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No Baby Steps After The Royal Commission

Life has been busy for the Government following the publication of the findings of the Royal Commission on Misconduct in the Financial Services Industry as it picks up the pace to implement the recommendations of the Royal Commission.

Treasury is well underway with consultation with calls for submissions on consultation papers having been published. Impacting on the insurance industry the consultations in 2019 so far, and time frames for those consultations and any submissions by the public are:

- Enforceability of financial services industry codes (Recommendation 1.15 of the Royal Commission that certain provisions of financial sector codes should be 'enforceable code provisions') In its response to the Royal Commission, the Government agreed to this recommendation to provide the Australian Securities and Investments Commission (ASIC) with additional powers to approve and enforce code provisions - 18 March 2019 - 12 April 2019.
- APRA Capability Review: Release of Final Terms of Reference and Request for Written Submissions regarding APRA's Capability - On 11 February 2019, the Treasurer announced a capability review of APRA, led by the Chair Graeme Samuel AC, Diane Smith-Gander and Grant Spencer. Treasury notes "The review will provide a forward-looking assessment of APRA's ability to respond to an environment of growing complexity and emerging risks for APRA's regulated sectors" - 13 March 2019 - 10 April 2019.
- Ending Grandfathered Conflicted Remuneration for Financial Advisers. The Royal Commission recommended that the grandfathering arrangements for conflicted remuneration in relation to financial advice provided to retail clients should be removed as soon as is reasonably practicable and the Government announced that it would end grandfathering of conflicted remuneration to financial advisers effective from 1

January 2021. The consultation documents include an Exposure Draft of the proposed legislation to remove the grandfathering arrangements for conflicted remuneration and other banned remuneration from 1 January 2021. It also enables the regulations to provide for a scheme under which amounts that would otherwise have been paid as conflicted remuneration are rebated to affected consumers. 22 February 2019 - 22 March 2019. Closed.

- Insurance Claims Handling - The Royal Commission recommended that the handling and settlement of insurance claims be included in the definition of 'financial service' and stated that it should not be unreasonable to ask an insurer to handle claims efficiently, honestly and fairly. - 01 March 2019 - 29 March 2019. Closed.
- Disclosure in General Insurance: Improving Consumer Understanding. On 18 December 2017, the Government responded to the Senate Economics References Committee's report into the general insurance industry. In releasing the Government's response to the Senate report, the Minister for Revenue and Financial Services tasked Treasury with developing proposals to improve consumers' understanding and access to information through better transparency and enhanced disclosure practices in the general insurance sector. The consultation seeks stakeholder views on the underlying issues and objectives behind the recommendations made in the Senate report relating to the disclosure regime. - 15 January 2019 - 28 February 2019. Closed.

With change in the air the Government has also stepped up and started its legislative agenda.

ASIC will be able to pursue harsher civil penalties and criminal sanctions against banks, their executives and others in the financial services sector who have breached corporate and financial services law, as the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 was passed.

The new legislation includes:

- maximum prison penalties for the most serious offences will increase to 15 years. These include breaches of director's duties, false or misleading disclosure and dishonest conduct;
- civil penalties for companies will significantly increase, now to be capped at $525 million;
- maximum civil penalties for individuals increase to $1.05 million and can also take in to account profits made;
- civil penalties will apply to a greater range of misconduct, including licensee's failure to act efficiently, honestly and fairly, failure to report breaches and defective disclosure.

The following provisions of the Corporations Act that apply to the insurance industry have been made civil penalty provisions:

- s 911A(5B) -need for an Australian financial services licence
- s 911B(4) -providing financial services on behalf of a person who carries on a financial services business
- s 912A(5A) -general obligations of a financial services licensee
- s 912D(3) -financial services licensee to notify ASIC of certain matters
- s 941A(3) obligation on financial services licensee to give a Financial Services Guide if financial service provided to person as a retail client
- s 941B(4) obligation on authorised representative to give a Financial Services Guide if financial service provided to person as a retail client
- s 946A(4) obligation to give client a Statement of Advice
- s 952E(9) giving a defective disclosure document or statement (whether or not known to be defective)
- s 952H(3) financial services licensee failing to ensure authorised representative gives disclosure documents or statements as required
- s 1012A(5) obligation to give Product Disclosure Statement—personal advice recommending particular financial product
- s1012B(6) obligation to give Product Disclosure Statement—situations related to issue of financial products.

There is also an infringement notice regime that applies to all strict liability offences and certain civil penalty provisions.

An infringement notice can be issued by ASIC as an alternative to civil or criminal proceedings. Payment of the infringement notice is not considered an admission of guilt. Where the infringement notice is not paid ASIC can pursue criminal or civil penalties.

The basis for the issue of an infringement notice is that ASIC reasonably believes a person has contravened a provision subject to an infringement notice.

For strict and absolute liability offences, the penalty amounts are 50 per cent of the maximum pecuniary penalty for the relevant offence. For civil penalty provisions, the maximum penalty amount is 12 penalty units ($2,520) for individuals and 60 units ($12,600) for corporations.

That is a quick summary of the progress so far. There is much more to come. It's busy times ahead with changes for the Government and the Insurance Industry and we will keep you appraised of developments as they occur.

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Coming Soon – An AFSL To Manage Insurance Claims

The future for those that manage insurance claims is clear - they will need an Australian Financial Services Licence in the not too distant future. However what is not so clear is how far licence requirements will extend into the chain of service providers involved in insurance claims and whether managing claims will be an independent category for licence conditions which will cause insurers, insurance brokers and underwriting agencies to look to amend their licence conditions.

The Royal Commission recommended that the handling and settlement of insurance claims be included in the definition of 'financial service' in the Corporations legislation noting that a licence would require claims managers to handle claims efficiently, honestly and fairly. Hot on the heels of the publication of the Royal Commission findings, Treasury issued a consultation paper on Insurance Claims Handling inviting submissions on the way forward. A discussion paper from Treasury sets the scene from the Government's perspective. The period for public submissions closed on 29 March 2019.

Currently Regulation 7.1.33 of the Corporations Regulations states that a person is not taken to be providing financial advice or dealing in an insurance product (as defined in the Corporations Act), where these actions are taken in the course of and is a necessary or incidental part of:

- Handling of a claim or potential claim in relation to an insurance product; and
- The settlement of a claim or potential claim in relation to an insurance product.

Regulation 7.1.33 also specifies a number of examples of services which are exempt, including:

- Negotiations on settlement amounts;
- Interpretation of relevant policy provisions;
- Estimates of loss or damage;
- Estimate of value or appropriate repair;
- Recommendations on mitigation of loss;
- Recommendations, in the course of handling a claim, on increases in limits or different cover options to protect against the same loss in the future; and
- Claims strategy such as the making of claims under alternate policies.

So what is proposed?

It's easy. First get rid of this Regulation and then use existing legislative powers to define the activity of handling or settling an insurance claim as a 'financial service' for the purposes of the Corporations Act.

But wait-the devil will be in the detail. A lot of activities carried on by an insurer in relation to claims handling are unlikely to meet the current definitions of providing a financial service.

So the Government intends to define the activity of handling or settling an insurance claim (in relation to both life and general insurance products) as a 'financial service' for the purposes of the Corporations Act.

The form of the definition hasn't been decided however it will have wide compass. It will extend further than the industry expected. The definition will cover:

- Making a decision about a claim, including investigating claims and interpreting policy provisions;
- Conducting negotiations in respect of settlement amounts;
- Preparing estimates of loss or damage, or likely repair costs; and
- Making recommendations about mitigation of loss.

So who will need a licence?

Treasury has noted:

"Given the scope of the proposed new financial service, it is expected that the following persons would be covered:

- *Insurers that provide a claims handling service. This would include the insurer's employees (broadly defined to include contractors) and related body corporates of the insurer and their employees (broadly defined to include contractors) if they provide a claims handling service on behalf of the insurer;*
- *Certain third party representatives of insurers that provide a claims handling service on behalf of the insurer. It is likely that third party representatives (which could be identified using a title such as 'claims handling service providers') would need to include service providers such as investigators, loss adjustors, loss assessors, collection agents and claims management services; and*

Other persons that ASIC declares are included. This would give ASIC the power to include other entities if problematic conduct is identified in the future."

But here is the good news. A medical practitioner carrying out an assessment for an insurer is unlikely to be acting in the capacity of a representative of the insurer so may not need an AFSL. That is pretty obvious and is sure to please the medical profession. However the example Treasury has provided shows the issue that will drive the need for the financial services licence is whether the person is acting on behalf of an insurer.

Loss adjusters will be in for licensing as will third party claims administrators. Insurers may need to vary their

licence conditions to add a new category, “Managing Insurance Claims”. Brokers and Underwriting Agencies join the queue as you are likely to need an amendment to your licence.

Treasury sees that it is likely that the third party representatives which would need licences (which could be identified using a title such as ‘claims handling service providers’) would include service providers such as investigators, loss adjustors, loss assessors, collection agents and claims management services. The list seems to go on. Perhaps lawyers won’t escape the net, but legislation is usually crafted by lawyers isn’t it.

The concerns of the Royal Commission about claim handling and settling of insurance claims arose as a consequence of claims made by retail clients. Treasury sees that it is an option to limit the definition of claims handling activity for the purposes of licensing to services provided to retail clients.

However Treasury notes to do this Government would need to consider “whether the definition of retail client in relation to general insurance products (which, under section 761G(5) of the Corporations Act, is restricted to specified kinds of general insurance products) would result in claims handling conduct requirements not applying to a significant number of policies commonly acquired by individuals or small businesses”.

Don’t hold your breath for too long. It is easier to introduce a licence for claims management for all insurance policies rather than take the risk and get it wrong and leave individuals and small businesses without the perceived benefits of a licensing regime governing all claims.

Yes we will have a claims handling licence category for an AFSL very soon.

It is most likely AFSL holders will need an amendment to their existing AFSL if they handle claims.

There will be more businesses that will need an AFSL for claims handling than first expected but watch for the rise of appointments of Authorised Representatives to manage insurance claims.

But the jury is still out on whether to limit claims handling licensing to managing claims for specified types of insurance policies for retail clients

Times are a changing.

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Optus Liable for Wet Pit Lid

There is no doubt that there are many trip hazards in Sydney City. This includes various footpaths, infrastructure pits and so on.

The District Court recently considered a slip and fall on the metal lid of an Optus telecommunications pit.

Garry Burling fractured his left leg on 7 March 2017 when he slipped on the metal lid of an Optus telecommunications pit. The pit was located on the western side of Bligh Street. The area is a busy area between Bent and Hunter Street in the City. Burling had parked his car in the Wentworth Hotel and crossed Bligh Street to go to an appointment in Pitt Street. He was walking along the western side of Bligh Street and trod on the stainless steel grid and slipped.

Burling’s evidence was to the effect that not only was there a dip in the pit lid but the dip was full of muddy brown water. Burling’s daughter helped him straight after the accident and also saw the pit in that condition.

Photographs of the pit lid at the time of and after the fall were tendered at the hearing.

The evidence established there were two Optus pit lids that were installed on 23 October 2007. The pit had been accessed on several occasions by Optus workers. In March 2018, after the accident, a request was made for the pit lid to be replaced.

Expert evidence was served by both Burling and Optus. Optus’ expert did not inspect the pit until after the lid was replaced.

The trial judge, Russell DCJ SC, accepted Optus had worked on the pit on many occasions after August 2015. If Optus had followed its own system of inspection then Optus would have noticed the pit lid was bowed and required replacement. Further, as the pit lid was bowed water would pool in it when it rained.

Optus owed a common law duty and a statutory duty that had to be exercised under the *Telecommunications Act 1997*.

Russell DCJ observed the High Court in *Brodie v Singleton Shire Council* dealt with a broader principle than just the duty applying to statutory authorities responsible for maintenance and repair of roads or footpaths. In the decision of Justices Gaudron, McHugh and Gummow, their Honours said:

“*The duty which arises under the common law of Australia may now be considered. Authorities having statutory powers of the nature of those conferred by the LG Act upon the present respondents to design or construct roads, or carry out works or repairs upon them, are obliged to take reasonable care that their exercise of or failure to exercise those powers does not create a foreseeable risk of harm to a class of persons (road users) which includes the plaintiff. Where the state of a roadway, whether from design, construction, works or non repair, poses a risk to that class of persons, then, to discharge its duty of care, an authority with power to remedy the risk is obliged to take reasonable steps by the exercise of its powers within a reasonable time to address the risk. If the risk be unknown to the authority or latent and only*

discoverable by inspection, then to discharge its duty of care an authority having power to inspect is obliged to take reasonable steps to ascertain the existence of latent dangers which might reasonably be suspected to exist."

Russel DCJ observed:

"*It is clear that the judgment (in Brodie) deals with not only roads and footpath authorities, but with "authorities having statutory powers of the nature of those conferred by the LG Act". While the defendant is not an authority with statutory powers in relation to footpaths generally, it does have statutory powers under the Telecommunications Act 1997 (C'th)*."

His Honour did not accept the submission of Optus that Optus was only responsible for the installation of the pit lid. His Honour stated:

"A telecommunications carrier does not simply come along and dig up a public footpath to install a pit in order to conduct its own private profitable enterprise. There are provisions in Sch 3 (of the Telecommunications Act 1997 (C'th)) which require the carrier to apply for a permit to enter upon and alter land. Schedule 3, Division 5, Clause 10 requires a carrier to act in accordance with good engineering practice; to protect the safety of persons and property; and to ensure that the activity interferes as little as practicable with public roads and paths.

Thus the defendant is an authority having statutory powers of the nature of those specifically dealt with by the High Court in Brodie. The defendant is therefore an authority with power to remedy the risk and is obliged "to take reasonable steps by the exercise of its powers within a reasonable time to address the risk", to adopt the language ... in Brodie.

I find that the defendant did owe a duty of care to pedestrians in Bligh Street, including the plaintiff. The defendant was under a duty to take reasonable steps by the exercise of its powers within a reasonable time to address the risk of harm to pedestrians."

The decision delivers a warning to owners of infrastructure and footpaths and especially telecommunication providers that often use contractors for installation and repair works – if you work on the footpath regularly and you come across a potential issue it is not enough to undertake works without rectifying all issues with the infrastructure.

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An Insurer's Entitlement to Costs of Defending a Deregistered Insured

A common feature of indemnity policies of insurance involves the insurer agreeing to conduct the defence of a claim brought against the insured for compensation or damages which falls for cover, or potentially falls for cover, under the policy.

The insurer's decision to assume conduct of the insured's defence is usually made early and thereafter the insurer foots the bill with respect to defence costs, subject to any excess or policy deductible that may apply.

In some circumstances the conduct of the insured's defence by the insurer may span several years depending on the timeliness and complexity of litigation which culminates in a hearing before a judge.

Occasionally, where the insurer is conducting the defence for an insured company, the company may become deregistered before the hearing, resulting in the insurer being joined directly as a defendant.

What happens if the insurer is ultimately successful? Is the insurer entitled to its costs limited to the period after the insurer was joined to the proceedings, or is the insurer also entitled to costs of defending the insured despite its deregistration?

These interesting issues were recently considered by his Honour Justice Stevenson in the NSW Supreme Court decision of *The Owners – Strata Plan 30791 v Southern Cross Constructions (ACT) Pty Limited (in liq)*.

SP30791 brought proceedings at the NSW Supreme Court against seven defendants.

The seventh defendant, NMK (Aust) Pty Limited ("NMK"), was joined to the proceedings in September 2015.

In November 2015, just two months later, QBE Underwriting Limited as managing agent for the Members of Lloyds Syndicate 386 ("QBE"), assumed conduct of NMK's defence and paid all of the defence costs of resisting the claim against NMK by SP30791, save for a policy deductible in the sum of $2,500.

In July 2017 NMK was voluntarily deregistered without the knowledge of QBE or SSP30791.

The fact of NMK's deregistration was not known to QBE (or SP30791) until October 2018, some 15 months later.

QBE immediately notified SP30791 which, in November 2018, joined QBE as eighth defendant under the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW).

No application was made to reinstate NMK under Section 601AH(2) of the *Corporations Act 2001* (Cth) despite the obvious fact it had been deregistered incorrectly at a time when NMK was involved in Court proceedings.

The matter proceeded to hearing before Justice Stevenson in February 2019.

On the sixth day of the hearing SP30791 agreed to discontinue its claim against QBE which effectively

brought the proceedings to an end as against NMK and QBE.

The question for his Honour's determination was what costs order should be made in favour of QBE.

SP30791 accepted it must pay QBE's costs after QBE was joined as eighth defendant in November 2018.

However, QBE contended it was also entitled to the costs incurred by QBE in defending the claim by SP30791 against NMK prior to QBE's joinder in November 2018.

In effect, QBE argued it was also entitled to costs as a non party to the proceedings.

NMK argued QBE was not entitled to those costs for the following reasons:

- any claim by NMK for payment of its costs prior to deregistration was a chose in action of NMK;
- upon NMK being deregistered, that property vested in ASIC;
- as NMK had not been reinstated, the property remained vested in ASIC;
- in the absence of an explanation as to how NMK came to be voluntarily deregistered in July 2017 the Court should not make an order for costs incurred by NMK to be paid by any other party to the proceedings.

QBE contended the claim against NMK should never have been brought and the proceedings against NMK (and by implication, QBE), were doomed to fail.

Stevenson J concluded he was not in a position to reach any conclusions as the matter had settled as between SP30791 against QBE before the merits of the claim had been determined.

Further, his Honour observed that three of the other defendants had named NMK as a concurrent wrongdoer in their respective List Responses which suggested the claim was not improperly brought against NMK.

Nevertheless, his Honour did not see the argument put forward on behalf of SP30791, regarding the implications arising from NMK's deregistration, as preventing QBE from seeking those costs as a non party.

Justice Stevenson identified the relevant question to be whether, in the exercise of the broad discretion afforded to the Court concerning costs, such an order was required by the interests of justice.

His Honour noted QBE had incurred the costs of defending the proceedings on behalf of NMK, both during the time that NMK existed and thereafter when it did not.

Until July 2017 those costs were incurred by NMK albeit with the benefit of insurance cover from QBE.

Stevenson J also highlighted that QBE did not know of its insured's deregistration for a period of more than one year but nevertheless continued to fund the defence of the proceedings against it.

Therefore, as QBE had actually incurred the costs in question, Justice Stevenson ruled in favour of QBE and ordered SP30791 to pay QBE's costs including the costs which QBE incurred as insurer of NMK but not including the costs incurred by SP30791 in obtaining leave to proceed against QBE.

This interesting case highlights that an insurer may in appropriate circumstances be entitled to claim the entirety of defence costs incurred in the defence of proceedings brought against its insured notwithstanding the subsequent deregistration of the insured company.

Despite being a non party to the proceedings for several years, the insurer in this instance successfully obtained an order for defence costs to be paid including those costs as a non party.

Ultimately these matters involve a Court exercising its discretion. The factors which weighed heavily in favour of the insurer in this matter involved a period of several years during which the insurer conducted the insured's defence which included a period of more than one year when the insurer funded those defence costs without having any knowledge of its insured having become deregistered.

The interests of justice prevailed in favour of the insurer in this instance.

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Using Shareholder's Rights To Take Control Of A Company Associated With A Bankrupt

This article illustrates how the Trustee of a Bankrupt Estate can exercise shareholder rights in appropriate circumstances to facilitate the preservation of assets and improve the chance of achieving a return to creditors in the Bankrupt Estate. This article covers three cases:

- Gillis Delaney's involvement in a case in the Federal Court of Australia commenced in September 2018 for the Trustee of a Bankrupt Estate arising from his exercise of shareholder rights, in which the Court appointed the Trustee as provisional liquidator of a company associated with the Bankrupt, as a means of preserving the assets of the company, the Trustee's aim being to make a recovery in the Bankrupt Estate.
- a recent decision of Parker J in *Hurst v Bar Machiavelli (No 2) [2018] NSWSC 1549* which, like the Federal Court matter, shows that the same insolvency practitioner can be appointed in

more than one capacity even if a theoretical conflict of interest exists.

- a recent decision of Black J in *Re Loremo Pty Ltd [2018] NSWSC 1355* in which a provisional liquidator was appointed without any requirement for the plaintiff to give an undertaking as to damages.

Legislative framework

Assets of which the Bankrupt is the beneficial owner vest in the Trustee and are divisible pursuant to ss 58(1) and 116(1) of the *Bankruptcy Act 1966*. Accordingly, shares of which the Bankrupt is the beneficial owner vest in the Trustee of his or her Bankrupt Estate when the Trustee is appointed.

Where a registered trustee is appointed to a Bankrupt Estate, if the Bankrupt is a shareholder, the Trustee may have the opportunity to preserve assets of an associated company and thereby achieve a prompt recovery for the Bankrupt Estate if:

- the Bankrupt is the beneficial owner of shares in a company; and
- the Bankrupt is a creditor of the company, contingent or otherwise; or
- some other feature of the legal relationship between the Bankrupt and the company concerned means that it is appropriate for the company to be wound up.

Section 1072C *Corporations Act 2001* operates where the Bankrupt's beneficially owned shares in a company have vested in the Trustee and the Bankrupt is the registered holder of those shares. That section provides that where the Trustee produces to the directors of the company such evidence as they require (in a practical sense, the Certificate of Appointment from AFSA and evidence of the beneficial shareholding), the Trustee has the same rights as the Bankrupt in respect of the shares. Importantly, these rights include entitlement to information about the company and voting and other rights connected with the shares. Section 1072C(7) renders any provision in the company's constitution void against the Trustee if it removes the shareholder's rights because a shareholder is bankrupt.

The Trustee can become registered as the shareholder in place of the Bankrupt pursuant to s 1072E(2) of the *Corporations Act 2001* in his or her trustee capacity (meaning, non-beneficially). However, such registration is not a condition precedent to the Trustee exercising rights in respect of the shares pursuant to s 1072C.

Thus, the Trustee of a Bankrupt Estate can:

- exercise the same rights as the Bankrupt could, as a registered shareholder; and
- sell the shares.

But what if a sale of the shares is impracticable? We look at a recent scenario in which we were involved.

In early 2018 two new directors were appointed to the company in place of the Bankrupt. A few months later, the Bankrupt presented her debtor's petition and thus became bankrupt. The directors appointed in early 2018 remained in office in late 2018 and were close relatives of the Bankrupt. After his appointment in mid 2018, the Trustee wrote to the directors requiring that pursuant to sections 1072C and 1072E of the *Corporations Act 2001* they record the Trustee in the company's register as the holder of the Bankrupt's beneficially owned share in the company. That share was the sole issued share.

The board complied with the request, and so the Trustee became the sole registered shareholder of the company. Exercising the rights in s 1072C(2) of the *Corporations Act 2001* to inspect company records, the Trustee obtained access to financial statements and tax returns of the company, and thereby ascertained that the company had been appointed as and remained the trustee for a discretionary trust, that it was sole registered proprietor of land in its trustee capacity and that there were doubts about its solvency.

The Trustee's investigations revealed that:

- debt of the company was secured by first registered mortgage over a residential property of which the company was registered proprietor;
- that debt was cross-collateralised with debt of the Bankrupt to the same lender secured by first registered mortgage over another residential property of which the Bankrupt was sole registered proprietor; and
- the residential property of which the Bankrupt was sole registered proprietor was subject to an exchanged contract for sale of land which the Bankrupt as vendor entered into some months before the presentation of the debtor's petition. The contract remained on foot, specified a price at or above market price, and the purchaser remained willing to complete it.

The Trustee determined that it was appropriate to complete the sale contract and to obtain a recovery from the company, based on a right of contribution in favour of the Bankrupt Estate against the company. That right arose from the impending discharge of cross-collateralised debt to the first registered mortgagee to which the Bankrupt and the company were jointly and severally liable (the Bankrupt being the guarantor and the company being the principal debtor, each having mortgaged one parcel of land to the lender as security).

After identifying these rights and the opportunity to enforce them, the Trustee passed a resolution as sole shareholder under s 249B(1) of the *Corporations Act 2001* that the company be wound up pursuant to s 461(1)(a) of the *Corporations Act 2001*. The Trustee then commenced proceedings in the Federal Court

seeking an order for winding up under s 461(1)(a), his appointment as Liquidator of the company (see *Pascoe v Ambernap Pty Ltd* [2008] FCA 1975) and his appointment as Receiver of the property of the discretionary trust (*In the matter of Stansfield DIY Wealth Pty Limited* [2014] NSWSC 1484 and *In the matter of Australasian Barrister Chambers Pty Ltd* [2016] NSWSC 1767 and [2016] NSWSC 1939).

At the time of writing the Trustee has been appointed as the provisional liquidator of the company and there are appropriate interim orders for the preservation of the trust property. In ordering that the Trustee be appointed provisional liquidator of the company, the Duty Judge indicated that even if a theoretical conflict existed, that was secondary to the need to place the affairs and assets of the company (including trust properties of which the company was registered proprietor) under the control of a person other than the directors (who were the Bankrupt's close relatives). The provisional liquidator was given limited powers only.

The Trustee will be seeking to complete a sale of the Bankrupt's property which is expected to enable the loan to the mortgagee to be repaid in full, discharge the mortgage over the Bankrupt's property and the mortgage over the company's property (to the same lender) and then assert a right of contribution against the company arising out of the discharge of the company's liability to the mortgagee, so as to achieve a further recovery from the company into the Bankrupt Estate.

The decision in *Hurst v Bar Machiavelli (No 2) 2018, Supreme Court of NSW* throws further light on the situation.

This decision is important because it affirms that although a company liquidator must be independent, act impartially and avoid conflicts of interest, a person is able to be appointed as liquidator of a particular company even if a theoretical or actual conflict between their interests and duties exists. Parker J held that:

"even where a potential conflict, or even an actual conflict, arises, the Court does not automatically remove the liquidator whatever the circumstances of the administration. The Court has wide powers to direct the liquidator in the conduct of an administration; indeed in appropriate cases it is even possible to appoint a further special purpose liquidator to deal with an issue which might otherwise give rise to a conflict."

The Court observed that the liquidator could apply for Court directions, and at that hearing an interested party could act as contradictor to assert its rights against the liquidator.

Finally in- Re Loremo Pty Ltd 2018 the Supreme Court of NSW looked at the necessity for an undertaking as to damages when appointing a provisional liquidator.

In this case, a director of the company applied to the Court for the winding up of the company, and pending the hearing of the winding up, for the appointment of a provisional liquidator. The company owed a substantial debt to its shareholder and appeared to be insolvent. The secured creditor of the company supported the application for the appointment of a provisional liquidator, as did the Trustee of the Bankrupt Estate of the sole shareholder in the company, who was also a former director.

Significantly, Justice Black's decision confirms that:

- where a company itself has standing to bring an application for its winding up on the just and equitable ground (which would be the case if its sole shareholder passed such a resolution and the company then applied to the Court for the appropriate order); and
- by its director, the company seeks the appointment of a provisional liquidator

then the balance of convenience favours the appointment of a provisional liquidator, and the party seeking that order is not required to provide an undertaking as to damages.

Wherever possible, the Trustee of a Bankrupt Estate should avoid providing an undertaking as to damages to the Court if seeking the appointment of himself, herself or another person as provisional liquidator. Providing such an undertaking creates a potential liability for the Trustee which if crystallised, may not necessarily be limited to the assets in the Bankrupt Estate and could therefore generate losses which the Trustee cannot recoup fully from the Bankrupt Estate.

It is apparent that in appropriate cases, the Trustee of a Bankrupt Estate can exercise shareholder's rights which were previously available to the Bankrupt, and in doing so can obtain possession of a company's financial records, analyse its financial position and ascertain the nature of the legal relationship between the company and the Bankrupt.

These steps can be completed cost effectively, and can enable the Trustee to quickly determine whether to exercise a shareholder's right to appoint a liquidator (and in the interim, a provisional liquidator), and if the company is a trustee, to seek a further appointment as receiver to trust assets.

All of these measures can place assets of a company and/or trust under the control of a neutral third party pending recoveries being made from the company or the trust assets into the Bankrupt Estate. As the decisions in *Hurst, Re Loremo* and *Australasian Barrister* show, an insolvency practitioner is not barred from seeking their appointment in a different capacity (such as liquidator or receiver) of an associated entity even if a theoretical or actual conflict of interest exists, provided suitable safeguards against conflicts are in place (eg a requirement to seek judicial advice by way

of directions from the Court, on the order of priority of payment and the identities of those entitled to receive payment, out of funds recovered from the company or the trust assets).

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CONSTRUCTION ROUNDUP

Agent of undisclosed principal held personally liable for defective work

Property developers and construction contractors often utilise a special purpose vehicle (SPV) to undertake a development and/or construction work on specific project. The benefit of including an SPV in the project structure is that these corporate entities are unlikely to hold any assets apart from those to be used in the project, and the company is closed down when the development is completed and thus it is relatively easy to quarantine any liability that may arise with respect to the work.

Asset protection is also at the forefront of the mind of smaller residential builders who will generally operate through construction companies, rather than as individuals. This allows them to protect their personal finances from the claims of owners of homes where defective work has been carried out.

However protecting assets by utilising a company structure to operate the business becomes more complicated when licensing comes into play. In NSW section 12 of the *Home Building Act 1989* (NSW) (HBA) prohibits any person (or corporation) from carrying out residential construction work unless they hold a licence issued by the NSW Government. This means that it is the construction company that must hold the relevant licence – and the person at the helm of the construction company may not have his own separate building licence.

So how is one to know whether the person or company they are engaging to carry out residential construction work is properly licensed? A quick search of Fair Trading NSW's website will disclose whether a person or entity is licensed, whether the licence is subject to any restrictions and the identity of any other licensed persons or entities that have a connection with the subject of the search.

However, there still arises the issue of whether the homeowner understood that the person with whom they were discussing their renovation or construction work was merely acting as an agent for a licensed entity, who was intended to be liable to the homeowner for any defective work. In such a situation, it will be necessary to examine whether the existence and role of the licensed entity was ever actually disclosed to the homeowner.

This was recently considered by the NSW Supreme Court in *Cincotta v. Russo* [2019] NSWSC 272. Mr & Mrs Cincotta owned a property in Concord West that they wished to renovate. They approached Mr Russo, who they had met through their daughter's school. Mr Russo carried on a construction business through a company called Bespeak 3 Pty Limited, which held a contractor licence under the HBA. Mr Russo was employed by Bespeak, but only held a Supervisor Certificate. This meant that he was not permitted by the HBA to contract directly with consumers.

Mr Russo provided Mr & Mrs Cincotta with a quotation on the letterhead of "SER Constructions" ("SER" were Mr Russo's initials) offering to carry out the work for $610,000. At the bottom of the quotation it stated that SER Constructions was a nominee of Bespeak Pty Limited. The Cincottas accepted the quotation and signed the document.

Mr Russo prepared a standard form MB4 contract for the work. Where the contract schedule required the identification of the builder, Mr Russo wrote in his own name. Where the schedule asked for the licence number, Mr Russo provided his own supervisor certificate number. Adjacent to the provision for "ABN No.", Mr Russo wrote down Bespeak's ABN.

Mr Cincotta gave evidence that Mr Russo told him that he did not have his builder's licence on him since it was being transferred from another entity to his personal name. Mr Cincotta told the court that he did not have a problem with that as long as they were dealing with Mr Russo.

Mr Cincotta explained to the court that it was important to him and his wife that Mr Russo was the builder because that would mean that he had some "skin in the game" and would thus "be less likely to go bust than if it was a company".

The work was carried out but was ultimately found to be seriously defective. Court action followed. While Mr Russo filed a defence to the Cincottas' claim, he did not serve any evidence and he did not appear at the hearing. Bespeak was placed into liquidation and the court granted leave to the Cincottas to proceed with their case against Bespeak on the basis that they would not enforce any judgment against Bespeak except for using it to prove their debt in the winding up proceedings.

The court was satisfied that the Cincottas would be entitled to damages against one or other of Mr Russo and Bespeak, and that the measure of damages should be quantified by an expert. The question remained however whether they were entitled to relief against Mr Russo in the circumstances of this project, or just against Bespeak.

Stevenson J noted that, pursuant to the general principle of privity of contract, if a person signs a

written contract, they are to be considered as the contracting party, unless it clearly appears that that person has executed the document as an agent only: *Cooke v. Wilson* (1856) 1 CBNS 153 at 164; *Taheri v. Vitek* (2014) 87 NSWLR 403 at 412.

If the agent enters into the contract as an agent for an *undisclosed* principal, the question whether the agent has any personal liability will depend on the intention of the parties, which in turn will be deduced from the particular circumstances of the case. In this regard, the relevant inquiry is what a reasonable person with knowledge of the communications between the parties and the surrounding circumstances would conclude that the parties had intended: *Pethybridge v. Stedikas Holdings Pty Limited* [2007] NSWCA 154 at [54].

Stevenson J noted that the Mr Russo had entered into the contract as "Builder". Prior to executing the contract he had (falsely) informed Mr Cincotta that he had a builder's licence and that he was the person with whom the Cincottas would be dealing under the contract.

Importantly, while Mr Russo intended that the building work would be carried out by Bespeak, he did not disclose this to the Cincottas. Stevenson J held that there was also no reasonable basis upon which the Cincottas could have concluded that this was so. Nor was it able to be concluded from the circumstances and the documentation that the Cincottas would have understood that Mr Russo was intending to execute the contract only as agent for Bespeak.

Stevenson J commented that this was not a case where the *identity* of the principal that was to carry out the building work was not disclosed. This was a case where the *fact* that a principal was to carry out the building work was not disclosed. Accordingly, Bespeak was an undisclosed principal.

As a consequence, the court held that Mr Russo was personally liable to the Cincottas for breaches of the contract that he had signed with them.

This case presents a lesson to those who incorporate entities to carry out their construction work (and intended to bear all the potential liability) and then execute the contractual documents as that entity's agent. If the agent does not wish to bear any liability for the building company's work, he would be prudent to make it clear in the contract that he is acting solely in the capacity of agent, and that the work is in fact to be carried out by another party. If he does not do so, he could find himself personally liable after all.

At Gillis Delaney Lawyers we can provide advice and assistance in preparing and negotiating contracts to ensure that pitfalls like this are avoided.

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Divergent adjudication determinations face off

The purpose of the payment and adjudication processes in the *Building and Construction Industry Security of Payment Act 1999* (NSW) is to facilitate cash flow down the contractual chain of a construction project in order to allow the smaller participants to sustain their businesses. In order to ensure that these interim processes does not preclude a participant from being entitled to press their rights under their contract (and at common law), section 32(2) of the Act provides that nothing done for the purposes of the Act affects any civil proceedings arising under a construction contract.

Additionally, section 22(4) provides that an adjudicator in a later adjudication is required to give the work the same value as determined by a previous adjudicator.

The courts have also held that payment claims under the Act cannot be reagitated and to do so would be an abuse of process. In *Dualcorp Pty Limited v. Remo Constructions Pty Limited* (2009) 74 NSWLR 190 Allsop P stated:

> "*The Act was not intended to permit the repetitious use of the adjudication processes to require an adjudicator or successive adjudicators to execute the same statutory task in respect of the same claim on successive occasions. A party … should not be able to reignite the adjudication process at will in order to have a second or third or fourth go at the process provided by the Act merely because it is dissatisfied with the result of the first adjudication*."

In the ten years since the *Dualcorp* decision was handed down, most construction claimants and respondents have accepted that they will not be permitted a second bite of the cherry. However, as a recent case in the Supreme Court showed, some still try to reverse a previous adjudication determination by lodging a new claim.

In *Icon Co (NSW) Pty Limited v. AMA Glass Facades Pty Limited* [2019] NSWSC 250, Icon was the main contractor who constructed the now infamous Opal Tower at Sydney Olympic Park. AMA had been engaged by Icon to install a façade on the building.

In early 2018 AMA submitted a payment claim under the Act which was referred to Ms Helen Durham for determination. The adjudicator determined that AMA was entitled to payment of some $1.9 million, principally due to variations in the work – notwithstanding that the variations had not been instructed or confirmed in writing. The adjudicator also determined that Icon was not entitled to any liquidated damages since the work had not yet been completed.

A few months later, AMA submitted a new payment claim, which was again referred to adjudication. Mr Doron Rivlin was appointed as adjudicator and he

determined that AMA would not be entitled to additional payment for variations if the variations were not instructed or confirmed in writing. Mr Rivlin also determined that Icon was entitled to a specified amount of liquidated damages.

While at the time of the later Supreme Court proceedings AMA contended (by way of cross claim) that the Rivlin determination was void, it had not immediately commenced proceedings to this effect. Instead, it submitted a new payment claim a few months after the Rivlin determination had been made.

This third payment claim was referred to Ms Durham the adjudicator of the first claim. Ms Durham determined that notwithstanding the inconsistent approach of Mr Rivlin to the construction of the contract, her earlier findings were correct and therefore AMA was entitled to some $660,000 in further payment.

In the Supreme Court, Icon sought a declaration that the second Durham determination was void, while AMA sought a declaration that the Rivlin determination was void. It was common ground between the parties that each of the three determinations had dealt with the same issues of how the variation clauses in the contract should be construed.

Icon submitted that AMA had not been entitled to make the third payment claim since the Rivlin determination had already dealt with its entitlement to payment for the relevant work, and to do make a further payment claim and refer that claim to adjudication had been an abuse of process.

AMA submitted that an issue estoppel had arisen from the first Durham determination which had prevented Icon from re-agitating before Mr Rivlin the contractual construction issues.

Stevenson J described the litigation as a "spectacle" and "highly unsatisfactory", which he stated had been caused by two things:

- the decision by Mr Rivlin to express differing opinions as to the construction of the contract to that expressed by Ms Durham; and
- AMA's failure to immediately commence proceedings to challenge Mr Rivlin's findings.

With respect to Mr Rivlin's inconsistent determination, his Honour stated that irrespective of whether Ms Durham's construction was correct or her opinions were fundamental to her determination, it was not appropriate for a later adjudicator to, in effect, dissent from her earlier expression of opinion in relation to the same provisions of the contract.

His Honour also described Mr Rivlin's determination as "subversive of the intended operation of the Act" to achieve the result that "each party knows precisely where they stand at any point in time" (citing *Chase Oyster Bar Pty Limited v. Hamo Industries Pty Limited* (2010) 78 NSWLR 393).

AMA had submitted that section 22(4) was not an exhaustive statement of the matters determined in an earlier adjudication that are binding on a subsequent adjudicator. Stevenson J agreed with this submission.

However, AMA's failure to commence proceedings to challenge the Rivlin determination and its decision instead to serve an identical payment claim was in effect a repetitious use of the adjudication process that had been criticised in Dualcorp.

Notwithstanding what his Honour described his "misgivings" concerning Mr Rivlin's decision not to adopt Ms Durham's construction of the contract, Stevenson J remarked that there was substance in Icon's submission that Ms Durham's conclusions in her first determination about the construction of the contract were merely one of a number of bases upon which she concluded that AMA was entitled to the variations claimed and that Icon was not entitled to liquidated damages.

However, his Honour did not express a final view about this point since, in his view, AMA failed in its application on the basis that it had not sought declaratory relief in response to the Rivlin determination within the three month time limit prescribed by the Uniform Civil Procedure Rules.

His Honour declined to grant an extension of time to AMA (despite having the power to do so) since it had made the "inappropriate" decision to challenge the Rivlin determination by resubmitting its payment claim rather than commencing court proceedings.

Stevenson J also held that he would withhold relief from AMA on discretionary grounds since AMA had not provided any explanation for the delay in commencing proceedings and his Honour thus inferred that they had no explanation to offer but had instead made a strategic decision to re-submit their claim to adjudication.

Accordingly, his Honour made an order quashing the second Durham determination and dismissing AMA's cross summons.

From his Honour's comments, the outcome in this case clearly is likely to have been very different if AMA had chosen to commence court proceedings rather than simply re-submit its payment claim.

When navigating the complex area of security of payment in the construction industry, It is very important to ensure that the strategic decisions will not have unintended ramifications at a later date.

At Gillis Delaney Lawyers we can provide expert advice and assistance with respect to security of payment claims and adjudications.

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EMPLOYMENT ROUNDUP

$330K In Penalties for Employer & Director For Failing To Pay Interns Who Were Really Employees

Eager potential employees may offer their services on an unpaid basis to get "a foot in the door". Quite often employers allow such eager persons to work on an internship to gain work experience to assist them to gain employment either with the employer offering the internship or with another employer.

Care must be taken by employers to ensure they are not exposed to breaches of the *Fair Work Act 2009* or modern awards where an intern performs work for the employer and is not paid their proper entitlements as an employee notwithstanding the arrangement is classified as an internship or work experience.

Generally an internship that has the main purpose of work experience is less likely to be considered an employment relationship. However, if the person is doing ordinary work within the business that benefits the business, an employment relationship may well exist. Generally the more productive the work an intern does (rather than just observation, learning or training) the more likely it is that person will be found to be an employee.

Circumstances have arisen in the past where an employer has engaged people on a six month internship for no pay and then at the end of the six month internship, the employer simply engages a new intern to do the same work. If those people are performing actual duties for which the employer gets a benefit and would normally pay an employee, those persons could be determined to be an employee and entitled to benefits under the *Fair Work Act 2009* and/or an award.

Recently the Federal Circuit Court determined that a start up company Her Fashion Box Pty Limited and its director, contravened the provisions of the *Fair Work Act 2009* by failing to pay employees their proper entitlements under the *Fair Work Act 2009* and relevant award. The Fair Work Ombudsman sought pecuniary penalties for admitted contraventions of the civil remedy provisions of the *Fair Work Act 2009*.

One employee was covered by the General Retail Industry Award 2010. Two other employees were covered by the Graphic Arts, Printing & Publishing Award 2010.

The Fair Work Ombudsman identified 15 contraventions of failing to pay employees their ordinary rate of pay, overtime on a monthly basis, annual leave entitlements, public holidays and failing to provide payslips to an employee. There were also further contraventions of failing to produce documents in compliance with a Notice to Produce issued by the Fair Work Ombudsman.

One employee had been used as an unpaid intern and was owed $6,913.00.

Whilst all workers were ultimately paid all arrears owing to them, His Honour Mr Justice Manousaridis of the Federal Circuit Court found the employer's contravention of the *Fair Work Act 2009* extended over a significant period of time and in circumstances where two of the employees were demanding they be paid for the work they had performed.

The size of the under payments and the extended period of failure to pay by the employer weighed heavily in favour of assessing a penalty at the higher end of the scale.

One employee commenced working for the employer on 1 July 2014 after answering an advertisement offering an "internship". The employee commenced working on average 2 days a week. She was not paid for the work she performed. The director advised the employee in August 2014 she would have to wait for four to six weeks for a contract of employment as the director was waiting on further funding.

In December 2014 the director informed the employee (who had now been working for no pay under an internship for nearly 6 months) that she would work full time and her salary would be $25,000 (although the award for a qualified designer was $35,000).

The employee received a Christmas bonus of $1,000.

In 2015, the director asked the employee for her time worked as she would pay the employee as a consultant. The employee ceased working on 20 January 2015.

The director of the employer admitted in a Statement of Agreed Facts that she knew an award applied to employees of her business and the award contained minimum rates of pay. As such, His Honour found the conduct of the company and its director that constituted the contraventions was deliberate.

His Honour noted the failure of the business to comply with Notices to Produce issued by the Fair Work Ombudsman in its investigation resulted in no discount on the penalty for the employer.

His Honour was satisfied a penalty should include a significant component for general deterrence in promoting the public interest in compliance. The principal object of a pecuniary penalty was to attempt to put a price on a contravention that is sufficiently high to deter repetition by the contravener and by others who might be tempted to contravene.

The Court assessed a penalty in relation to each contravention with a 20% discount from the maximum penalty.

The employer was fined $274,278.00 and the director fined $54,855.00.

Employers must carefully examine the role of an intern in a business. Interns who perform work for an employer that would ordinarily be done by a paid employee must ensure they comply with obligations to treat those employees in accordance with their entitlements under the *Fair Work Act, 2009* and any applicable award.

Employers and directors also need to be aware of the significant penalties they face when they flaunt the law and fail to pay their employees.

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Worker? No; Employee? Yes. Superannuation?

If the title to this article seems confusing, that's because it is. The challenges of determining whether someone is or is not an employee are never ending. And, as attempts by government to regulate increase, so does the complexity of the issue.

Many previous articles in GD News have discussed the consequences which flow from someone being either an employee or an independent contractor. Rights under workers compensation legislation, protections under the *Fair Work Act 2009* (Cth) (***FW Act***), and liability for payroll tax are some of the most prominent.

Generally, the task of deciding whether a person is an employee or an independent contractor looks at all the circumstances and conducts a balancing exercise. The test in various contexts is pretty similar. Generally also, that balancing exercise gives an answer one way or another, so that decisions, plans and assessments can be confidently made.

But it's not quite so easy!

It is possible for the same person providing services to be a worker/employee for some purposes, but an independent contractor for others.

The recent Federal Court of Australia decision in *Moffet v Dental Corporation* [2019] FCA 344 provides the classic - and frightening - example.

From 1987 Dr Moffet had operated a dental practice in Parramatta in New South Wales. He did so as an employee of a family trading trust.

In 2007, Dr Moffet and his family trust sold the practice to Dental Corporation. Two agreements were executed:

- a Dental Practice Acquisition Agreement; and
- a Services Agreement.

The Services Agreement regulated the provision of Dr Moffet's professional services – through his practice service trustee company – to Dental Corporation. It contained the common obligation that the service company was to ensure the availability of "the Principal" (i.e. Dr Moffet) to perform duties, and provisions relating to employment of other staff and supply of administrative services.

Importantly, the Service Agreement contained clauses stipulating:

- that the relationship was not one of employment; and
- that the Principal was responsible for all taxes, superannuation or other withholdings payable as a result of monies due to the service company for the Principal's services.

Inevitably, there was a falling out between Dr Moffet and Dental Corporation. Dr Moffet claimed that Dental Corporation:

- contravened section 357 of the FW Act by representing to him that the contract pursuant to which he performed work was a contract for services rather than a contract of employment;
- contravened sections 90(2) and 323 of the FW Act by failing to make payments with respect to accrued but untaken annual leave;
- contravened section 4(2)(a) of the *Long Service Leave Act 1955* (NSW) (***LSL Act***) by failing to make payments with respect to long service leave; and
- failed to make superannuation contributions so as to avoid liability for the payment of a superannuation guarantee charge with respect to a superannuation guarantee shortfall arising under the *Superannuation Guarantee (Administration) Act* 1992 (Cth) (***SG Act***).

The Court proceeded on the ground that it was the "*totality*" of the relationship between Dr Moffet and Dental Corporation that had to be assessed.

Although it was readily accepted that different minds may draw a different conclusion from the facts presented, the Court found that the "*totality*" of the relationship was that after the acquisition of his dental practice in 2007, Dr Moffet was retained by Dental Corporation as an independent contractor.

That finding disposed of the issue of whether Dr Moffet was an employee for the purposes of the FW Act, and also whether he was a worker under the LSL Act. Accordingly, his claim for annual leave and his claim for long service leave failed.

On the claim for superannuation, however, Dr Moffet was successful. How so?

Section 12 of the SG Act provides in part as follows:

Interpretation: employee, employer

(1) Subject to this section, in this Act, ***employee*** *and*

employer *have their ordinary meaning. However, for the purposes of this Act, subsections (2) to (11):*

(a) expand the meaning of those terms; and

(b) make particular provision to avoid doubt as to the status of certain persons.

(3) If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract.

The Court said that although it had concluded that the relationship between Dental Corporation and Dr Moffet was not one of employment, the effect of s 12(3) of the SG Act is to extend the application of the Act beyond a relationship which would be recognised by the common law as an employment relationship. The effect of s 12 is to extend the reach to "*employment-like relationships*".

The Services Agreement was a "*contract that* [*was*] *wholly or principally for the labour*" of Dr Moffet within the meaning of s 12(3), and hence Dental Corporation was required to make superannuation contributions on his behalf to avoid liability to pay a superannuation guarantee charge in accordance with the SG Act. Unsurprisingly, it had not done so.

And the Takeaway

This decision highlights the very significant problems which can arise in today's workplace setting.

On the facts of this case, a relationship which is clearly one of independent contractor avoids liability for statutory leave entitlements but – and it's a big but – does not avoid a liability to make superannuation contributions.

This is despite a detailed agreement between the parties attempting to deal explicitly with the superannuation issue.

It might mean that employers are unknowingly liable for very significant superannuation liabilities for their independent contractor workforce. Now is the time to review the situation.

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WORKERS COMPENSATION ROUNDUP

WID Claims -The Effect of No Mediation Certificate

Work injury damages claims must be referred to mediation before court proceedings can be commenced. If the mediation is unsuccessful ordinarily a Mediation Certificate is provided.

Section 318A(4) of the *Workplace Injury Management and Workers Compensation Act 1998* (the "Act") stipulates that Court proceedings for recovery of work injury damages cannot be commenced whilst the claim is the subject of mediation in the Commission.

The mechanics are straightforward.

Section 318B(2) of the Act requires a mediator to issue a certificate certifying the final offers of settlement made by the parties in the mediation where a case does not resolve.

Section 318E of the Act prohibits the disclosure of the amount of any offer of settlement made by a party in the course of mediation in any Court pleading, Affidavit or other document filed in any Court proceedings..

However the amounts of the final offers are relevant to the question of costs awarded to the parties as there are consequences for a party that doesn't achieve an outcome in the proceedings better than their offers at mediation.

Final offers are not to be disclosed to or taken into account by the Court before the Court's determination of the amount of damages in the proceedings.

What happens though when a Mediation Certificate is not issued?

This issue was examined in the recent NSW District Court decision of *Sukumar v Weir Minerals Australia Limited*.

A worker was injured whilst working at his employers factory on 2 February 2012 when he slipped on the floor near a machine. He injured his right shoulder, lumbar spine and right knee. A work injury damages claim was pursued which ultimately resulted in proceedings in the District Court. The defence filed denied negligence and alleged contributory negligence. The employer also asserted the absence of a Mediation Certificate was a defence to the claim.

The claim had been referred to mediation however the mediator refused to issue a Mediation Certificate as he was not satisfied the parties had used their best endeavours to resolve the claim.

Counsel for the defendant submitted because the certificate had not been issued, the mediation was not at an end and thus due to Section 318E of the Act, Court proceedings could not be commenced.

It was not in issue that there was no certificate.

The Court observed there were provisions in the Act requiring the issue of a certificate but the Act was silent when it came to the next step if a mediator did not issue a certificate.

The effect of is certificate is stipulated in Clauses 94, 95 and 96 of the Workers Compensation Regulation 2016.

Clause 94 provides that if a plaintiff obtains a judgment that is no less favourable than the terms of the plaintiff's final offer of settlement as certified by a mediator under Section 318B of the Act, the Court is to order the insurer to pay the plaintiff's costs assessed on a party/party basis.

Clause 95 provides that if the plaintiff obtains a judgment less favourable than the terms of the employer's final offer of settlement as contained in the certificate under Section 318B of the Act, the Court is to order the plaintiff to pay the insurer's costs assessed on a party/party basis.

Clause 96 provides the parties to Court proceedings for work injury damages are to bear their own costs.

The Court determined in spite of the fact there was no mediator's certificate, it is not a bar to the plaintiff commencing proceedings and pursuing the proceedings to judgment. The Court referred to the remarks of Justice Hoeben in *Wilkinson v Perisher Blue Pty Limited* [2012] NSWCA 250, where His Honour stated:

> *"The general scheme of Part 6 of Chapter 7 of the WIM Act is for the Commission to control various preparatory steps before proceedings are commenced in a Court. That is why proposed pleadings, with their supporting documents, referred to as Pre Filing Statements and Pre Filing Defences is only when all of the steps have been satisfactorily completed and a mediation has taken place pursuant to Section 318A, that a Statement of Claim can be actually filed in a Court. The purpose of Part 6 is to ensure full disclosure of the position of the parties so that by mediation and otherwise the prospects of settlement can be fully explored."*

The Court was satisfied that as a mediation took place and the prospects of settlement had been fully explored that the plaintiff had complied with her obligations under the Act. It was also a fact the parties arranged an informal settlement conference following the mediation and the matter did not resolve. The Court also observed the defendant did not ask the mediator to reconvene the mediation to continue negotiations

The matter was allowed to proceed to hearing and the plaintiff obtained judgment.

The Court determined as the parties had participated in mediation and used their best endeavours to resolve the matter the process outlined in the Act had been followed.

However it then came to the question of costs.

The Court then referred to Clause 96 of the Workers Compensation Regulation 2016 which deals with costs recoverable in work injury damages matters. The parties made no submissions in relation to the costs of the application and accordingly the Court ordered each party bear their own costs of the proceedings however the parties have leave to return to Court and argue the question of costs. That is because Clause 97 of the Regulation was seen as having possible application.

Regulation 97 includes a provision permitting costs to be awarded where there has been an unsuccessful mediation and a follow up offer by the claimant after the mediation. If the claimant makes an offer within one month of the mediation where the mediation was not successful and the insurer has wholly denied liability and the claimant obtains an order or judgment on the claim, costs will be determined on the basis of the claimants offer certified by the mediator or the highest offer within one month of the mediation and the employers last offer being deemed to be nil.

If parties intend to pursue costs orders under Clauses 95 and 96 of the Workers Compensation Regulation 2016 then they must ensure they obtain a Certificate of Mediation to certify final offers made.

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Annual Leave Accrual During Workers Compensation Absences

Workers and employers regularly ponder over the obligations of an employer to accrue annual leave whilst a worker is off work and receiving workers compensation benefits.

Does an injured worker accrue annual leave whilst on workers compensation? The answer in New South Wales is simple. Yes.

Section 49 of the *Workers Compensation Act, 1987* ("WCA") provides that worker's compensation is payable in respect of any period of incapacity, even though the worker has received, or is entitled to receive, in respect of the period of payment, an allowance or benefit for annual holidays or long service leave. However Section 49 does not deal with the accrual of annual leave whilst a worker is receiving payments of compensation.

However the *Fair Work Act 2009* ("FWA") does deal with the issue.

Section 130 of the FWA provides that:

> *"(1) An employee is not entitled to take or accrue any leave or absence (whether paid or unpaid) under this Part during a period (a compensation period) when the employee is absent from work because of a personal illness, or a personal injury, for which the employee is receiving compensation payable under a law (a compensation law) of the Commonwealth, a State or a Territory that is about workers' compensation.*

(2) Sub-section (1) does not prevent an employee from taking or accruing leave during a compensation period if the taking or accruing of the leave is permitted by a compensation law.

(3) Sub-section (1) does not prevent an employee from taking unpaid parental leave during a compensation period."

The interaction of the WCA and FCA was considered in *NSW Nurses & Midwives Association ("NSWNMA") v Anglican Care* (2014). NSWNMA brought an application on behalf of Ms Copas, arguing that she was entitled to payment of around $3,000.00 for 18 months unpaid annual leave she had accrued whilst on worker's compensation following an injury in December 2009. The Association argued that Section 49 of the WCA is a law that permits taking or accrual of leave during a compensation period for the purpose of Section 130(2) of the FWA.

Anglican Care argued that section 49 does not create any entitlement for the accrual of leave, and therefore section 130(2) of the FWA applied so as to extinguish any claim for leave.

At first instance, her Honour Judge Emmett in the Federal Circuit Court determined that an injured worker can accrue annual leave whilst receiving payments of compensation. Her Honour was of the opinion that Section 49 expressly provided for an opportunity for an injured worker to receive workers compensation and accrue annual leave at the same time. Her Honour was therefore satisfied that Section 49 did not prevent an injured worker from receiving compensation and accruing annual leave.

Anglican Care appealed to the Full Bench of the Federal Court.

The Full Bench concluded the purpose of Section 130(2) was to enable injured workers who were absent from work and in receipt of compensation to retain their entitlements to leave over the same period, as long as that course is sanctioned, condoned or countenanced by the relevant compensation laws.

A key component of the decision was an examination of what was meant by "*permitted*" or more precisely "*permitted by*" Section 130(2) of the FWA. The Full Bench determined that "*permitted"* should be constructed as "*allowed*".

Justices Bromberg and Katzmann in a joint judgment stated:

"It would be odd if Parliament's intention were to confine the operation of s 130(2) to compensation laws which actually created or conferred entitlements to leave. After all, compensation laws create or confer rights to compensation."

Their Honours continued:

"As Anglican Care argued, s 49 of the WC Act did not create an entitlement to accrue leave. But s 130 of the FW Act does not require that the source of the entitlement be found in the compensation law in order for an employee to be able to enjoy the benefit of both compensation and leave over the same period. The purpose and effect of s 130 is to remove the entitlement to take or accrue leave for employees in receipt of workers compensation unless there is a law relating to compensation in the relevant jurisdiction which countenances the simultaneous receipt of workers compensation while the employee is absent from work. Section 49 of the WC Act is such a law."

In 2015 the *Fair Work Amendment Act* was passed. The initial draft of that Bill contained a provision whereby annual leave entitlements were not to accrue whilst an employee was absent from their employment and in receipt of worker's compensation. That provision was not enacted.

The situation in NSW therefore remains that injured workers will accrue leave whilst on workers compensation.

Work injuries that result in long term incapacities have a significant financial impact on employers and in NSW the impact includes the ongoing accrual of annual leave entitlements during the periods of a workers incapacity.

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Settlements & Issue Estoppel in Workers Compensation claims

Section 355 of the *Workplace Injury Management and Workers Compensation Act 1998* (WIM Act) provides an Arbitrator is not to make an award or otherwise determine a dispute for determination by the Commission without first using their best endeavours to bring the parties to the dispute to a settlement acceptable to all of them. Despite this mandate the structure of the legislation and the interpretation of various means utilised by legal practitioners in an effort to settle disputed claims, it is particularly difficult to finalise disputed claims once and for all unless the issues are determined by a judgment.

Central to the impediment of finalisation by way of settlement is Section 234 of the WIM Act which provides that the Act and the *Workers Compensation Act 1987* (1987 Act) apply despite any contract to the contrary. That is, the section prevents parties from "contracting out" of the legislation.

Parties often resolve disputes by way of consent orders supported by agreed facts and/or admissions on the basis that the worker has recovered from the effects of an injury and has no further entitlement to weekly or medical compensation. The principles that apply in respect of the consequences of prior

settlements effected by consent awards and orders were summarised by Deputy President Snell in *Seaib v Hayes Personnel Services (Aust) Pty Limited* [2008] NSWWCCPD 36:

"(i) a consent award can create res judicata estoppels, and also will involve admissions of facts inherent to the award, for example the occurrence of injury, or the existence of economic incapacity resulting from injury, at a certain point in time;

(ii) when an issue is the subject of res judicata estoppel, it is not justiciable in a further action; it is not open to consideration de novo;

(iii) a res judicata estoppel, created by a consent award for an employer, on a weekly claim, or claim for Section 60 expenses, operates up to the date it is made. It does not eliminate future rights;

(iv) a consent award does not oblige the Commission, in subsequent proceedings, to take the factual position described in the consent award as a starting point in a fact finding process. The Commission should determine the facts as at the date of further hearing, "without legal constraints flowing from the earlier award";

(v) when engaging in this fresh fact finding process, it is appropriate to have regard to admissions flowing from the earlier consent award, and the presumption of continuance. However such matters are only part of the evidence, to be considered with other evidence, lay and medical;

(vi) a consent award does not create an issue estoppel;

(vii) where a worker executes admissions and agreed facts as part of a settlement, these speak as at the time they were made. They are evidence of the facts stated, but not conclusive;

(viii) it is necessary to analyse and interpret admissions and agreed facts with care, in deciding what evidentiary force they have;

(ix) Section 60 is an indemnity provision. Admissions that a worker has no entitlement to such expenses "thereafter", or "over and above" an agreed sum, should be read in this light;

(x) agreed facts which purport to impose a blanket bar upon the recovery of further compensation, for example a worker "is not entitled to any further weekly payment or compensation", or "has no entitlement to compensation against a respondent", must progress subject to Section 234 of the 1998 Act, which prevents contracting out of the 1987 and 1998 Acts;

(xi) the parties cannot use a series of consent awards to achieve de facto commutation, without appropriate approval;

(xii) it is not necessary to show a change in circumstances or a deterioration in an injured worker's condition after the date of a previous settlement where there were agreed facts and admissions."

In the decision of *Anderson v Charles Sturt University* [2002] NSWWCC 62, Neilsen J held the making of an agreement between the parties does not take away or diminish the jurisdiction of the Court. Even though the parties can ask the Court to enter up an award in accordance with their agreement, and provided jurisdiction exists a Court can enter up that award. Even though formed in the terms of a Court Award it is still in effect an agreement between the parties and does not create any issue estoppel. Further payment of compensation in respect of a consent award cannot amount to an estoppel and at most, if anything, is an admission. In effect a consent award does not involve any findings by the Court but rather enshrines in an award what was an agreement between the parties.

The decision of Deputy President O'Grady in *CSR Limited v Gonzales* [2010] NSWWCCPD 11 indicated that complying agreements under Section 66A of the 1987 Act provide means whereby a worker and an employer may reach a final and binding contract concerning entitlement to lump sum compensation. As such the section represents an exception to the "no contracting out provision" in Section 234. A Complying Agreement entered into pursuant to the provisions of Section 66A may by agreement fix the quantum of entitlement a worker has to lump sums pursuant to Sections 66.

In that particular case the parties also entered into agreed facts and admissions specifying the lump sum compensation payable pursuant to the agreement represented the full extent of any entitlement the worker had pursuant to Sections 66 and 67. Deputy President O'Grady found the doctrine of estoppel by agreement operated in those circumstances on the basis it would be unfair or unjust to permit the claimant to resile from the agreed fact. The Deputy President did not however have any regard to the contents of the documents completed by the parties headed "Admissions" that were executed many months after the making of the award by the Commission and the making of the agreement.

The decision of Acting Deputy President Roche in *Kaibau v Gillespies Produce & Packing Pty Limited* [2006] NSWWCCPD 168 makes it clear that a consent award can create an estoppel however the extent of the estoppel is quite limited and can go no further than creating an estoppel of the facts agreed as at the date of the agreement. This is because a settlement cannot eliminate future rights. The Deputy President indicated the Commission does not determine lump sum damages on a once and for all basis but determines rights at a particular point in time, thus the application of the traditional principles of estoppel and res judicata

need to be approached with some caution in the Commission.

In effect the principles of res judicata and issue estoppel are both based on the premise that a party cannot re-litigate that which has already been decided.

The Deputy President referred to the distinction between res judicata and issue estoppel that was considered in the decision of *Pond v Workcover Corporation (SA) Ltd* [2001] SAWCT 69 where it was stated in the case of res judicata one need go no further than the formal judgment or order of the relevant adjudicating authority. In the case of issue estoppel one can go further to the sub-stratum of findings upon which the formal judgment or order was based, although there are limitations described as 'facts fundamental to the decision arrived at'.

In that decision it was made clear that a settlement in respect to injury arising out of one part of the body does not prevent a worker from making a claim for a consequential injury to other body parts, provided there is a direct chain of causation between the work accident and the subsequent condition.

In *Gane v Dubbo City Council* [2007] NSWWCCPD 140 Deputy President Roche held where there is no issue as to injury and the only issue is whether there has been an increase in the permanent impairment previously agreed, the only course open where there is a dispute as to the degree of permanent impairment was to refer the claim to an AMS for assessment.

However in the subsequent decision of Acting Deputy President Moore in *E v Sydney South West Area Health Service* [2009] NSWWCCPD 108 it was held that there needed to be plausible evidence of deterioration for further assessment to take place.

That decision was followed by Arbitrator Wynyard in *Caulfield v Whelan Kartaway Pty Ltd* [2014] NSWWCC 50. There he stated that the authorities establish that an estoppel does exist as to orders made by the Commission until such time as further evidence is introduced that demonstrates alteration of events since the order was made.

In *Moon v Conmah Pty Limited* [2009] NSWWCCPD 134, Deputy President Roche commented that orders by consent create estoppels between the parties but only to the extent of "matters that are necessarily decided". There the Deputy President found that the worker was estopped from seeking compensation for an "an injury" to his left arm by a previous consent award in the respondent's favour, but that did not stop him from claiming compensation for consequential loss resulting from the accepted right shoulder injury.

Overall the decisions confirm the difficulty that confronts an insurer in relying upon facts that were agreed between the parties as a basis for resolving an earlier disputed claim in subsequent proceedings where a worker seeks further compensation for the same injury. The only facts that can be relied upon to inform decisions on a subsequent claim are facts that have been determined during a litigated dispute.

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