the parties actually used and the purpose which the clause was intended to achieve. Both, however, are relevant."*

The Court accepted that in this case the purpose of the exclusion was to remove certain claims for loss or damage from the scope of cover provided by the insuring clause.

Vero submitted the Court should accept it would be uncommercial for insurers to provide cover against losses arising from pandemics and that if it were found that losses from such events were covered it would impose a potentially unsustainable strain on the resources of insurers.

In addressing this issue the Court stated:

> *"None of these submissions are relevant to the Court's decision and they have not been taken into account. Apart from the fact that Courts could expect that insurers are not likely to offer high risk cover for matters such as pollution or pandemics, save pursuant to express provisions, the economic impact of the Court's decision on Vero or other insurers has, and has had, no bearing on the outcome of this case."*

In answering the separate question the Full Court stated that the question as formulated posed difficulties. Vero's preferred construction, namely that the essence of the exclusion's causal factor was the listed human disease may well facilitate the establishment of the connection required for its triggering but it was a significant departure from the ordinary meaning of the words used.

The insurer's desired outcome was that, once a disease becomes the subject of a human biosecurity emergency declaration, any claim consequent upon a closure, required because of the disease, would fall within the exclusion.

Further, the Court noted that a disease may become a listed human disease under the Biosecurity Act but not ever become specified in a declaration of an emergency. To that extent, a listed human disease specified in a declaration, of itself, is not the emergency to trigger the exclusion.

It held that an emergency of a particular character must exist in order for there to be a declaration under the Biosecurity Act.

The Court held that in ascertaining whether the exclusion operates in a particular case will require an examination of the causes for any Governmental imposed closures. Where they occur as a result of directions or requirements made under the Biosecurity Act consequent upon the making of a declaration it is likely the causal connection will be easily satisfied.

Where, as in the present case, the closures were pursuant to the exercise of power by a State or local authority, albeit after the making of the declaration, the position is less clear and consideration may have to be given to inter-Governmental agreements and protocols between the State and Federal body politics and the practical realities of the circumstances which arise once the Governor General has made a declaration.

However, as the parties specifically asked the Court not to determine any issue regarding whether the closures imposed by the Victorian State Government were caused by the existence of the emergency, the Court did not consider those issues further.

It followed that the question posed for the Court's determination was answered in the negative. It was held to be insufficient to exclude cover if the claim is somehow causally connected to a human disease specified in a declaration of a human biosecurity emergency.

The relevant question of causation is, according to the Full Federal Court, a matter of fact to be answered in the circumstances of each particular case and here the clause operates to exclude a claim where the relevant trigger is the human biosecurity emergency declared under the Biosecurity Act and not the human disease specified in that declaration.

The Court was at pains to emphasise that the result, although favourable to the insured, did not reflect the arguments presented by either party. The Court noted it did not accept Rockment's construction of the exclusion clause and whilst Vero contended the question should be answered in the affirmative, the construction accepted by the Court was closer to the insurer's alternative construction than any proffered by Rockment.

This decision provides little utility for insurers. Although the judgment considered the wording of an exclusion clause that might be common to other insurers and policies providing BI cover in the marketplace, the Court did not decide the ultimate question - namely whether the exclusion clause applied in this particular case.

Rather, the scope of the Court's decision was confined to a determination of a separate question that focused on whether the human disease itself, namely COVID-19, was a sufficient causative trigger to enliven the exclusion clause. The Court held it was not.

Based on the wording of the exclusion clause, the Full Federal Court held that it was the emergency in the declaration, not the human disease giving rise to it, which triggered the exclusion clause.

The Court expressed some misgivings about the exclusion clause being poorly worded. However, in keeping with the theme of the recent NSW Court of Appeal test case, the Federal Court gave considerable weight to the actual wording of the policy when interpreting its meaning consistent with the purpose of the overall policy as a whole.

The more wide-ranging implications for the insurance industry will be felt from the UK and NSW appeal judgments. Those final pieces in the puzzle will make the overall picture clearer for insurers.

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Time to Pay on Time: Shaming Late Payers

On 1 January 2021, the Payment Times Reporting Scheme commenced in accordance with the *Payment Times Reporting Act 2020* (Cth) (Act) and the *Payment Times Reporting (Consequential Amendments) Act 2020* (Cth).

The scheme requires large businesses and large government enterprises to report on their payment terms and practices with small businesses.

It is hoped that the scheme will:

- improve payment times for small businesses;
- provide increased transparency around the payment performance of large enterprises;
- assist small businesses in deciding who to do business with;
- incentivise improved payment times and practices;
- reduce the impact of delayed payments on small business cash flows; and
- assist the public in making decisions about the large businesses they buy from.

Reporting Entities

The Scheme applies to:

- large businesses and certain government enterprises with a total annual income exceeding $100 million;
- controlling corporations where the combined total annual income for all members exceeds $100 million; and
- businesses with a total annual income exceeding $10 million and that are part of a group headed by a controlling corporation with a collective income exceeding $100 million,

(Reporting Entities).

Businesses that fall within one of the above categories are required to report twice yearly on their payment terms and practices for their small business suppliers over the previous 6-month period (Reporting Period). Reports must be provided within three months after the end of each Reporting Period. The scheme also permits businesses that do not fall within one of the above categories to voluntarily report in April 2021.

Rather than requiring Reporting Entities to pay small businesses within a certain period, the scheme provides a framework to encourage greater transparency over the payment practices employed by large businesses.

Small Business Identification Tool

The Small Business Identification (SBI) tool will identify a business as a small business if its annual turnover was less than $10 million for the most recent income year.

Reporting Entities can use the SBI tool to identify their small business suppliers. However, Reporting Entities will not be required to report on their payment terms and practices with small businesses that opt out of being identified by the SBI tool.

The Payment Times Reporting Regulator

The scheme will be administered by a regulator appointed by the Secretary of the Department of Industry, Science, Energy and Resources.

The Regulator will maintain a central public register known as the "Payment Times Reports Register" (PTRR). The PTRR will be available to the public free of charge and show how Reporting Entities pay their small business suppliers.

Reports must include certain content such as:

- a Reporting Entity's standard payment periods, including the shortest and longest standard payment periods;
- the proportion (in terms of total number and total value) of small business invoices that were paid by the Reporting Entity within 20 days, between 21 and 30 days, between 31 and 60 days, between 61 and 90 days, between 91 and 120 days and more than 120 days after the invoice was issued; and
- the proportion (in terms of total value) of all procurement by the Reporting Entity from small business suppliers during the Reporting Period.

Penalties

Reporting Entities may be subject to civil penalties where the Reporting Entity:

- fails to comply with an audit notice issued by the Regulator;
- fails to keep records used in preparing payment

times reports for at least seven years after the end of the Reporting Period;

- fails to provide an auditor with all reasonable facilities and assistance necessary for the auditor's duties; and
- provides false or misleading information to the Regulator.

The Regulator may also publish the identity of Reporting Entities and details of non-compliance on the PTRR where a Reporting Entity fails to comply with the Act.

A 12-month transitional period (expiring in December 2021) will apply before compliance and enforcement measures are applied.

Key takeaways

The Payment Times Reporting Scheme imposes significant compliance burdens on Reporting Entities. As a result, businesses should assess whether they are a Reporting Entity and if so:

- familiarise themselves with the scheme as a priority;
- review payment systems and procedures; and
- review governance structures.

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CONSTRUCTION ROUNDUP

Design and Building Practitioners Regulation 2020

On 10 June 2020, as part of its reform of the construction industry in New South Wales, the NSW Government enacted the *Design and Building Practitioners Act 2020*.

Various aspects of the new Act were to commence on the date of its assent (ie 10 June 2020); other parts of the Act are to commence either on 1 July 2021 or on a day to be appointed by proclamation

Pursuant to the new *Design and Building Practitioners Act 2020*:

- design and building practitioners (including architects, engineers, consultants, and building contractors) must be registered and covered by insurance;
- the main aspects of the design (including all variations) are to be fully documented;
- each design and building practitioner is to provide a declaration that their work complies with the Building Code of Australia, including any performance solution implemented where the relevant item of work is not automatically deemed to comply with the BCA's requirements;
- particularly where the work is "residential building work" within the meaning of the HBA, each design and building practitioner is subject to a statutory duty of care owed to (amongst others) owners corporations and having retrospective effect with respect to construction work carried out up to 10 years ago;
- owners corporations will be entitled to recover economic loss suffered by reason of a breach of this statutory duty of care, including the value of an owners corporation's liability to rectify any defects in the common property and any consequential damage to individual owners' lots or third party property.

At the end of last year, a draft Design and Building Practitioners Regulation was released to the public for consultation. This consultation period expired on 11 January 2021.

Interestingly, the proposed Regulation now confines the building work which is the subject of the Act to Class 2 buildings or buildings which contain a Class 2 part. A Class 2 building is one which contains two or more sole-occupancy units, each being a separate dwelling. Usually, this would be an apartment building, but it may also include townhouses which share a common basement garage.

For practical purposes, this means that the reform introduced by the NSW Government (including the requirement for registration and insurance of building and design practitioners) is now limited to the design and construction of residential apartment buildings. While this may assist in addressing the public's concern about defects in newly constructed apartment buildings, the downside is that "cowboy" builders who do not want to comply with the new regime or who cannot arrange insurance may focus their work on other areas of the construction industry – such as the wide scale construction of residential houses or commercial buildings - which may also need reform in the future.

The proposed Regulation introduces time periods for compliance with the requirements of the Act. However, they also create additional obligations on the part of the design and building practitioners.

For example, section 15 of the Act provides that a building practitioner must provide the Secretary with copies of the design documents and design compliance declarations no later than 90 days after the occupation certificate is issued for the building.

However, Clause 16 of the proposed Regulation provides that these documents are now also to be provided to the Secretary before the relevant building work is commenced. A failure to comply with this requirement can attract a fine of $22,000 for a

company and $11,000 for an individual. It is therefore worthwhile to carefully review the Regulation together with the Act to identify all the obligations and time requirements relevant to a party's participation in a construction project.

The draft Regulation also sets out details of the process for becoming registered as a practitioner and for continuing professional development. It is interesting to note that geotechnical engineers (who were overlooked by the Act) would also now be required to be registered.

The requirements for the professional indemnity insurance which is required to be maintained by practitioners are also detailed in the draft Regulation.

Importantly, the insurance coverage for a design practitioner is required to extend to all liability incurred at any time since that individual first became a design practitioner, and partnership and corporate policies are required to extend to all employees of the design practice.

Interestingly, such a wide scope of coverage is not required for building practitioners. Instead, the proposed Regulation provides that the insurance to be maintained by a building practitioner must, in his own reasonable opinion, provide for "an adequate level of indemnity for liability that could be incurred" in the course of his work.

In determining whether a policy provides for an adequate level of indemnity, the practitioner is required to take into account matters such as:

- the nature and risks associated with his work
- the volume of work typically carried out
- the length of time he has been registered
- a reasonable estimate of claims that could be brought against him
- his financial capacity and
- the policy's terms, limits, exclusions etc.

These provisions are likely to lead to the question of whether a builder's own opinion of the adequacy of his insurance is reasonable, given that it is financially prudent (and usual practice) for a builder to obtain the most cost-effective insurance coverage that is available.

Another requirement introduced by the proposed Regulation is to keep all records associated with a construction project for at least 10 years. These records must be kept in the practitioner's business premises or at another location approved by the Secretary (a secure archive facility is likely to be approved).

Since many construction records are now kept solely in electronic form, this obligation means that a practitioner will need to arrange specialist archiving and retrieval of electronic data when they purchase new software or upgrade their hardware and software during this ten-year period.

Since non-compliances with the new regime may result in a practitioner being liable for several hundred thousand dollars in fines, it is extremely important that every person involved in the construction of Class 2 buildings fully understands their obligations and sets up processes to ensure that they do not fall foul of the new law.

Our expert lawyers at Gillis Delaney Lawyers can provide advice on your obligations under the Act and the proposed Regulation as well as training your personnel on the appropriate processes and documentation.

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A drastic change for residential builders and homeowners in NSW

Up until now, the *Building and Construction Industry Security of Payment Act 1999* (NSW) has only affected the commercial sector of the construction industry. However, from 1 March 2021, owner occupiers will also be required to understand and apply the Act with respect to the construction of their family homes.

In 2020, the NSW Government introduced the Building and Construction Industry Security of Payment Regulation 2020. The 2020 Regulation made changes to four key areas:

- trust account management;
- supporting statements provided by head contractors;
- adjudicator requirements; and
- owner occupier contracts.

The 2020 Regulation commenced on 1 September 2020 (except for Schedule 2) and repeals the Building and Construction Industry Security of Payment Regulation 2008, which was otherwise set to lapse on 1 September 2021.

Schedule 2 will commence on 1 March 2021 and amends the definition of "exempt residential construction contract" with the effect that residential constructions contracts are now caught under the security of payment regime.

The 2020 Regulation provides the legislative support and administrative detail for the operation of the Security of Payments Act. These amendments also aim to implement the recommendations of independent reviews relating to the sector, including the Review of Security of Payment Laws by John Murray AM (the Murray Review) in 2017 which recommended that the security of payments legislation be extended to apply

against 'mum-and-dad' owner occupiers. However, it should be noted that the recommendation also included a requirement that progress payment claims issued by builders must include information on how the owner occupier respondent can reply to the payment claim and the time-period within which the reply/payment schedule must be issued.

The 2020 Regulation underwent a public consultation period in mid-2019. However, Schedule 2 to the Regulation did not exist at the time and was only added following the consultation period. There does not appear to be any commentary or publications issued by the NSW Government in relation to the addition of Schedule 2 either, despite the Schedule's significant impact on the industry.

Current Security of Payments Regime

Currently, the Act does not apply to owner occupier residential construction contracts by operation of the following provisions:

- Section 7(5) of the Act states that the Act does not apply "to any construction contract, or class of construction contracts, prescribed by the regulations for the purposes of this section";
- Clause 4 of the 2020 Regulation states that "for the purposes of section 7(5) of the Act, owner occupier construction contracts are prescribed as a class of construction contracts to which the Act does not apply". However, Clause 4 will be omitted upon the commencement of Schedule 2 of the 2020 Regulation next month; and
- Section 4 of the Act defines owner occupier construction to mean "a construction contract for the carrying out of residential building work within the meaning of the Home Building Act 1989 on such part of any premises as the party for whom the work is carried out resides or proposes to reside in".

Under the current regime, a builder who carries out residential building work under a contract with an owner who resides in or proposes to reside in the property is not able to use the processes available under the Act to fast track the determination of payment disputes.

At present, these types of claims are generally ventilated in the NSW Civil and Administration Tribunal or a court.

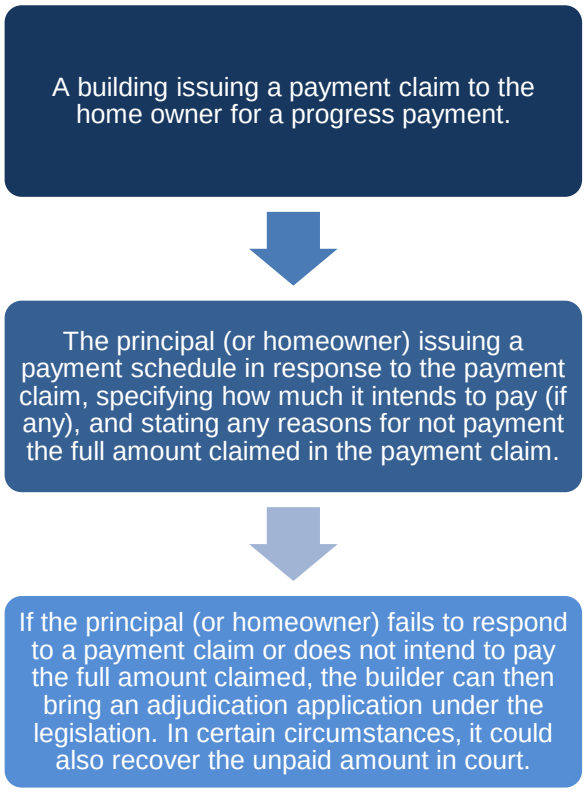
This process can be expensive and time-consuming. However, these forums can also provide a number of benefits to the owner-occupier, who in general, do not understand the legal processes involved in resolving such disputes and/or have not prepared themselves to take on the risks associated with a construction project which large constructions companies account for prior to engaging in a commercial construction project.

Amendments under the 2020 Regulation

From 1 March 2021, under Schedule 2 of the 2020 Regulation, owner occupier contracts will come within the definition of "exempt residential construction contracts". Exempt residential construction contracts will have different requirements in relation to the due date for payment of progress payments in comparison to commercial projects but are not otherwise exempt from the Act.

An owner occupier contract is defined as a residential building contract under the *Home Building Act 1989* (NSW), or in other words, a contract between a builder or tradesperson and a homeowner. This is significant, as previously, the security of payment legislation had only applied to commercial building projects.

The payment process under the Act is relatively simple, however, it contains a number of strict timeframes which must be complied with. These timeframes differ between commercial and residential projects and can depend on what is written in a particular contract. In summary, the payment process involves:



Practical Effect of the 2020 Regulation

The changes to legislation have some obvious benefits for builders, such as:

- it provides builders with additional paths to recover payment from the homeowners;
- if a homeowner fails to make payment in accordance with the legislation, the builder will have the option of commencing an adjudication application and in some circumstances, to commence court proceedings to recover the unpaid amount as a judgment debt; and
- it provides a cheaper and quicker alternative to the

NSW Civil and Administrative Tribunal.

However, the changes transfer a significant risk onto homeowners who typically will:

- be inexperienced in the construction industry;
- have limited to no knowledge of the security of payments regime; and
- have limited assets to satisfy a large adjudication determination within the set timeframes or appeal an adverse adjudication determination in the courts.

The amendments add a further complexity to the already stressful process of building a home for owner occupiers and do not afford any consumer protection despite the recommendations of the 2017 Murray Review.

Homeowners will need to be aware of the payment process under the legislation, and the ability of the builder or tradesperson to commence an adjudication application. Homeowners will need to pay close attention to payment claims they receive, and to ensure they respond to them within the timeframes in their contract and/or legislation and understand the repercussions of failing to adhere to those time frames. Homeowners may also need assistance from lawyers in relation to adjudication applications made under the Act.

Further, any disputes relating to defective work will need to be ventilated in separate proceedings in either the Tribunal or relevant court as the Act only relates to payment disputes. This may in fact increase overall costs of resolving disputes between owner occupiers and builders.

For builders, they will need to consider whether their residential building contracts need to be adjusted to align with the payment regime under the Act. They will also need to understand their rights to be able to pursue homeowners who fail to make a payment in accordance with the legislation. This is particularly relevant for builders who solely operate in the residential space and may not have had prior exposure to the security of payment legislative regime.

The changes made under the 2020 Regulation introduce the security of payments regime to a whole new sector of the construction industry. As the transition is made, it would be sensible for parties to adopt a collaborative approach to understanding these new requirements and seek independent specialised legal advice where necessary.

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Victoria imposes a tougher ban on combustible cladding. Will NSW be next?

In August 2018 NSW banned the use of aluminium composite panels (ACPs) with a polyethylene core in excess of 30% on high rise buildings. An exception to the ban is where a performance solution has been developed to minimise the effect of the potential combustibility. One example of a performance solution would be the installation of sprinklers in the vicinity of combustible panels.

Residents in NSW are still awaiting the NSW Government's formal advice on the appropriate form of cladding to replace ACPs which are subject to the current ban.

However, in the meantime the legislative approach throughout Australia to the use of ACPs with combustible cores has continued to evolve as a greater understanding of the panels' composition and combustibility is developed.

The most recent and significant development has been more stringent ban on combustible cladding imposed in Victoria which came into effect on 1 February 2021.

Like NSW, Victoria had previously banned the installation of ACPs containing a 30% or greater combustible core. However, as of 1 February, building approvals are no longer permitted to be issued in Victoria for the installation of ACPs containing a core with less than 93% inert mineral filler (ie 7% or more polyethylene or other combustible core). The Victorian Government has also banned the implementation of performance solutions with respect to combustible cladding.

The Victorian ban applies to all building approvals issued from 1 February 2021; at the moment there is no retrospective ban in Victoria with respect to cladding containing a core which is between 7% and 30% combustible polyethylene.

The decision of the Victorian Government was based on expert technical advice issued by the CSIRO in May 2020.

In that report the CSIRO made the following key findings:

- small scale tests on individual materials did not directly predict real fire behaviour of complete façade systems but could provide initial risk ranking of the individual material components;
- the material characterisation testing of the panel cores (used to quantify the core chemical composition) was originally introduced in Australia as a means to quickly sample ACPs from existing buildings and determine the type of ACP installed. It was not originally intended to be used for control or regulation of new ACP products;
- While New South Wales, Queensland, Victoria and Western Australia have introduced bans, ministerial guidelines or other state-based regulation which act to limit the availability or use of combustible ACPs with more than 30% polyethylene content, a number of issues have

been identified with the state-based ACP bans, which include the following:

- ❖ the bans do not align with the National Construction Code (NCC) requirements because ACP products not banned by the existing State-based bans may still fail to meet the NCC non-combustibility requirements for Type A and B construction and are not compliant without an adequate performance-based solution;
- ❖ there are some inconsistencies in detail between the different State bans;
- ❖ the State restrictions are based on polyethylene content which does not capture all other combustible polymers that may potentially be used in ACPs;
- ❖ the bans do not define the material characterisation testing methods or measurement accuracy that is to be applied. Methods (and possibly resulting accuracy) used between different laboratories currently varies;
- ❖ ACP bans do not directly address root causes of non-compliant product use and therefore may not prevent similar issues with other types of non-compliant products in the future;
- ❖ some State-based ACP bans impose restrictions on the types of materials that are permissible for performance-based solutions. For example, the Western Australian ban requires a prescribed methodology to be applied and no other form of performance-based assessment is accepted.

Whilst the Victorian ban does not apply to New South Wales, the New South Wales Government has historically followed the advice of the CSIRO and the Victorian Government's stance on the restriction of ACPs on multi-storey buildings. Therefore, it is likely that similar restrictions will be imposed in New South Wales in the coming years.

With the current uncertainty surrounding the permitted use of ACPs on high rise buildings, owners of such buildings where combustible cladding has previously been installed face a dilemma:

- replace the cladding now with cladding containing a combustible core of between 7% and 30% (or apply a performance solution) and risk being required to replace the cladding again in the future; or
- replace all the cladding now with a different type of cladding that has little or no combustible core; or
- wait until NSW Government issues its advice on the appropriate form of replacement cladding.

The presence of combustible cladding on multistorey buildings is and will continue to be a complex issue until the NSW Government issues formal advice on the appropriate form of cladding to replace ACPs subject to the current ban. In the meantime instances of combustible cladding should be approached on a case-by-case basis and where possible a conservative approach should be adopted.

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EMPLOYMENT ROUNDUP

Underpayment? Can a workforce be silenced?

Claims of underpayment of workers, and the blurred line between employed and contracted workforces, continue to dominate the Australian industrial landscape.

Claims and accusations are easily made (and often sensationalised), and employers in particular often look for ways to counter what they perceive to be unfounded assertions. There are ways and ways.

Some idea of how critical - and sensitive - these issues are for industry and employers, on the one hand, and workers and other participants on the other, is underlined by a recent decision of the Full Federal Court of Australia - *ALDI Foods Pty Limited v Transport Workers' Union of Australia* [2020] FCAFC 231.

During 2017, the Transport Workers' Union of Australia published communications relating to ALDI supermarkets. The communications consisted of:

- media releases,
- hand-distributed pamphlets
- flyers,
- a media interview and
- a Facebook post

In addition, the TWU undertook certain protest actions at a number of ALDI stores and an ALDI distribution centre.

The communications contained statements to the effect that ALDI's contractual arrangements with trucking companies had resulted in truck drivers being underpaid and put under pressure, causing them to speed and drive long hours without mandatory breaks with a detrimental impact on transport safety. The protest actions voiced the same allegations.

ALDI commenced a court proceeding against the TWU alleging that this conduct constituted breaches of:

(a) section 45D(1) of the *Competition and Consumer Act 2010* (Cth) (CCA), which prohibits

secondary boycott conduct;

(b) section 18 of the *Australian Consumer Law* (ACL), which prohibits misleading and deceptive conduct;

(c) section 31 of the ACL, which prohibits conduct that is liable to mislead persons seeking employment; and

(d) the common law torts of trespass and injurious falsehood.

ALDI sought injunctive relief to prevent repetition of the alleged unlawful conduct and damages, including aggravated damages.

By the time of the final hearing before the trial judge, ALDI had abandoned all claims for relief other than those founded upon s.18 of the ACL and the tort of injurious falsehood.

ALDI's claims were dismissed by the trial judge.

In relation to the claim under s.18 of the ACL, the primary judge found that the communications made by the TWU were not made in trade or commerce. That finding was sufficient to dismiss the claim and was the principal basis on which the claim was dismissed.

The primary judge also found that the TWU is not a trading corporation. That finding resulted in the dismissal of the claim in respect of all communications other than those involving "*the use of postal, telegraphic or telephonic services*" (which activated the extended operation of the CCA).

Although it was unnecessary to resolve whether any of the relevant communications were misleading or deceptive or likely to mislead or deceive, his Honour concluded that the alleged representations made by the TWU in the communications, save in one respect, were likely to mislead.

The primary judge found that the claim for injurious falsehood failed because either ALDI had not established that the statements relied upon were malicious, and/or ALDI conceded that it had suffered no actual loss or damage by reason of the making of the statements relied upon.

ALDI appealed the dismissal of the claim under s.18 of the ACL. Specifically, it challenged the conclusions that the communications made by the TWU were not made in trade or commerce and that the TWU is not a trading corporation.

The Full Court dismissed ALDI's appeal.

As to whether the communications made by the TWU were made "in trade or commerce", the Full Court confirmed that the assessment of whether conduct is undertaken in trade or commerce is necessarily fact-specific. The assessment may be assisted by analogies from the decided cases, while recognising that no analogy is perfect or determinative.

On the facts found by the trial judge, the Full Court agreed that, while the TWU's misleading communications may be characterised as having been made in connection with the trade or commerce being undertaken by ALDI, the communications were not made *in* trade or commerce within the meaning of the ACL.

The Full Court said:

> *"While such communications were plainly directed to ALDI customers, the communications did not call for a consumer boycott of ALDI stores. Rather, the communications made (misleading) claims about ALDI's commercial arrangements with transport companies and the impact on transport workers.*
>
> *... the substantial purpose and intention of the TWU was to put pressure on ALDI to negotiate with or to discuss issues with the union."*

None of this was "in trade or commerce".

On the issue of whether the TWU was a "trading corporation", the Full Court rejected the primary contention advanced by ALDI that the core activities of the TWU, seeking to advance the industrial interests of its members, are trading or commercial activities such that the TWU is a trading corporation.

As stated by the majority in *Adamson*, the expression "trading corporation" is not a term of art and connotes what is commonly accepted to be trade in accordance with the ordinary meaning of that term. It is a commercial or business activity principally involving the supply of goods or services for reward. We consider that there is a clear distinction between activities which constitute industrial or political (in the broad sense) advocacy by a body on behalf of its members and activities that are trading or commercial.

So, a frustrating result for an employer in the face of representations which were found to be misleading.

Given the frequency with which such claims are made, however, employers will continue to explore avenues to prevent such conduct.

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Summary dismissal of an employee disproportionate to the misconduct

The Full Bench of the Fair Work Commission in a matter of *Butterfly Systems Pty Limited v Seegelov* has made a number of important observations about the Small Business Dismissal Code and unfair dismissal regime.

The employer had had a telephone call with the employee around 9.30am which the Tribunal member determined contained a direction from the employer to the employee to attend work on that day. The employee was found to have understood he had received a direction to work.

The employee refused to undertake work on that day and subsequently refused to answer any further telephone calls from the employer, even though he knew the employer was attempting to contact him and that the employer had directed him to attend work. The employee's excuse for not working was not accepted as a valid excuse by the Tribunal Member.

The employer terminated the employee's employment summarily later the same day by text as they were unable to speak to the employee, who admitted he had turned his mobile telephone off as he knew the employer was trying to call him.

The employer was found to be a small business employer for the purposes of the Small Business Dismissal Code.

The first question was whether or not non-compliance with the Small Business Dismissal Code led to the absence of a valid reason. The Full Bench held that it did not. The Full Bench also found that the applicant had not complied with a lawful and reasonable direction.

The Full Bench held that:

> *"a refusal by an employee to comply with a lawful and reasonable direction will almost always provide a valid reason for dismissal in the sense of being well founded, sound and defensible"*

However the Full Bench went on to determine that summary dismissal was disproportionate in the circumstances and that there was a failure to afford procedural fairness.

Having found that the dismissal was unfair, the Commission was required to make a determination as to the time that the applicant would have continued in employment. In this case, the primary Tribunal member had determined that:

> *"the unpleasantness and experience of the incident on 24 March 2020, and its consequences for both parties, would likely have not resulted in the applicant continuing in employment for any significant period of time. I estimate this period of time to be 16 weeks."*

As the Full Bench noted:

> *"In the circumstance of a finding that further employment would not have been for a significant period of time, it is counterintuitive that the Tribunal Member would then conclude that such period of time would be 16 weeks."*

The Full Bench then went on to rehear the matter and award compensation of four weeks' pay. In doing so, the Full Bench had regard to the period of statutory notice in the Act and the existence of a valid reason.

The Full Bench found that the misconduct plainly contributed to the Company's decision to dismiss him and so it was necessary for there to be a consideration of the "appropriate amount" by which the compensation must be reduced on account of that misconduct. The Full Bench determined a deduction of 20% for that misconduct.

The decision provides a very useful summary of the proper process for applying the Code and determining compensation. Neither is particularly easy.

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WORKERS COMPENSATION ROUNDUP

Heart attack and work: How long is the chain of causation?

The Workers Compensation Commission in *Galea v Department of Communities and Justice* [2020] NSWWCC 253 has determined that a heart attack suffered by a former worker of the Department was a compensable "injury**".**

Background

The worker suffered a psychological injury in the course of her employment as a disability worker. The injury arose out of both a protracted assault on the worker by a patient and from bullying by her co-workers. The injury was deemed to have occurred on 26 July 2013.

The worker left employment with the employer in June 2014.

On 24 December 2015, the worker was attending a local shopping centre when she saw a former colleague. In response, she developed Takotsubo Cardiomyopathy (TCM), which the parties agreed was a heart attack injury for the purposes of section 9B of the *Workers Compensation Act 1987.*

On 8 May 2019, the employer issued a section 78 Notice denying liability for the TCM on the basis it was not a work-related injury, that employment was not a substantial contributing factor to the injury and that employment did not give rise to a significantly greater risk of her suffering the injury.

Whether the worker's TCM is a work-related injury

Section 4 of the *Workers Compensation Act 1987* defines injury as *"a personal injury arising out of or in the course of employment".* Arbitrator Cameron Burge noted the definition of *"injury"* encompassed a sudden or identifiable pathological change that is not temporary.

The Arbitrator found that although the worker had left the employ of the Department over 12 months prior, her heart attack on 24 December 2015 arose out of her employment. In so concluding, the arbitrator noted that when assessing issues of causation, a common-sense evaluation of the causal chain was required.

In the Arbitrator's view, the medical evidence supported a finding that had the worker not experienced a prior work-related psychological injury her meeting with a work colleague unexpectedly would probably not have provoked the emotion which in turn triggered cardiomyopathy.

Whether the worker's employment is a substantial contributing factor to the injury (section 9A of the 1987 Act)

Section 9A of the *Workers Compensation Act 1987* states *"no compensation is payable under this Act in respect of an injury (other than a disease injury) unless employment concerned was a substantial contributing factor to the injury."*

The employer submitted that there were no work-related factors that took place at the shopping centre when the worker's encounter with the former colleague occurred.

The Arbitrator disagreed and considered that if not for the worker's employment as a disability support worker and her experience in that employment, her encounter with a former colleague would not have been of significance and she would not have suffered a heart attack.

The Arbitrator accepted that the worker's uncontested statement together with the medical evidence established the presence of such a causal connection and satisfied the requirements of section 9A.

Whether the nature of the applicant's employment gave rise to a significantly greater risk of suffering TCM (section 9B of the 1987 Act)

Section 9B of the Workers Compensation Act 1987 states:

> *"no compensation is payable under this Act in respect of an injury that consists of, is caused by, results in or is associated with a heart attack injury or stroke injury unless the nature of the employment concerned gave rise to a significantly greater risk of the worker suffering the injury than had the worker not been employed in employment of that nature."*

The worker's IME maintained that Takotsubo Cardiomyopathy was well-known to be influenced by emotional distress and did not occur spontaneously. The doctor concluded that the worker had a significantly greater risk of suffering the cardiac condition because of her psychological injury suffered in the employ of the Department.

In the opinion of the Arbitrator, the above was supported by the employer's IME who concluded that the worker's pre-existing psychological condition was a "key factor" in provoking anxiety which subsequently led to her Takotsubo Cardiomyopathy.

Based on this evidence, the Arbitrator accepted that the worker's employment with the Department placed her at a significantly increased risk of injury of suffering a heart attack thereby satisfying s9B of the 1987 Act.

The Department was ordered to pay the worker permanent impairment compensation in the amount of $48,940 in respect of a 20% whole person impairment caused by the heart attack injury.

Comment

The decision confirms that an employer's liability can extend beyond the workplace and indeed the period of employment.

The Commission's approach to assessing a "*significantly greater risk*" with reference to a common-sense test of causation arguably weakens the onus required by s9B and potentially exposes employers to a liability beyond that contemplated by the Legislature.

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Personal Injury Commission – What is the difference?

The Personal Injury Commission (PIC) was established in NSW on 1 March 2021 and replaced the Workers Compensation Commission and SIRA's Dispute Resolution Services that managed disputes involving injured workers and road users.

The Personal Injury Commission is a single, independent tribunal for injured people claiming workers compensation and compensation and damages pursuant to compulsory third party (CTP) insurance schemes.

The relevant legislation includes:

- Personal Injury Commission Rules 2021.
- Personal Injury Commission Regulation 2020.
- Personal Injury Commission Act 2020.

Section 3 of the Personal Injury Commission Act states the objects of the Act as follows:

(a) to establish an independent Personal Injury Commission of New South Wales to deal with certain matters under the workers compensation legislation and motor accidents legislation and provide a central registry for that purpose,

(b) to ensure the Commission –

  (i) is accessible, professional, and responsive to the needs of all of its users, and

  (ii) is open and transparent about its processes, and

  (iii) encourages early dispute resolution,

(c) to enable the Commission to resolve the real issues in proceedings justly, quickly, cost effectively and with as little formality as possible,

(d) to ensure that the decisions of the Commission are timely, fair, consistent and of a high quality,

(e) to promote public confidence in the decision-making of the Commission and in the conduct of its members,

(f) to ensure that the Commission –

  (i) publicises and disseminates information concerning its processes, and

  (ii) establishes effective liaison and communication with interested parties concerning its processes and the role of the Commission,

(g) to make appropriate use of the knowledge and experience of members and other decision-makers.

There are no changes to the entitlements and benefits under the workers compensation and compulsory third-party insurance schemes, the substantive law concerning legal tests and the court access under the schemes.

Key changes

Production of Documents

The President (or delegate) may direct that a person does not need to comply with an aspect of a direction for production if complying would pose a risk to the safety, health, or well-being of a party to proceedings or a person affected by the proceedings.

Lodgement of documents

The Commission will only accept lodgement through the online portal unless the President (or delegate) allows otherwise.

Documents not lodged by portal can only be served on the Commission via email and post (removing the existing service rules for DX and fax).

Unrepresented workers

If a worker is unrepresented, leave is required for an insurer to have legal representation before the Commission.

There are provisions around circumstances where leave is not required (the preparing and lodging of documents, the telephone/conciliation conference, and corresponding with the Commission and other parties).

Medical Assessment Support Persons

Where the person being assessed is under legal incapacity, they have the right to a support person being present during an examination.

The existing prohibition on a legal or union representative acting as a support person is maintained and extended to a treating or health practitioner that has treated the worker.

Surveillance Material before Medical Assessors

Surveillance material will not be referred to a medical assessor unless in exceptional circumstances as ordered by the Commission.

However, there will be an additional right to allow a claimant to file a response addressing the surveillance recording, within seven days of service of the surveillance recording.

Panel Review Proceedings

The panel determines its own procedure and may determine the matter on the papers.

Appeals to Presidential Members of the Personal Injury Commission under section 352 of the *Workplace Injury Management and Workers Compensation Act 1998*

The power to make rules to extend or abridge time under Part 9, Chapter 7 of the *Workplace Injury Management and Workers Compensation Act 1998* is contained in section 364(1)(g) of the 1998 Act. Section 364(1)(g) was repealed by the *Personal Injury Commission Act 2020*, with effect from 1 March 2021.

Decisions by non-presidential members of the Workers Compensation Division, made on or after 1 March 2021, will be subject to the 28-day time limit to make an appeal against the decision. There is currently no provision in the *Personal Injury Commission Rules 2021* to extend the time to make an appeal.

Conclusion

We note that the above changes to the case management processes are for the applications lodged on or after 1 March 2021.

In our view, it is advantageous to have a single point of contact for dispute resolution services for injured people and it will create a commission where issues can be resolved justly, quickly and cost effectively.

We are excited to see how it unfolds.

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