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High Court confirms engineer liable for all project losses caused by misleading certificate

On 11 March 2021, by refusing leave to appeal from a recent NSW Court of Appeal decision, the High Court declined to entertain an argument that an engineer (and its insurer) should not be held liable to compensate a developer for the totality of its losses suffered as a consequence of the engineer's defective design certificate, rather than just the cost of rectifying the defects in the design.

As a consequence of the High Court's refusal to grant leave to appeal, the NSW Court of Appeal's earlier judgment in the case represents the current state of the law in New South Wales on this issue, and potentially may be applied by courts in the other Australian States.

The effect of the Court of Appeal's decision was to widen the scope of losses that can be claimed by parties affected by misleading and deceptive conduct. Insurers who were anxiously awaiting the outcome of the application to the High Court will be re-evaluating the extent of their exposure under their policies – not only on construction projects but also in other transactions where one mistake can have significant ramifications for the entire deal.

Mistrina Pty Limited was the developer of a project to construct a mixed-use building at Brighton-le-Sands, NSW in 2010. BankWest provided $7.2 million of financing for the project, with a director of Mistrina (Mr Sikos) guaranteeing the developer's obligations under the loan facility and providing his family home as collateral.

Mistrina engaged Jabbcorp Pty Limited to design and construct the project. Jabbcorp in turn engaged an engineer, Australian Consulting Engineers Pty Limited (ACE), to provide and certify the structural design.

ACE duly produced a design and issued a certificate that the design complied with the Building Code of Australia and relevant Australian Standards, and the project proceeded in accordance with that design.

When around eight storeys of the structure had been erected, a resident of the neighbouring apartment

block (who was a practising structural engineer) complained that the ongoing construction had been causing damage to the building. An enquiry established that the structural design of the building under construction was deficient, inappropriately applying loading on to the neighbouring building.

A stop work order was issued, halting construction while a solution could be found. A short while later, BankWest issued a demand for full repayment of the loan facility, although the loan was not yet repayable. Mistrina was not able to meet this demand, and the bank appointed receivers to the company, and took over the project.

A rectification solution was not able to be implemented until more than a year later. After the rectification works had been completed, BankWest sold the uncompleted development to another party for $4.975 million. It also took possession of and sold Mr Sikos' home worth $1.3 million, which it accepted as full satisfaction of the outstanding balance of the loan. In the meantime, Jabbcorp had gone into administration.

Mistrina and Mr Sikos commenced Supreme Court proceedings against ACE, claiming that their losses on the project had been caused by ACE's misleading and deceptive conduct in issuing the design certificate.

ACE did not dispute that its conduct was misleading and deceptive in contravention of the Australian Consumer Law

Section 82 of the Australian Consumer Law entitles a party to recover their loss caused by the misleading and deceptive conduct of another party in contravention of that law.

The question arose as to whether the plaintiffs' losses from the failure of the project could be categorised as having been caused "by" the contravening conduct.

ACE disputed that the plaintiffs' losses had been caused solely by its conduct. In this regard, ACE relied on the fact that the project had suffered some weeks' delay which had meant that it was unlikely to achieve completion until after the loan facility had expired.

The trial judge, Hammerschlag J, found against the plaintiffs, stating that he was not satisfied that there was sufficient evidence of BankWest's motivation in calling on the loan. However, his Honour held that if he had found for the plaintiffs, he would have applied a 15% discount to their entitlement to damages, to account for their contributory negligence in the way that they had managed the project.

Mistrina and Sikos appealed from Hammerschlag J's decision. ACE cross-appealed, contending that the discount applicable to any recovery of damages for contributory negligence should be 85% not 15%.

In the Court of Appeal, the appellants submitted that pursuant to the principles laid down by McHugh J in *Henville v. Walker* (2001) 206 CLR 459, they only needed to establish that ACE's conduct materially contributed to the loss, and it was sufficient that the contravention was "a" cause of the loss.

ACE argued that the appellants' loss was not a reasonably foreseeable consequence of this conduct; to hold that it was a foreseeable loss would make the engineer the effective underwriter of a project in which it had a limited part, which could not have been the intent of the legislation.

The NSW Court of Appeal handed down its decision on 24 September 2020.

Ward JA (with whom Leeming and McFarlan JJA agreed) held that the primary judge had erred in not determining that the structural design defect issue was a material cause of BankWest taking over the development. Her Honour noted that had such a finding been made, the primary judge would have accepted that there was a relevant and requisite causal connection between the misleading and deceptive conduct and the loss that was sustained by the appellants.

Her Honour noted that BankWest's actions in exercising its rights had occurred at a time when:

- the project was almost complete, despite having previously experienced some delays and cost overruns; and
- there were no other serious issues which would have caused the bank concern; however
- the builder was unable to identify when the project would resume.

Ward JA stated that there was "*an overwhelming inference to be drawn*" that the cessation of the building works due to the structural design defect (and the existing uncertainty as to when the construction would be completed) was "a" material cause of the decision by BankWest to step in and exercise its rights under the security documents. Her Honour stated:

> *"Indeed, to my mind, it might well even be permissible to infer that the defect was, in the events that happened, the only material factor that led to that decision."*

Ward JA also held that the loss suffered by the appellants was a reasonably foreseeable consequence of the misleading and deceptive conduct. Her Honour stated that the "*overwhelming inference*" that had been drawn on the question of causation applied equally: it was foreseeable even in a general way (if not more so) that the appellants would suffer damage, including the loss of the opportunity to make a profit on the development.

Her Honour noted that a secured creditor calling up its loan is "*the very sort of event that could naturally arise*" from delays, additional costs and the discovery of such significant structural defects, and she did not see that such a statutory construction could have the effect that professional service providers would thereby become

unwitting underwriters of commercial risk, as ACE had suggested. Accordingly, the decision of Hammerschlag J was set aside, and the appellants were awarded 85% of their losses.

Gillis Delaney Lawyers acted for the successful appellants in this case. At the time of receiving our instructions, the matter had been set down for hearing, but liquidators had been appointed to Mistrina, and Mr Sikos had tragically passed away. (Sadly Mr Sikos' son also passed away before the High Court handed down its decision.)

Litigation funding was secured to allow the proceedings to continue and notwithstanding the challenges of the case (particularly the passage of time since the relevant events and the death of Mr Sikos), we were successful in establishing that Mistrina and the estate of Mr Sikos were entitled to compensation for the losses they had suffered as a consequence of ACE's conduct – resulting in Mistrina's principals and Mr Sikos' loved ones recovering compensation for their losses.

With the Court of Appeal judgment remaining as the law of NSW, engineers and their insurers should take heed at the consequences that will now flow from misleading and deceptive design certificates – they may be liable for all losses the principal suffers from a project.

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Work Accident - Is it or isn't it a Motor Accident?

In claims for damages pursuant to the *Motor Accidents Compensation Act 1999* (NSW) ("MACA") (which preceded the current legislation which came into effect on 1 December 2017), the question of whether or not an accident that occurs at work is classified as a motor accident or a claim for work injury damages will have a significant impact on the damages that can be recovered.

Where the claim is for work injury damages, the injured worker must satisfy the threshold of 15% whole person impairment and then, even after that threshold has been satisfied and a number of procedural requirements have been complied with, the injured worker is only entitled to recover past and future economic loss, past and future loss of superannuation and tax paid on weekly payments. Obviously if the threshold of 15% is not satisfied there is no entitlement to bring a claim at all.

However, in a claim for damages pursuant to the MACA, a plaintiff can recover substantial damages for non-economic loss (if the threshold of greater than 10% whole person impairment), past and future out of pocket expenses and past and future domestic assistance along with past and future economic loss, past and future loss of superannuation and tax on weekly payments. Even if the threshold for non-economic loss is not satisfied then a claim can still be brought for the other heads of damage.

If the motor accident involves an unregistered vehicle being operated within an employer's premises then the workers compensation policy will respond to the claim.

Justice Cavanagh in the Supreme Court has recently considered whether or not an accident can be classified as a work injury or as a motor accident (*Adlawan v Reochem Inc*).

In that case, the worker sustained injury at his employer's premises at Padstow on 9 November 2012. At approximately 11.30 am the worker was struck by a forklift that he had been operating shortly prior to the accident. The worker sustained significant injuries including ultimately an amputation of the right leg.

His Honour Justice Cavanagh was not asked to consider quantum. It was agreed that if the MACA applied, damages were in the sum of $3.7 million.

The particulars of negligence were expressly pleaded such that no claim was made for work injury damages.

In his judgment, his Honour Justice Cavanagh noted it was necessary for him to consider the precise circumstances of the accident, whether the defendant was negligent and if so, was the injured worker entitled to damages assessed under Chapter 5 of the MACA.

It was agreed between the parties that if the accident was not classified as a motor accident there would be a judgment in favour of the employer as none of the procedural requirements to bring a work injury damages claim had been satisfied. This is clearly because an ongoing entitlement to payments of compensation would be more valuable than any judgment for work injury damages.

It was contended by the worker that the accident occurred after he parked the forklift on a slope and left the engine on. His evidence was that he was never told he should not be doing this. The written policy of the employer, the "Forklift Safe Operation Policy and Procedure" booklet provided that forklift operators must park the forklifts on level ground and subsequently turn the engine off. The worker however contended that he was told if he needed to alight from the forklift during either unloading or loading, the engine should be left in neutral and the handbrake applied. The worker contends this is what he did immediately before the accident.

On the day of the accident, a Border Express truck had arrived with a load that required unloading. The worker began to use the forklift to unload the truck. According to the worker, he parked the forklift slightly at an angle. Whilst he was checking stock the forklift collided with him. The worker's evidence was to the effect that he turned around and saw the forklift coming in his direction and he managed to almost move out of

the way, apart from his right leg which was struck.

There was an argument between the worker and the employer as to whether the handbrake had been applied properly and the exact timing of the incident. The worker estimates he was struck by the forklift about two minutes after he alighted the forklift and he had applied the handbrake. The employer argued that the worker did not apply the handbrake properly and in fact the worker was struck by the forklift only seconds after he had alighted from it.

Ultimately his Honour determined there was a slight delay before the forklift started to roll down the slope.

Whether or not the forklift was actually on a slope was also an issue. The employer submitted the area was essentially flat. The worker said he parked it at the top of a slope. His Honour noted it would be difficult to understand how the forklift could roll if it was wholly on a flat surface.

Apart from lay witnesses, expert evidence was provided. Neither expert had the opportunity to examine the specific forklift as it had since been sold.

Grant Johnson (who provided an expert's report on behalf of the worker), was of the opinion that the fact the forklift was controlled for a period on the slope prior to rolling backwards suggested there had been a failure in the braking system.

On the contrary, Dr White (engaged by the employer) was of the opinion there was no evidence to support a suggestion the braking system had failed.

When the forklift was examined following the incident, no defect was found in the operation of the handbrake.

There was no dispute between the parties that if the handbrake had been fully applied it ought to have prevented the forklift rolling. His Honour noted that left two explanations: either the handbrake was not properly applied or there was a defect with the handbrake at the time that was not detected on later examination, a possibility that his Honour thought was unlikely.

His Honour noted it was clear, and indeed, not disputed by the defendant, that the accident arose as a consequence of clear failures by the defendant. The defendant undertook an investigation following the incident which made a number of recommendations.

A number of changes were made by the employer since the accident including prohibiting loading trucks outside, prohibiting alighting from the forklift outside on the slope and more training. A recommendation had also been made for a switch on the seat however that had not been implemented.

His Honour stated:

> *"There could be no doubt that the defendant was negligent in not so informing the plaintiff as it records in its own manual that forklifts must be parked on level ground and recognised in its own post investigation report the need to enforce this.*
>
> *The defendant did not adduce any evidence to establish that it informed the plaintiff that he should not park the forklift on the sloping driveway. Indeed, the evidence is that it was a regular practice. There is no evidence that any training the plaintiff undertook would have been sufficient to inform the plaintiff that he should not park the forklift where he parked it immediately before it rolled into him.*
>
> *... the duty of care imposed on the defendant required it to instruct the plaintiff that he should not park the forklift (with the intention of alighting from it), whilst it was on the sloping ground. The defendant did not so instruct."*

His Honour continued:

> *"A reasonable person in the position of the defendant would have instructed the plaintiff not to park on the slope. The further question is whether a reasonable person would have undertaken the modifications nominated by the plaintiff.*
>
> *I doubt that it was reasonable in all the circumstances for the defendant to have replaced the handbrake with a different type of handbrake which operated only slightly differently. Both types of handbrake required the operator to pull the handbrake on fully. The fact that the ratchet type might not have dropped back in circumstances in which it was only pulled on to 80% for example does not impact of the prospective analysis of what the exercise of reasonable care required in all the circumstances.*
>
> *It is important to observe that none of the modifications suggested by the plaintiff were required by any standard rule, guideline or law. There is no evidence that the forklift generally, including the handbrake, was not fit for purpose as that term might be understood in the context of ordinary goods."*

His Honour therefore concluded that although modifications to the forklift were not required, reasonable care required the employer to reduce the risk of harm. That could have been done through proper training, instruction and supervision.

After finding the employer negligent, his Honour then went on to consider the issue of whether or not the accident could be classified as a motor accident. His Honour noted that the definition of a motor accident includes a vehicle running out of control, which occurred in this case when the forklift struck the worker. However, it was necessary to establish further facts before determining the accident was a motor accident. There was no issue that the employer was the owner of the forklift. It did not matter that the actual owner of the forklift was another entity as the employer was deemed to be the owner.

His Honour noted Section 122 of the legislation provides that Chapter 5:

> *"applies only in respect of an award of damages which relates to the death or injury to a person*

caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle."

His Honour considered the other case law and noted that, as observed by Justice Basten of the Court of Appeal, there is:

"no bright line that determines which cases might be subject to Section 122 and which are not. The fact that it might be described as a work injury claim or arise out of a failure at the workplace does not preclude the application of MACA 1999."

His Honour continued:

"Work injury claims are expressly included in Section 3B [of the MACA]. Further, whether the act of negligence occurs in the minutes before the injury (or at some earlier stage) whilst the driver is driving the vehicle or after the driver has alighted from the vehicle is not the determining factor in assessing whether the fault was in the use of the vehicle.

This is not a loading or unloading case. The injury was not caused by something falling off the vehicle and this conclusion is not undermined because the fault can be characterised as a failure to provide instruction.

In my view, this case falls squarely with the observations of Basten JA in Chaseling.

Sections 3A and 122 are satisfied. The plaintiff is entitled to damages assessed under MACA which have been agreed at $3.7 million."

His Honour went on to consider contributory negligence and formed the view there ought to be a 20% reduction.

The worker was therefore awarded substantial damages.

When considering cases involving unregistered forklifts and there are allegations as to whether or not the claim is a motor vehicle accident, careful consideration must be given to the facts and circumstances and whether or not the particular claim satisfies the statutory requirements of the MACA. This will have a significant impact on the damages that may be awarded.

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Can you re-register a company after more than 15 years?

The NSW Court of Appeal has recently considered the scenario where a plaintiff sought to reinstate Richards Contracting Co Management Pty Limited, a company that had ceased to exist 15 years ago.

The worker alleged that whilst he was working for Richards Contracting as well as other employers, he was exposed to and inhaled silica dust which caused injury to both lungs as well as silicosis.

However, the difficulty for the worker in the claim against Richards Contracting was that entity had been deregistered on 29 May 1984. Richards Contracting also held an insurance policy in 1975 and 1976 with Associated General Contractors Insurance & Co Ltd ("AGCI"). That policy would have indemnified the company against liability for damages in respect of any claims arising independently of the *Workers Compensation Act 1926* including the worker's claim. However, AGCI had become insolvent some time in the 1980's and had subsequently dissolved.

The Court of Appeal noted that Section 236 of the *Workers Compensation Act 1987* provides for an Insurers' Guarantee Fund ("IGF") administered by SIRA. The purpose of the Guarantee Fund is to deal with claims for indemnity against insolvent insurers.

The worker's intention, as he had no prospects of obtaining any judgment against either Richards Contracting or their relevant insurer, was to reinstate the company, obtain judgment and then seek to recover the proceeds from the IGF. SIRA were therefore also joined in the Dust Diseases proceedings. SIRA, the regulator, denied that the worker was entitled to proceed against them directly.

The importance of the issue generally was demonstrated by the fact that the Court of Appeal was constituted of 5 judges, including the President and the Chief Justice who delivered the leading judgment.

The Court of Appeal considered the statutory background to deregistering companies and noted that the *Corporations (NSW) Act 1990* came into force on 1 January 1991. That legislation provides that the National Scheme prevails. Although Section 85 remains in force, the *Companies (Application of Laws) Act* (NSW) which established the NSW Code was subsequently repealed by the *Statute Law (Miscellaneous Provisions) Act 2008*.

It can therefore be seen that the statutory history is complex. The worker relied on Section 30(1)(c) of the *Interpretation Act 1987* and argued that he had a right to have the company reinstated at the time of repeal of the Cooperative Scheme Laws and that right was preserved.

The Court of Appeal after consideration was of the opinion that the worker did not have an entitlement to proceed directly against SIRA. This meant that the issue of whether or not the company could be reinstated was critical.

In this regard the Court noted:

"The purpose of Section 236 of the Workers Compensation Act (NSW), which includes the protection of workers against the loss of their entitlement under a statutory policy due to the dissolution of the insurer, best achieved by giving effect to the words of the section, as distinct from construing it as limited to a discretionary payment ...

To establish an entitlement for the purpose of Section 236(2) of the Workers Compensation Act 1987 (NSW), it is first necessary to establish the liability of the insured employer. This is because that liability is a pre-condition to the liability of the insurer, and hence the entitlement to make a claim under Section 236(2)."

The Court however provided that despite this, SIRA was a proper party to the proceedings as if the worker had established, he had a right to claim against the company and the insurer he would have a right under Section 236 of the *Workers Compensation Act 1987*.

The Court of Appeal then went on to consider the question of whether the Court had the power to reinstate the company in such complex circumstances and where the company had been dissolved so long ago. The Court noted that the worker's right to reinstate the company arose immediately on deregistration or at the latest when his claim against the company had crystallised.

The Court of Appeal determined that it was established the worker had the right to seek reinstatement, then the means of enforcing the right including making an application to extend time was also preserved.

Bathurst CJ stated:

"I do not think the possibility that the Court retains some residual jurisdiction to refuse an order, notwithstanding that the applicant is a person aggrieved and it is just to make the order, affects the position. It is difficult to see how such a discretion could properly be exercised once it was concluded that the applicant was a person aggrieved and it was just to order reinstatement."

Therefore, although there had been a substantial period of time since the deregistration the Court of Appeal found that, particularly where there was evidence that neither ASIC or the previous company directors opposed making the orders, it was in the public interest that an order that gave rise to a worker's statutory rights be made.

Ultimately therefore through what may seem a convoluted process the worker was entitled to access the IGF, which was a just result in all the circumstances.

Dust Diseases claims can be difficult given the length of time that can have passed since the exposure and the injury. Companies and insurers can cease to exist. The decision gives hope to those with Dust Diseases that the IGF will be able to be accessed as appropriate, albeit after some steps along the way.

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The fundamental principles of subrogation and recoupment

An insurer that indemnifies its insured for a claim made under a policy of insurance and makes payments to the insured in satisfaction or settlement of that claim is entitled to exercise an equitable right of subrogation and bring a claim (in the name of the insured) against a third party liable for the loss and damage which gave rise to the insurance claim but only to the extent of that indemnity.

If the insured (not the insurer) brings the above third party claim for damages in those circumstances, the insurer is entitled to recoup the total indemnity payments made under the policy from the proceeds successfully recovered in the third party claim whether by judgment or settlement.

Difficulties can arise when there is a dispute between an insurer and its insured regarding the nature and extent of payments made under the policy, whether those payments by the insurer were intended to reduce the insurer's liability for the claim or otherwise, and any disputes regarding insured and uninsured components.

This can be significant if the insured is the party who brings a third party claim and successfully recovers a substantial award of damages, interest and costs and then has to account to its insurer where there is a dispute regarding the insurer's entitlement to recoupment.

These issues were recently considered by Chief Justice Allsop in the Federal Court decision of *Technology Swiss Pty Limited v AAI Limited t/as Vero Insurance*.

Technology Swiss made a claim under its combined marine and cargo policy of insurance with Vero in respect of damage to fog cannons that were transported from Melbourne to Bangkok. The basis of valuation under the policy was cost, insurance and freight ("CIF") plus 10% with an excess of $250.00 for each and every loss.

The CIF value of the damaged fog cannons was $770,095.58. However, the policy had a sub-limit of $500,000.00 thereby leaving Technology Swiss uninsured for any amount above $500,000.00.

Technology Swiss argued it had suffered a constructive total loss and claimed the full amount under the policy sublimit.

Vero granted indemnity for the claim but disputed the quantification of loss, arguing that there was only a partial loss with a repair value of EUR 127,500.00 (equivalent to about AUD $200,000.00).

Technology Swiss commenced proceedings at the Federal Court (not the current proceedings) against Vero regarding the insurance claim dispute.

During those proceedings, Vero paid Technology Swiss the AUD $200,000.00 payment which the insurer agreed to on the basis of a partial loss but maintained its dispute regarding the claim for constructive total loss under the policy.

Further correspondence ensued between insurer and insured regarding the remaining claims including storage costs payable under the policy.

The parties subsequently attended a mediation. About three months after the mediation was concluded, the Federal Court proceedings were settled on the basis of a Deed of Release which provided for a payment by Vero to Technology Swiss in the amount of $425,000.00 in addition to the earlier $200,000.00 payment and further payments that had been made by Vero for storage costs.

The deed expressly provided for the insurer's subrogated rights to be preserved and a claim for damages was contemplated by both parties to be brought against the carrier responsible for the damage to recover both insured and uninsured losses.

The Federal Court proceedings were discontinued on that basis.

At the time of Vero making the additional payment of $425,000.00 to Technology Swiss, the insured had incurred legal costs in the amount of $277,260.16.

The deed between Technology Swiss and Vero did not expressly state whether the $425,000.00 payment was intended to be made as a payment to reduce the insurer's liability under the policy or in settlement of all claims made by Technology Swiss, including its claim for legal costs.

Technology Swiss subsequently brought a claim for damages against the carrier at the Victorian County Court in which judgment was entered in favour of Technology Swiss for $863,758.70 comprising:

Invoice value -	$738,615.40
Freight -	$ 16,526.94
Interest -	$108,616.36
Total:	**$863,758.70**

No sum was awarded for storage costs.

Technology Swiss had therefore succeeded in establishing a claim against the carrier for a total loss in respect of the damage to the fog cannons.

The above amount was paid to the solicitors for Technology Swiss.

Correspondence ensued between Technology Swiss and Vero regarding Vero's entitlement to recoupment from the proceeds of the successful claim against the carrier.

Vero contended it was entitled to recoup the total amount of $625,000.00 (plus storage costs it paid) representing the total payments made by Vero in good faith by reference to the initial claim made by Technology Swiss under the Vero policy.

Technology Swiss disputed Vero's entitlement to the full amount of those payments on the basis that it had appropriated the $425,000.00 payment firstly toward its costs incurred as at that date in the amount of $277,260.16 and the balance ($147,739.84) was appropriated for storage costs and the remaining insured component.

Technology Swiss commenced the current proceeding against Vero to ascertain the entitlements of the parties to the proceeds successfully recovered by Technology Swiss in the Victoria County Court proceedings.

Chief Justice Allsop approached the matter by applying the fundamental principles of subrogation and recoupment. His Honour helpfully summarised those principles as follows:

- Subrogation arises if payment is made even if not legally required under the policy if it was honestly intended to be in satisfaction of a loss under the policy.
- Where a payment is made by an insurer to resolve a dispute about policy coverage, the question arises whether any payment or some part of any payment by the insurer engages the doctrine of subrogation.
- The extent to which a payment by the insurer is to be characterised as a payment of indemnity under the policy is a matter of financial importance to both insurer and insured.
- To the extent the insurer pays under the policy and the insured is indemnified under the policy (the two being equivalent) each has an interest in any recovery action and any proceeds of recovery.
- The equities of subrogation and of recoupment depend upon substance and not form and upon the practicalities of application of commercial good sense and right behaviour, including the duty of good faith.
- The question of the meaning of legal instruments of compromise is important but may not be comprehensively determinative.

His Honour rejected the arguments by Vero regarding its entitlement to recoup the full amount of $625,000.00. His Honour considered the payment of $425,000.00 was made in respect of all claims by Technology Swiss against Vero including included the costs incurred by Technology Swiss in the earlier Federal Court proceedings.

Further, Allsop CJ considered the Deed of Release entered into between Technology Swiss and Vero did not adequately explain how that payment was made, whether it was attributable to costs or as an ex-gratia payment in settlement of the dispute solely attributable to the claim under the policy.

His Honour therefore held Vero was entitled to recoup the initial $200,000.00 payment plus a proportion of the $425,000.00 payment not referable to the costs incurred by Technology Swiss as at the date of that payment and storage costs.

That proportion was calculated to be $116,770.42. His Honour concluded that Vero was therefore entitled to recoupment of no more than $316,770.42.

The Chief Justice emphasised the following:

> *"An insurer who wishes to maintain rights of subrogation or recoupment to sums paid to settle or compromise a dispute about coverage should identify what is paid by way of compromise or indemnity under the policy, even if disputed and in that sense ex-gratia or compromised, and subject to reservation of rights. If this requires agreement with the insured, as a matter of mutually commercial interest, so be it. If no clarity is given to the matter, an insurer cannot expect guesswork or surrogate ex-post facto negotiation for its benefit."*

This decision is an important reminder for insurers to make sure that where a subrogated recovery action is contemplated, any settlement of the initial insurance claim between insurer and insured must be clear in its terms regarding the nature of indemnity payments made by the insurer.

Any ambiguity or failure by the insurer to clarify that issue can result in the insurer's entitlement to recoupment being substantially reduced.

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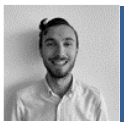

ASIC eyes backdated director resignations

On 18 February 2020, the *Treasury Laws Amendment (Combatting Illegal Phoenixing) Act 2020* (Cth) (**Act**) was enacted to help curb illegal phoenix activity.

What is illegal phoenix activity?

According to the Federal Government's 'Action Against Fraudulent Phoenix Activity' proposal paper, illegal phoenix activity occurs when a company that carries on a business, accumulates debts and liquidates the company to avoid repayment.

The assets of the company will often be stripped and transferred into a new company prior to liquidation, allowing the same person or group of individuals to continue the business of the company in a new company.

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

What has changed?

Previously, directors could backdate their resignations and incur a late fee if the resignation was lodged after the prescribed lodgement period (i.e. within 28 days after the resignation occurred).

The Act introduces new rules regarding:

- the effective date of director resignations that are lodged with ASIC after the prescribed lodgement period; and
- resignations of last remaining directors.

In effect, the changes prevent directors from improperly backdating resignations when this would leave a company with no directors.

How will the changes affect directors who resign?

The relevant transition period contained in the Act has now expired.

From 18 February 2021, if a director resigns, the director or company is required to notify ASIC within 28 days of resignation.

Should ASIC not be notified within 28 days, the effective date of resignation will be the day on which ASIC is notified of the resignation.

For example, if a director resigns on 1 April 2021 but neither the director nor the company notify ASIC until 1 July 2021 (i.e. more than 28 days after the resignation occurred), the director's effective resignation date will be recorded as 1 July 2021.

This will have significant implications for directors as:

- they will still be required to perform their legal duties as a director of the company until the effective resignation date (including duties to prevent insolvent trading); and
- may still be liable for conduct that occurs following the date they thought they had resigned.

Fixing the resignation date

The resigning director or the company may apply to ASIC within 56 days from the claimed resignation date to backdate the resignation to the claimed resignation date. Should ASIC accept the application, the resignation date will be fixed as the claimed resignation date.

Applications to the Court must be made within 12 months of the claimed resignation date unless the Court allows a longer period. If the Court fixes an earlier resignation date, the order must be lodged with ASIC by the applicant within 2 business days of the court making the order.

Last director resignation has no effect

Under the new rules, directors will also no longer be able to resign from a company if they are the last remaining director and their resignation would leave the company with no directors.

Accordingly, applications of this nature will be rejected if no replacement director is being appointed.

This change will ensure that directors cannot seek to avoid responsibilities in paying taxes, creditors and employees.

An exception to this rule will include circumstances where the company is being wound up.

Key takeaways

If you resign as a director of a company, it is important that you ensure that ASIC is notified within the prescribed 28-day period. A failure to do so may not only attract a late fee but result in a director being liable for conduct following the date on which they thought they had resigned.

A comprehensive summary of the Act can be found in our July 2020 newsletter.

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Lapse of temporary COVID-19 relief measures for executing documents and holding virtual meetings

Temporary relief measures were introduced in response to the COVID-19 crisis to amend the Corporations Act to permit companies to hold their company meetings virtually and to allow company officers to sign documents electronically.

Parliament was considering a bill to extend those relief measures. However, the bill did not pass prior to the last sitting day before the temporary measures lapsed on 22 March 2021. Further debate on the bill will resume in parliament on 3 August 2021.

The effect of the temporary measures lapsing is that the pre-COVID 19 requirements under the Corporations Act relating to execution of documents by company officers and the holding of company meetings will now apply again.

Virtual Meetings

With regard to meetings, the lapsing of the temporary measures has again caused doubt about the validity of meetings which are exclusively held on a virtual basis.

While the Corporations Act (subject to the terms of a Company's constitution) permitted 'hybrid' meetings (i.e. a combination of a physical location and the use of technology), there was doubt as to whether a 'virtual' meeting which is conducted entirely online was permitted by the Act.

Following the lapse of the temporary measures, ASIC has issued a 'no action' position confirming that, until the earlier of 31 October 2021 and Parliament passing its own measures, companies may convene and hold meetings from 21 March 2021 onward using 'virtual' technology and may issue notices of meeting electronically.

For virtual meetings, the conditions of relief require:

- the technology used to hold the meeting must provide members as a whole a reasonable opportunity to participate;
- voting at the meeting is to occur by poll rather than a show of hands;
- each person entitled to vote must be given the opportunity to participate in the vote in real time; and
- the notice of meeting is to include information about how those entitled to attend can participate in the meeting.

For notices of meeting, the conditions of relief require:

- notice of the meeting, and supplementary information in relation to the meeting, is to include the contents of the notice or details of an online location where the contents of the notice can be viewed or from where they can be downloaded;
- for persons entitled to receive notice but have not nominated an electronic address, they must be given notice personally or by post of how the contents of the notice of meeting can be accessed; and
- supplementary instructions for online participation in a meeting to be given at least two business days before the meeting is held.

Execution of Documents

ASIC has stated it will not issue a no action position in relation to electronic execution of documents under the Corporations Act.

In relation to signing of documents, this means the return of uncertainty surrounding the validity of electronic execution and split execution by company officers under section 127 of the Corporations Act.

Accordingly, from 22 March 2021 onwards, the safest method to ensure the validity of execution by company officers will be to revert to signing documents, particularly deeds, in wet ink and on a single static counterpart of the document.

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CONSTRUCTION ROUNDUP

A minor error with a big effect: the importance of getting the details right

The statutory security of payment processes operational throughout Australia are designed to facilitate cash flow to all participants in a building project.

The East Coast model of the security of payment

legislation (adopted by all the East Coast States and in the Australian Capital Territory) provides an opportunity for contractors and subcontractors to apply for speedy adjudication of any disputed payment claim. The adjudicator's jurisdiction to issue a determination is defined by the payment claim submitted by the contractor or subcontractor and the responding payment schedule issued by the principal or main contractor.

To ensure certainty about the parameters of the adjudicator's jurisdiction, a form may be required to be completed when the adjudication application is being made.

It is important to complete this form correctly. A recent decision by the Queensland Supreme Court has illustrated how an error in this regard can mean that the adjudicator does not have the requisite jurisdiction, and any determination issued by him or her is liable to be declared void.

Kangaroo Point Developments MP Property Pty Limited (in its capacity as trustee of a property unit trust) had engaged RHG Construction Fitout and Maintenance Pty Limited to carry out certain development works at Kangaroo Point in Brisbane.

The construction contract provided that within 10 business days after receiving a payment claim from RHG, the Superintendent was to issue to Kangaroo Point Developments and RHG a payment schedule evidencing his opinion of the moneys due to RHG.

The nomenclature of "payment claim" and "payment schedule" was consistent with the terms used in the *Building Industry Fairness (Security of Payment) Act 2017* (Qld). Section 76 of this Act requires a respondent to a payment claim to give the claimant a payment schedule stating the amount proposed to be paid by the respondent. A failure to give such a payment schedule renders the respondent liable to pay the whole payment claim.

Accordingly, the contract between RHG and Kangaroo Point Developments also provided as follows:

> "*In so far as necessary to ensure compliance with the Security of Payment Act, the Superintendent is deemed to issue any payment schedule … as an agent of the Principal and each such schedule shall constitute a payment schedule for the purpose of the Security of Payment Act*."

RHG submitted a payment claim on 27 July 2020. On 6 August 2020 the solicitors acting for Kangaroo Point Developments wrote to the solicitors acting for RHG, stating:

> *"…we hold instructions to respond, on behalf of our client, to your client's [payment claim] by giving you, on behalf of our client, our client's 'payment schedule' for the purposes of section 76 of the BIFA within the requisite 15 business day time period.*
>
> *To avoid doubt, on this occasion anything issued to your client by the Superintendent in respect of [the payment claim] is not to be construed as a 'payment schedule' for the purposes of the BIFA as our client will be providing its own response as foreshadowed above."*

On 10 August 2020, the Superintendent issued a payment schedule pursuant to the contract, stating that payment was "recommended" for a certain (negative) amount.

On 17 August 2020 (within the time allowed by the Act) the solicitors for Kangaroo Point Developments sent a letter to RHG's lawyers which, amongst other things, confirmed that "this correspondence is our client's payment schedule" in response to the payment claim.

RHG applied for adjudication of the payment claim under the Act. Section 79(2) of the Act requires that an application be in "the approved form". This approved form is published by the Queensland Building and Construction Commission. Amongst other things, the form asks: "*Has the respondent given you a payment schedule*?" In response, RHG had ticked "Yes, attach copy" and had identified the payment schedule issued by the Superintendent on 10 August 2020 rather than the lawyer's letter of 17 August 2020.

The adjudicator accepted that the 10 August document constituted the payment schedule and issued a determination. Kangaroo Point Developments applied to the Supreme Court of Queensland for a declaration that the adjudication determination was void.

The Court held that the 10 August 2020 payment schedule issued by the Superintendent was <u>not</u> a payment schedule for the purposes of the Act. This was for the following reasons:

- The Superintendent had not stated an amount that Kangaroo Point Developments intended to pay. Rather, his schedule had "recommended" an amount to be paid.
- Notwithstanding the terms of the contract, the Superintendent's payment schedule was not capable of being deemed as a payment schedule pursuant to s.76 if it did not comply with that section.
- The agency of the Superintendent had been specifically revoked in the lawyer's letter of 6 August 2020.
- Since the lawyers had foreshadowed issuing a separate payment schedule (and in fact had done so), it was not necessary for the Superintendent's payment schedule to be deemed to be such for the purpose of the Act.

Since RHG had not identified Kangaroo Point Developments' 17 August payment schedule in the form in which they applied for adjudication, the application was not valid.

Further, the adjudicator had not had the authority to decide the payment claim; he had authority only to determine a dispute in circumstances where the

payment schedule issued by the Superintendent was a valid payment schedule for the purpose of the Act. Since that document was not a valid payment schedule, the adjudicator lacked the requisite authority.

This case illustrates the importance of getting the details right. While some may consider the misidentification of a document on a printed form to be a minor error, the effect of this error was to invalidate the application itself, and to deny the adjudicator the necessary statutory jurisdiction to determine the payment claim.

This provides a salient lesson: not only to check each document thoroughly, but also to seek legal advice if unsure as to the correct document to be identified on the application form.

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Victorian Court of Appeal hands down its decision on Lacrosse Tower

The Victorian Court of Appeal has largely dismissed the appeal of the building surveyor, architect, and fire engineer (Consultants) from the decision of the Victorian Civil and Administrative Tribunal which attributed liability to the Consultants for the loss arising out of the Lacrosse Tower fire.

Many would recall the Lacrosse Tower fire which occurred in November 2014 in Victoria. The source of the ignition of the fire was an incompletely extinguished cigarette butt left in a plastic container on the balcony of an apartment. The fire spread to the nearby external cladding of the building which was constructed with aluminium composite panels (ACPs) containing a polyethylene core.

The owners corporation of the Lacrosse apartment tower sustained over $12 million in losses as a result of the fire and brought proceedings against the builder, consultants and the resident who had discarded the cigarette in the Tribunal.

VCAT Decision

In February 2019, the Tribunal handed down its decision, which held the builder solely liable to pay damages to the owners corporation. (Refer to our newsletter articles in May, June and July 2019 for an in-depth discussion on the Tribunal's decision.)

The entirety of the builders' liability was then apportioned to the relevant building consultants and Mr Gubitta, the resident who had discarded the cigarette in the following amounts:

- building surveyor – 33%;
- architect – 25%;
- fire engineer – 39%; and
- the resident – 3%.

The Tribunal found that the builder had breached its statutory warranties concerning the suitability of materials, compliance with the law and fitness for purposed implied into its Design and Construct (D&C) Contract.

Each of the Consultants was found to have breached their consultancy agreements to which they were parties with the builder, by failing to exercise due care and skill in the provision of their services. Additionally, it was found that the resident breached a duty of care he owed the owners corporation by failing to ensure that his cigarette was fully extinguished before leaving it in the plastic container.

Court of Appeal Decision

The Consultants sought leave to appeal against the Tribunal's decision and identified 11 issues that required resolution. Leave to appeal was refused for all but one ground and the apportionment of liability as against the Consultants was maintained in line with the Tribunal's original decision.

Arising from the appeal decision were four primary issues:

- whether the builder's breach of its statutory warranties was apportionable;
- the identity of the party responsible for the selection of the ACP;
- whether the Tribunal had properly construed the Deemed to Satisfy (DTS) provisions under the BCA; and
- whether the Tribunal had erred in its conclusion that the 'peer professional opinion' was 'unreasonable'.

Was the builder's breach of its statutory warranties apportionable?

In the Tribunal the owners corporation's claim against the builder had been confined to breaches of warranties implied into the D&C contract and did not extend to a failure to take reasonable care.

The Tribunal held that despite any breach of its obligations to comply with the Building Code of Australia ("BCA"), the builder had not been shown to have failed to take reasonable care. Therefore, the breaches of warranties were not apportionable within the meaning of the *Wrongs Act*.

On appeal, the architect and fire engineer contended that the owners corporation's claim against the builder was apportionable because it may be regarded as a claim "*arising from a failure to take reasonable care*" based on findings made to that effect, and not by the case that was framed by the owners corporation.

The Court of Appeal rejected this submission and held that:

> *"nothing in Pt IVAA [of the Wrongs Act] suggests that a claim that is not apportionable might be transformed into a claim that is apportionable by a*

party establishing that the circumstances upon which the claimant relies arose out of a failure to take reasonable care."

The Court of Appeal concluded that the terms in which a claim is framed against a concurrent wrongdoer are an essential determinant of whether the claim can be said to arise from a failure to take reasonable care. Therefore, the Tribunal had not erred in determining that the breach of warranty claims against the builder were not apportionable, as the owners corporation's claims did not arise from any failure to take reasonable care.

Who was responsible for the selection of the ACP?

In the first instance, the Tribunal had determined that the architect's breach of its obligations to the builder under the consultancy agreement was in part based on its finding that the architect's design specified ACPs for the external walls of the Lacrosse Tower that failed to comply with the BCA.

In the appeal, the architect sought to attribute liability to the builder by contending that:

- the specification did not prescribe the use of an ACP with 100% polyethylene core;
- the builder was responsible for meeting the performance requirements of the specification; and
- the specification did not permit departure from the BCA.

The Court of Appeal rejected the architect's submissions on the basis that, to construe the specification in the manner suggested by the architect would ignore the obligations expressly imposed on the architect under its consultancy agreement, and would have the unreasonable result of absolving the architect of its liability to the builder as a consequence of the contractual obligations owed by the builder to the developer.

Further the obligations under the consultancy agreement required the architect (in its capacity as superintendent at the time) to "*inspect and approve samples as required in the architectural specification*" during the construction phase.

It was argued at first instance that the proper construction of this obligation only required the architect to inspect and approve the visual characteristics only and did not extent to its regulatory compliance. However, this submission by the architect was directed to the construction of the obligation to inspect samples and did not challenge the findings of breach of its broader obligations. Therefore, no error was found in the Tribunal's reasoning.

Did the Tribunal properly construe the Deemed to Satisfy (DTS) provisions under the BCA?

The building surveyor had been engaged by the builder to ensure that the design and materials used in the construction of the building complied with the BCA. The BCA's fire resistance provisions require the external walls of buildings to be non-combustible to achieve the required fire resistance level. "Non-combustible" means not deemed combustible by the test in AS1530.1. Under the BCA, a building element that is "non-combustible" means that it must be constructed wholly of materials that are not deemed combustible. The installed ACPs were combustible and failed to meet the test under AS1530.1.

The building surveyor contended that the ACPs installed on the façade of the building met the DTS provisions contained in cl C1.12(f) of the BCA. This argument was made on the basis that the Alucobest ACPs comprised of bonded laminated materials and the word 'laminate' where used in cl C1.12(f)(i) of the BCA does not include the polyethylene core of the ACPs and therefore such core was not required to be non-combustible.

The Court of Appeal rejected this interpretation and preferred the Tribunal's construction of the DTS provisions.

Did the Tribunal err in its conclusion that the "peer professional opinion" was "unreasonable"'?

Section 59 of the *Wrongs Act* provides that in some circumstances a peer professional opinion constitutes a defence to a claim of negligence on the part of an individual practising a profession.

The building surveyor contended that the professional practice of issuing building permits for the use of ACPs with a polyethylene core and with a certificate under AS1530.3 relying on BCA C1.12(f), constituted a 'peer professional opinion'.

The Tribunal had accepted that the building surveyor could rely on peer professional opinion as a defence to a claim of negligence. However, it had held that the relevant professional opinion relied upon did not give rise to a defence as the opinion was "unreasonable" in the sense that it lacked a logical basis.

The Court of Appeal held that the question whether an opinion is "unreasonable" is ultimately a question of fact. In this instance it was determined that the peer professional opinion relied upon by the building surveyor was unreasonable.

Key Takeaways

The Court of Appeal's confirmation of the Tribunal's decision will have far-reaching ramifications for construction professionals, consultants, and their insurers.

With confirmation that liability under a statutory warranty is not apportionable, consideration will need to be given to the appropriate causes of action based on contribution, contractual relationship, and obligations between the parties.

The Courts will take a purposive approach in interpreting the BCA and its DTS provisions, and the prospects of successfully relying on standard practice

and peer professional opinion in similar circumstances will likely be limited.

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EMPLOYMENT ROUNDUP

New rules for casual employees

On Friday 26 March 2021, the *Fair Work Act 2009* (FW Act) was amended to change workplace rights and obligations for casual employees. The changes were made by the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (**Amendment Act**).

The changes came into effect on Saturday 27 March 2021.

The changes

The Amendment Act introduces a:

- definition of casual employment;
- pathway for casual employees to move to full-time or part-time (permanent) employment;
- Casual Employment Information Statement.

Definition of a casual employee

The FW Act has been amended to include a new definition of a "casual employee".

Under the new definition, a person is a casual employee if they accept a job offer from an employer knowing that there is no firm advance commitment to ongoing work with an agreed pattern of work.

When determining whether a firm advance commitment to continuing and indefinite work exists, the Amendment Act requires a Court to have regard to only the following considerations:

- whether the employer can elect to offer work and whether the person can elect to accept or reject work;
- whether the person will work as required according to the needs of the employer;
- whether the employment is described as casual employment; and
- whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument.

Once employed as a casual, an employee will continue to be a casual employee until they either:

- become a permanent employee through:
  - ❖ casual conversion; or
  - ❖ are offered and accept the offer of full-time or part-time employment; or
- stop being employed by the employer.

Existing casual employees

Casuals who were employed immediately before 27 March 2021 and whose initial employment offer meets the new definition continue to be casual employees under the FW Act.

Becoming a permanent employee

The Amendment Act adds a new entitlement to the National Employment Standards (NES) giving casual employees a pathway to become a full-time or part-time (permanent) employee. This is also known as "casual conversion".

An employer (other than a small business employer) has to offer their casual employee an opportunity to convert to full-time or part-time (permanent) when the employee:

- has worked for their employer for 12 months;
- has worked a regular pattern of hours for at least the last 6 of those months on an ongoing basis;
- could continue working those hours as a permanent employee without significant changes.

Some exceptions apply, including:

- small business employers;
- if an employer has 'reasonable grounds' not to make an offer to a casual employee for casual conversion.

Making and responding to offers and requests

There are rules for how employers and employees need to make and respond to offers. There are also rules for offering casual conversion to existing casual employees.

Casual employees have a right to request to convert to full-time or part-time (permanent) employment in some circumstances. This applies:

- for casual employees working for a small business – at any time if they meet the requirements;
- for other casual employees – after their employer has decided not to make an offer for casual conversion.

Casual Employment Information Statement

Employers have to give every new casual employee a Casual Employment Information Statement (the CEIS) before, or as soon as possible after, they start their new job.

Small business employers need to give their existing casual employees a copy of the CEIS as soon as possible after 27 March 2021. Other employers have to give their existing casual employees a copy of the CEIS as soon as possible after 27 September 2021.

Loading offset

The Amendment Act also introduces a new avenue to resolve some disputes about casual conversion through the Federal Circuit Court.

When an employee is described as casual, but through court proceedings it is determined that they are not casual, the Amendment Act also introduces a new rule that requires a court to reduce any amounts that the employee could be entitled to by reference to casual loading amounts already paid by the employer to the employee to compensate for those entitlements.

Implications for Employers

Now is the time for employers to review their workforce contractual arrangements and implement new written contracts which embrace the changes brought about by the Amendment Act.

There are also compliance issues which need to be addressed immediately.

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WORKERS COMPENSATION ROUNDUP

The fine line between a "journey" and "in the course of employment" under the WCA 1987

The Deputy President of the Personal Injury Commission (PIC) has upheld an appeal brought by an injured worker against the decision of a Member which denied him compensation in accordance with the *Workers Compensation Act 1987* (1987 Act).

In *Hitchings v Secretary, Department of Planning, Industry and Environment* [2021] NSWCCPD, Deputy President Wood adopted a notably broad interpretation of the phrase "*in the course of employment*" and in so doing, concluded that the journey provisions detailed in s 10 of the 1987 Act did not apply.

The Facts

Mr Vaughan Hitchings (the appellant) was employed by the Secretary, Department of Planning, Industry and Environment (the respondent) as a procurement officer.

The evidence before the Member of the PIC confirmed that the appellant's employment with the respondent required him to undertake his duties at several locations. He was routinely required to work from his employer's Queanbeyan office on Mondays and Tuesdays, its Sydney office on Wednesday and the employer's premises at Port Macquarie on Thursdays and Fridays. The appellant's duties also required him to visit clients at various places within NSW.

On 8 October 2019, the appellant was driving from his home to his employer's Queanbeyan office when he suffered a severe onset of lower back pain associated with left leg sciatica. The appellant was unable to complete the journey, sought medical treatment and was certified as having no current capacity for work.

The appellant made a claim for compensation which was disputed by the respondent's insurer on the following grounds:

- At the time the injury occurred, the appellant was on a journey within the meaning of s 10 of the 1987 Act and there was not a real and substantial connection between his employment and the incident from which injury arose, as required by s 10(3A) of the 1987 Act.
- In the alternative, the workers injury did not arise out of or in the course of his employment and the employment was not a substantial contributing factor to the injury as required by s 9A of the 1987 Act.

On 25 September 2020, Member Isaksen determined the claim in favour of the respondent. The Member concluded on the evidence before him that the appellant was on a periodic journey from his place of abode to his place of employment at the time of the onset of his symptoms.

In view of the above, s 10(3A) applied and on the evidence the Member was not satisfied that there was the necessary causal nexus between the appellant's employment and the injury.

The worker appealed the above decision.

On Appeal

Deputy President Wood considered the provisions of the Act that set the parameters of the workers entitlement to compensation. These provisions are as follows:

Section 4

"Injury" in the 1987 Act is defined as:

> *"personal injury arising out of or in the course of employment."*

Section 9A - No compensation payable unless employment substantial contributing factor to injury

(1) No compensation is payable under this Act in respect of an injury (other than a disease injury) unless the employment concerned was a substantial contributing factor to the injury.

Section 10

(1) A personal injury received by a worker on any journey to which this section applies is, for the purposes of this Act, an injury arising out of or in the course of employment.

(3A) A journey referred to referred to in subsection (3) to or from the worker's place of abode is a journey to which this section applies only if there is a real and substantial connection between the

employment and the accident or incident out of which the personal injury arose.

Judgment

On appeal, Deputy President Wood considered the High Court's decision in *Hatzimanolis v ANI Corporation Ltd* in relation to the correct interpretation of the phrase *"in the course of employment"*.

The Deputy President was of the view that *Hatzimanolis* was instructive when considering the appropriate application of s 4 of the 1987 Act.

In *Hatzimanolis* the High Court had accepted that the phrase *"in the course of employment"* should be interpreted broadly to cover not only the actual work which a person was employed to do, but also '*the natural incidents connected with the class of work'".*

Further, the phrase required a consideration of the general nature, terms and circumstances of the employment "*and not merely to the circumstances of the particular occasion out of which the injury to the employee has arisen'".*

The Deputy President believed an analysis of the general nature, terms and circumstances of the worker's employment revealed that the appellant was not simply embarking upon a journey from his place of abode to his place of employment at the time of his injury.

In the view of Deputy President Wood:

"the Queanbeyan destination was just one destination on the overall route upon which the appellant embarked, having taken with him all of the things, both business and personal, which he would require at each destination throughout the working week."

The Deputy President placed significance on two factors:

- the Queanbeyan destination being just one destination on the overall route which the appellant embarked.
- the appellant having taken with him all things, both business and personal belongings.

It was determined on appeal that the activity that the appellant was undertaking on 8 October 2019 was not a journey within the meaning of s 10 of the *1987 Act*.

Instead, the Deputy President concluded that once the appellant left his place of abode on the morning of the injury, he was in the course of his employment.

The decision of the High Court in *Hatzimanolis* recognises that a flexible approach is required to be taken when considering the scope of a worker's employment.

In each case the facts must be carefully considered.

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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.