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IN THIS EDITION

ASIC Intervention on Insurance Products and Target Market Determinations

Following on the heels of the Royal Commission into Misconduct in the Financial Services Industry the Government has introduced design and distribution obligations for financial products and strengthened consumer protection. ASIC now has intervention powers permitting it to ban or impose conditions on the offering of financial products to retail clients. In addition in 2 years financial services providers will not be able to offer financial products to retail clients unless there is a target market determination for the product.

The Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019 was passed by Parliament in April this year. The new regime will be phased in.

ASIC's new intervention powers commenced on 6 April 2019 and ASIC can make product intervention orders preventing insurance sellers from engaging in specified conduct where the financial product will, or is likely to result in, significant detriment to retail clients.

But there is more. Insurers, insurance brokers and underwriting agencies put 6 April 2021 as a placeholder in their diaries to herald the commencement of target market determinations for all financial products offered to retail clients.

From 6 April 2021 where insurance products are sold to retail clients a target market determination must be in place for each product. All businesses involved in the supply chain for insurance products will need to consider the determinations to ensure products are offered to the intended market.

ASIC has the power to make product intervention orders when a financial product has resulted in, or will or is likely to result in, significant detriment to retail clients.

Intervention orders can include a requirement that a product must not be issued to a retail client unless the retail client has received personal advice.

In considering whether a financial product has resulted

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in, or will or is likely to result in, significant detriment to retail clients ASIC must take into account:

- the nature and extent of the detriment;
- the actual or potential financial loss to retail clients resulting from the product;
- the impact that the detriment has had, or will or is likely to have, on retail clients.

ASIC must not make a product intervention order unless it has:

- consulted persons who are reasonably likely to be affected by the proposed order; and
- if the proposed order will apply to a body that is regulated by APRA—consulted APRA.

ASIC can also make intervention orders that persons must not engage in specified conduct in relation to a class of products.

However the conduct specified by ASIC in a product intervention order must be limited to conduct in relation to a retail client.

For the next 2 years we are likely to see increasing interest from ASIC in insurance products offered to retail clients whether the products are for retail clients or wholesale clients. With time, product intervention orders will shape how insurance is sold particularly if intervention orders include requirements that the seller of the product must provide personal advice. Intervention orders are sure to impact on distribution strategies deployed by insurers in the future.

Turning to target market determinations, from 21 April 2021, sellers of insurance will need to have target market determinations for insurance sold to retail clients. The determinations must:

- be in writing;
- describe the class of retail clients that comprises the target market for the product;
- specify any conditions and restrictions on retail product distribution conduct in relation to the product (distribution conditions);
- specify events and circumstances (review triggers) that would reasonably suggest that the determination is no longer appropriate;
- specify the maximum period before a review of the determination is undertaken;
- specify a reporting period for reporting information to ASIC about the number of complaints about the product;
- specify the kinds of information needed to enable the person who made the target market determination to identify promptly whether a review trigger for the determination, or another event or circumstance that would reasonably suggest that the determination is no longer appropriate, has occurred.

Each target market determination must be available to the public free of charge.

Further, a person who makes a target market determination must take reasonable steps to ensure distribution conduct is consistent with the determination.

As a means of oversight, ASIC can require a person who makes a target market determination, or a seller who engages in retail product distribution to provide ASIC with distribution information including information in their possession or to which the person has access.

ASIC's product intervention powers will apply to all products sold to retail clients including those that are the subject of product market determinations.

If a financial product is sold to a retail client and no target market determination has been made the Courts can:

- declare the whole or any part of a contract of insurance or a collateral arrangement relating to such a contract to be void;
- if the Court thinks fit—declare the contract of insurance to have been void ab initio or void at all times on and after a date specified;
- make an order varying the contract or arrangement;
- make an order refusing to enforce any or all of the provisions of the insurance contract
- order a refund money.

A contravention of any obligation that arises under the new regime is an offence and will also attract criminal and civil penalties.

It is an offence:

- to engage in conduct contrary to a product intervention order;
- to fail to notify retail clients of a product intervention order;
- to fail to take reasonable steps to make others aware of a product intervention order;

and from 6 April 2021 it will also be an offence:

- to engage in retail product distribution conduct where no target market determination has been made;
- to fail to make and make available target market determinations for financial products;
- to fail to review target market determinations;
- to sell financial products before reviewing target market determinations;
- to fail to inform regulated persons of obligations not to engage in retail product distribution conduct in relation to financial products before review of target market determinations;
- to ensure that retail product distribution conduct is consistent with target market determinations;
- to fail to keep records as required by the new regime;

- to fail to report complaints and other information about financial products;
- to fail to provide information to ASIC on request;
- to fail to comply with stop order obligations.

ASIC will be consulting with the insurance industry over the next 2 years to develop guidelines for target market determinations.

The new law gives ASIC power to enforce design and distribution obligations and delivers to ASIC the power to obtain distribution information, stop distribution of products, impose terms on the distribution of products and oversee target market determinations to ensure financial products sold to retail clients are suitable and do not cause significant detriment.

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Whistleblower Protections - A New Regime Begins

The *Corporations Act 2001* protects whistleblowers from persecution and as a consequence of legislation recently passed by Parliament those protections will be expanded and large proprietary and public corporations will be required to have a whistleblower policy in place from 1 January 2020.

Legislation introducing changes to the current whistleblower protections received assent on 12 March 2019 and the changes will commence on 1 July 2019.

These changes herald categorisation of the persons who are eligible whistleblowers, the disclosures that are protected, the persons to whom protected disclosures can be made and the consequences of any failure to provide prescribed protection.

An individual that falls into one of the following criteria will be an "eligible whistleblower" entitled to protection:

- an officer of a regulated entity;
- an employee of the regulated entity;
- an individual who supplies services or goods to a regulated entity;
- an employer of a person that supplies services or goods to a regulated entity;
- an individual who is an associate of a regulated entity;
- a relative of any individual referred to above;
- a dependant of an individual referred to above.

"Regulated entities" include companies, corporations, general insurers, life companies, ADI's (within the meaning of the Banking Act 1959) and superannuation trustees.

Disclosure is protected where the discloser has reasonable grounds to suspect the information indicates either a regulated entity or an officer or employer of a regulated entity has engaged in conduct that constitutes an offence against or a contravention of a provision of any of the following:

- the Corporations Act 2001;
- the ASIC Act;
- the Banking Act 1959;
- the Financial Section Collection of Data (Act) 2001;
- the Insurance Act 1973;
- the Life Insurance Act 1995;
- the National Consumer Credit Protection Act 2009;
- the Superannuation Industry (Supervision) Act 1993;
- An offence under or against any other law of the Commonwealth that is punishable by imprisonment for a period of 12 months or more, or represents a danger to the public or the financial system.

The regime protects disclosure of information to officers or senior managers of a body corporate, the company auditor or actuary or persons authorised by the body corporate to receive such disclosures.

However the legislation excludes protection for disclosure of personal work related grievances.

It is an offence to disclose the identity of a discloser or reveal information that is likely to lead to the identification of a discloser without the discloser's consent. It is also an offence to engage in conduct causing detriment to a person that is suspected to be a whistleblower.

Confidentiality is the focus of the regime and whistleblowers are protected by prohibitions against:

- dismissal of an employee;
- injury of an employee in his or her employment;
- alteration of an employee's position or duties to his or her disadvantage;
- discrimination between an employee and other employees of the same employer;
- harassment or intimidation of a person;
- harm or injury to a person including psychological harm;
- damage to a person's property;
- damage to a person's reputation;
- damage to a person's business or financial position;
- any other damage to a person.

Persons will be entitled to seek compensation for contraventions of the protections and Regulators can pursue offenders for civil and criminal penalties.

The maximum civil penalties are:

- 5,000 penalty units ($1.050M) or three times the benefit derived/detriment avoided for an individual, and
- 50,000 penalty units ($10.5M), three times the benefit derived/detriment avoided or 10% of annual turnover (up to 2.5 million penalty units) for a body corporate.

A failure to comply with the confidentiality or prohibited conduct provisions will also be a criminal offence punishable by imprisonment and or fines. The maximum penalties after the initial transition period will be:

- for a breach of confidentiality 30 penalty units ($25,200) or six months imprisonment, or both, and
- for victimisation or threatened victimisation of a whistleblower 120 penalty units ($25,200) or two years imprisonment, or both.

Whistleblower policies must also be implemented by public companies and large proprietary companies detailing:

- information about the protections available to whistleblowers, and
- information about to whom disclosures that qualify for protection may be made, and how they may be made; and
- information about how the company will support whistleblowers and protect them from detriment; and
- information about how the company will investigate disclosures that qualify for protection; and
- information about how the company will ensure fair treatment of employees of the company who are mentioned in disclosures that qualify for protection, or to whom such disclosures relate; and
- information about how the policy is to be made available to officers and employees of the company.
- Remedies available include orders for compensation, an order granting an injunction, an order requiring an apology, an order requiring the first person to pay exemplary damages.

Large proprietary companies are corporations that satisfy at least two of the following conditions:

- those where their consolidated revenue for the financial year of the company and entities it controls is $25 million or more;
- the value of the consolidated gross assets at the end of the financial year of the company and any entities it controls is $12.5 million or more;
- the company and entities it controls have 50 or more employees at the end of the financial year.

Failure to implement a whistleblower policy is a strict liability offence resulting in 60 penalty units ($12,600).

ASIC plans to issue regulatory guidance on the requirement for a whistleblower policy, and will consult publicly in the second half of 2019.

And what else could be on the horizon?

Whistleblowing is sure to attract attention with ASIC's increased enforcement focus following the Royal Commission into Misconduct in the Financial Services Sector.

Enhancements to whistleblower protections are likely to flow with the passage of time and perhaps rewards for whistleblowers.

Prior to the election the Federal Government claimed it had done enough to protect and compensate whistleblowers with the changes it has introduced and there was no need to look for ways to financially reward whistleblowers. The Labor party however announced it would introduce a rewards scheme. So where will the ball eventually land. In USA a monetary incentive is offered by the government to individuals for exposing certain wrongdoing and federal laws require the government to reward whistleblowers with a percentage of the money that it recovers as a result of their tip. Whistleblowers in the USA may receive up to 30% of the total monetary recovery as a reward. Perhaps one day there will be an ASIC Whistleblower Reward Program.

As can be seen the changes to the Corporations Act will present corporate governance challenges as businesses look to build the policies, procedures and resources needed to ensure whistleblower protections are introduced as well as provide training for those responsible for receiving protected information from whistleblowers.

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The Horse Hasn't Bolted on Dangerous Recreational Activities

In New South Wales when the *Civil Liability Act 2002* came into effect the defence of dangerous recreational activities was introduced.

There have been surprisingly few decisions on what this provision, as well as the provision relating to risk waiver, actually mean.

The Supreme Court of New South Wales has however recently handed down a decision that provides some guidance in relation to not only dangerous recreational activities but also risk waivers (*Menz v Wagga Wagga Show Society Inc*).

Kerrie Anne Menz attended the agricultural show held at the Wagga Wagga Showground with her horse, Cannons Gladiator, who she called Sonny. On

27 September 2012 Menz attended the first day of the show and rode Sonny in a number of events. The events were entered by purchasing tickets at the office.

On 28 September 2012 Menz attended the last day of the show to ride Sonny in further events. At around 10.00 am Menz was riding Sonny in a warm up area of the showground prior to the start of the event in which she was competing. There were a number of children playing nearby on a fence that surrounded a greyhound track in the centre of the showground. The children made a loud noise when they banged a metal sign on the fence. A horse called Banjo that was being ridden nearby by Cassandra McDonald was startled, as was Sonny. Sonny fell onto his right side while Menz was in the saddle, as a consequence of which she also fell and sustained a significant injury.

Prior to this incident Menz had been competing at events in the show for many years.

Before the commencement of the show the Wagga Wagga Show Society issued the "148th Show Horse Program – 27 & 28 September 2012". Page 7 of that document provided that:

> *"All competitors must sign waivers before they ride if not they ask [sic] to leave the ring and will not be allowed to compete until waivers are signed. No exemptions will be granted and no certificates will be accepted from competitors."*

Menz conceded she would have obtained a copy of the program. Prior to competing in the events with Sonny the previous day Menz signed an indemnity and waiver according to which:

> *"The Agricultural Society's Council of NSW advises that the participation including passive participation, in events or activities at an agricultural show contains elements of risk, both obvious and inherent. The risks involved may result in property damage and/or personal injury including death.*
>
> 1. *I the signatory acknowledge, agree and understand that participation, including passive participation, in events and activities at this, or any show contains an element of risk of injury and I agree that I undertake any risk voluntarily of my own free will and at my own risk.*
> 2. *I the signatory acknowledge, agree and understand that the risk warning at the top of this form constitutes a "risk warning", for the purposes of Division 5 of the Civil Liability Act 2002.*
> 3. *I the signatory acknowledge the risk referred to above and agree to waive any and all rights that I, or any other person claiming through me, may have against the Wagga Wagga Show Society in relation to any loss or injury (including death) that is suffered by me as a result of my participation in this show/event.*
> 4. *The signatory must continually indemnify the Wagga Wagga Show Society on a full indemnity basis against any claim or proceeding that is made, threatened or commenced and any liability, loss (including consequential loss and loss of profits), damages or expense (including legal costs on a full indemnity basis) that the Wagga Wagga Show Society incurs or suffers, as a direct or indirect result of the undersigned's participation in any event held by the Wagga Wagga Show Society."*

Menz acknowledged the risk warning by signing the following:

> *"I have read this Indemnity and Waiver form and acknowledge and agree with its contents. I have made any further enquiries which I feel are necessary or desirable and fully understand the risks involved in this activity."*

The question therefore arose whether the Wagga Wagga Show Society was entitled to rely on the various defences in the *Civil Liability Act 2002*, including the defences relating to risk waivers and dangerous recreational activities.

Firstly, the Show Society argued it was not liable for the plaintiff's injury as her injuries were due to the materialisation of an obvious risk of a dangerous recreational activity (Sections 5L, 5F and 5K).

His Honour Justice Bellew agreed the activity was a dangerous recreational activity.

In order for a recreational activity to be dangerous, it must involve a significant risk of physical harm which was the case here.

His Honour Justice Bellew noted:

> *"At the time of being injured, the recreational activity in which the plaintiff was engaged was that of horse riding. There is a risk of catastrophic injury to the rider of the horse simply as a consequence of the horse being ridden. There is evidence before me which makes it clear that horses are unpredictable in terms of their reaction to external stimulae. That unpredictability exists as a consequence of the fact that a horse is a powerful animal, with a mind of its own, and which is prone to reacting suddenly and unexpectedly to external stimulae. The fact that the plaintiff was warming up with Sonny at the time of the incident does not meant that her activity of riding him was not dangerous. The risk of serious injury resulting from a horse being spooked is continually present, regardless of whether a horse is being ridden in a warm up exercise, or in an event or competition."*

The risk was also an obvious one and the harm suffered by Menz was due to the materialisation of that obvious risk.

The trial judge was of the opinion that there was also no duty to warn of this obvious risk.

Further, the Show Society was entitled to rely on Section 5I of the *Civil Liability Act* 2002 as Menz'

injuries were the result of materialisation of inherent risk.

The trial judge then went on to consider the risk warning. The defendant was also successful in the argument that there should be no liability as a consequence of the risk warning signed by Menz.

In His Honour's view:

> *"The risk warning in the present case was directed to the risk involved in participating in events or activities at the show with horses generally, and specifically with Sonny. In my view that risk warning identified, and warned, of the general nature of that particular risk. It is also warned that there was a risk of injury in undertaking any activity, or participating in any event at the show involving the use of horses. The risk was one which was known to the plaintiff."*

Menz also attempted to argue that her claim must succeed as a consequence of the operation of the Australian Consumer Law. In particular, Menz relied on Section 60 which contains a guarantee services will be provided with due care and skill however His Honour held that the provisions of the Australian Consumer Law could not be relied upon to circumvent the operation of the provisions in the *Civil Liability Act 2002*.

Section 275 of the Australian Consumer Law provides that:

> *275 Limitation of Liability*
>
> *If:*
>
> *(a) there is a failure to comply with a guarantee that applies to a supply of services under Sub Division of Division 1 of Part 3-2; and*
>
> *(b) the law of a State or a Territory is the proper law of the contract, that law applies to limit or preclude liability for the failure and recovery of that liability (if any) in the same way as it applies to limit or preclude liability, and recovery of any liability, for a breach of a term of the contract for the supply of the services."*

His Honour considered the various provisions of the *Civil Liability Act 2002* and noted Section 5L precludes liability, Section 5H limits liability, Sections 5H and 5M preclude liability. In these circumstances for the purpose of Section 275, each of the sections is a law that "applies to limit or preclude liability" and so Menz was not entitled to rely upon the provisions of the Australian Consumer Law to circumvent the operations of those sections of the *Civil Liability Act 2002*.

The end result is a resounding win for the defendant. The decision reminds us that the provisions in the *Civil Liability Act 2002* have teeth when relied on in the appropriate case.

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When does a Proposal form part of the Contract of Insurance?

It is commonplace for insurers, before entering into an insurance contract with an insured, to require an insured to complete answers to questions contained in an application for insurance otherwise known as a Proposal.

Since the High Court decision of *Deaves v CML Fire and General Insurance Co Ltd* in 1979, Australian law recognises the proposition that an attempt to incorporate terms from a Proposal into an insurance contract will be ineffective unless there is an express provision to that effect.

What happens if the Proposal is completed by or on behalf of the insured but only a partially complete copy is transmitted to the insurer? Are any missing pages to be incorporated into the insurance contract or is their omission to be taken into account?

This issue was considered by his Honour Justice Rothman of the NSW Supreme Court in the recent decision of *Bechini v IUS Pty Limited (in liquidation)*.

The decision before the Court involved a determination of separate questions regarding the interpretation of an insurance policy relevant to a claim brought by the Bechinis against IUS, a firm of architects.

One of the issues before the Court was whether or not a Proposal had been incorporated into the contract of insurance in circumstances where two pages were missing when it was transmitted to the insurer.

The relevant facts were as follows.

In February 2007, IUS approached M & R Insurance Brokers Pty Limited ("MRI") for a quote for professional indemnity insurance for the 2007 / 08 policy period.

IUS provided to MRI, as part of its request for a quote, an Aon Risk Services Australia Limited ("Aon") Proposal form from 2005 which IUS had completed.

MRI responded by providing a proposed Insurance Schedule summarising the nature of the insurance cover, a policy wording issued by Dual Australia (as agent for Lumley) and a Dual Australia / Lumley Proposal Form.

The Dual Australia / Lumley Proposal Form was signed by a director of IUS but it appears that, when it was returned to MRI, page 2 was inadvertently omitted resulting in an incomplete Proposal Form being received by MRI.

MRI's usual practice was to transpose the information from the Dual / Lumley Proposal Form into a worksheet which MRI then sent to Dual Australia, along with a complete copy of the Proposal Form, requesting the insurance to be effected.

However, MRI did not follow its usual practice as it did not complete the worksheet.

Dual as agent for Lumley subsequently effected the policy.

Page 1 of the Proposal Form confirmed it was a claims made policy of insurance and described the duty of disclosure.

Page 2 of the Proposal Form, the relevantly missing page, dealt with nondisclosure, surrender or waiver of any right of contribution or indemnity, notice of occurrence of events, subrogation rights and a privacy statement.

Thus, the first two pages were pro forma pages that did not require IUS to complete and provide information.

The remaining pages, which were not omitted, contained information provided by IUS.

The difference between the parties was whether the first two pages of the Proposal Form, being pro forma pages without any information provided by IUS, formed part of the contract of insurance.

His Honour referred to the High Court decision in *Deaves* and noted the following observations of Jacobs J:

"At least in Australia the policy itself must in some way express the incorporation of the proposal or its contents in the policy"

Rothman J noted that the terms of the policy wording defined the term "Policy" to include the "Proposal".

The question was whether "Proposal" included the first two pro forma pages or just the information on the remaining pages of the Proposal Form that were completed by IUS.

MRI and Lumley contended it did not. Unsurprisingly, IUS contended it did.

Justice Rothman decided the issue in favour of IUS. His Honour noted the major heading at the top of the first page of the document was described as "Architects Proposal Form" which then contained the following description:

"Notice Relating to This Proposal."

Rothman J noted the following:

> *"…the mere fact that the term 'relating to' refers to a connection between one thing and another, does not require acceptance of the proposition that the two things connected are different."*

Moreover, his Honour noted the Proposal Form was replete throughout the document with references to "this Proposal".

His Honour concluded:

> *"Given the heading of the document as an Architects Proposal Form, the reference to the notice 'relating to this Proposal' does not signify a distinction between the first two typewritten pages of the document, which is on the letterhead of Dual Australia and Lumley, and the form that is to be completed by IUS and was completed by or on behalf of IUS."*

Accordingly, his Honour found the entire Proposal Form, based on the policy wording, and the Court's interpretation of what constituted the "Proposal", was incorporated into the contract of insurance.

Rothman J also held that the unintended omission of a typewritten pro forma page of an entire document did not affect either the objectively or subjectively determined intention of the parties. The parties intended the Proposal Form would form part of the policy.

Accordingly, the missing second page of the Proposal Form was held to form part of the insurance contract.

This interesting decision illustrates the circumstances in which a Proposal Form, whether completed by the insured or otherwise, will form part of the contract of insurance.

In circumstances where the policy expressly provides for the policy to incorporate the Proposal Form, it will be held incorporated in its entirety, even where pro forma pages not completed by the insured, are missing when provided to the insurer.

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CONSTRUCTION ROUNDUP

The Lacrosse Tower Fire – The Liability Of The Builder

In the previous issue of our newsletter, we looked at the requirements of the Building Code of Australia with respect to combustible cladding on high rise buildings, and the reasons given by Woodward J in the Victorian Civil and Administrative Tribunal in finding that the Alucobest aluminium composite panels (ACPs) installed on the Lacrosse Tower did not comply with the BCA: *Owners Corporation No. 1 of PS613436T & Ors v. LU LU Simon Pty Limited & Ors* (Building and Property) [2019] VCAT 286.

In this edition we look at how Woodward J assessed the liability of the main contractor to the owners of the various strata plans comprising the Lacrosse Tower, and the extent to which this liability was diminished or otherwise affected by that main contractor's reliance on the various consultants and subcontractors who had played a role in the specification and certification of the installation of the Alucobest ACPs on the building.

The main contractor on the project had been LU Simon Builders Pty Limited (LU Simon). They had been

engaged by the developer to design and construct the Lacrosse Tower which, according to the Principal's Project Requirements, was intended to be a "prestigious residential apartment and serviced apartment development" suitable for the Docklands area of Melbourne.

Various consultants had been engaged by the developer for the initial design phase of the project, and these consultants' agreements had been later novated to LU Simon.

These consultants had included:

- the building surveyor Mr Stasi Galanos and his employer Gardner Group Pty Limited;
- the architects Elenberg Fraser Pty Limited; and
- the fire engineer Tanah Merah Pty Limited, trading as Thomas Nicolas.

Claim of breach of statutory warranties

The owners claimed that LU Simon had breached the warranties prescribed by the *Domestic Building Contracts Act 1995* (Vic) (such warranties are also mandatorily implied into residential building contracts by the NSW equivalent to this Act: the *Home Building Act 1989* (NSW)).

These warranties were:

- that all material supplied by Simon for use in the work in constructing the tower would be good and suitable for the purpose for which they were used (section 8(b));
- that the work would be carried out in accordance with, and would comply with, all laws and legal requirements including the Building Act 1993 (Vic) and the regulations made under that Act (which adopted and incorporated the BCA) (section 8(c)); and
- that the work and materials used in designing and constructing the tower for use as a residential apartment building would be reasonably fit for the purpose of such a building (section 8(f)).

LU Simon sought to shift its liability under these warranties to the consultants, claiming that it (LU Simon) had taken reasonable care in carrying out its obligations on the project, that it had relied on the advice and expertise of the consultants, and that those consultants had breached their own contractual obligations and duties to LU Simon.

However, the owners claimed that the statutory warranties given by LU Simon were absolute and not qualified by any obligation to take reasonable care. If so, the owners' claims against LU Simon would not be subject to apportionment pursuant to the *Wrongs Act 1958* (Vic). However, if the claims were held to be apportionable, then the owners claimed that the result would be that each of the consultants would be ultimately liable to them to the extent of that consultant's respective liability to LU Simon.

Woodward J noted that LU Simon had not sought to mount a substantive defence to the owners' claims that it had breached its statutory warranties. His Honour stated that, in his view, there was no defence.

His Honour noted that in *Barton v. Stiff* [2006] VSC 307, Hargrave J (as he then was) had confirmed the principle that a builder's liability for design and construction was not merely an obligation to use reasonable care.

In particular, the warranty of fitness for purpose was absolute. In this regard, his Honour noted that the obligation of the builder must be measured by reference to the purpose for which the building was required under the conditions likely to be encountered at the land.

For this reason, Woodward J accepted the owners' submission that the warranties given to them by LU Simon were not qualified or limited to an obligation to use reasonable care and skill.

The owners had submitted:

> *"[T]herefore, it is irrelevant whether LU Simon reasonably relied (as it asserts) upon the 'experts in the design team' (that is, the other respondents) for advice as to the compliance of the Alucobest panels with the BCA; or that it was not made aware of any concerns regarding the use of ACP as an external cladding material; or that ACP had been used to clad other high-rise buildings in Melbourne, such that personnel within LU Simon may have believed that it was suitable for that purpose."*

Accordingly, and consistently with the approach in *Barton v. Stiff*, Woodward J stated that it was necessary to start by determining the purpose for which the building (and thus the relevant materials) was required. In the present case, the purpose had been a multi-storey residential apartment building, which the BCA classified as a "Type A Construction" requiring the most fire-resistant type of construction, specifically with non-combustible external walls.

His Honour noted that the evidence was clear that the Alucobest panels installed on the Lacrosse Tower were "combustible" within the meaning of the BCA and that none of the parties had sought to contend otherwise. (However, there was an argument that the installation of such combustible panels on the tower was not in breach of the BCA – see the May edition of our newsletter.)

Against that evidentiary background (and after holding that the installation of the ACPs was in breach of the BCA), Woodward J agreed with the owners' submission that the Alucobest panels were obviously not good or suitable for the purpose of being used in the external walls of a high rise residential building such as the Lacrosse Tower and thus breached the warranty in section 8(b) of the Act.

His Honour also agreed with the Owners that the same

evidence established that the Alucobest panels installed by LU Simon were not fit for purpose in breach of the warranty in section 8(f) of the Act. In his Honour's view, the reliance prerequisite to a breach under that section was amply demonstrated by the provisions of the design and construct contract which set out the requirements and objectives of the project.

With respect to the warranty of compliance with all relevant legislation (section 8(c)), Woodward J held that no ACP with a polyethylene core would comply with the BCA (see our May newsletter for a detailed discussion on his Honour's examination of this issue). On this basis, his Honour was satisfied that LU Simon had also breached the warranty in section 8(c) of the Act.

Woodward J also noted that LU Simon had not cavilled with the owners' submission that they were entitled to damages for LU Simon's breach of the statutory warranties, and that those damages should be measured under the principles for damages at common law for breach of contract.

Did the builder fail to take reasonable care?

The consultants claimed that LU Simon had failed to exercise reasonable care in relation to:

- its selection of Alucobest ACPs in circumstances where those ACPs had insufficient supporting documentation and no test certificate under AS1530.3; and
- its failure to ensure that the ACPs installed by it as part of the external walls of the Lacrosse Tower were non-combustible as required by the BCA or otherwise complied with the deemed-to-satisfy provisions of the BCA.

Woodward J noted that LU Simon's selection of Alucobest ACPs rather than the Alucobond PE version of the cladding system was not a necessary condition for the ignition of the Alucobest panels. In other words, the fact that LU Simon had selected Alucobest over Alucobond PE did not make the cladding more combustible or actually cause the fire to either start or spread. His Honour therefore considered that it was unnecessary for the court to consider the anterior question of whether LU Simon had failed to exercise reasonable care in the process of the selection of Alucobest ACPs.

However, the question of whether LU Simon's installation of non-compliant ACPs constituted a failure to take reasonable care was less straightforward.

The building surveyor, Gardner Group, submitted that LU Simon was the principal contractor with control over the whole Lacrosse project, and that section 16 of the *Building Act 1993* (Vic) made it apparent that a builder does not discharge its obligations merely by constructing a building in accordance with the building permit (in other words, by relying on the work of the relevant building surveyor). In this regard (the surveyor submitted), the builder was independently fixed with liability to construct buildings that complied with the BCA, and if the surveyor was found liable for the fact of the building's non-compliance with the BCA, the builder must similarly be liable.

Similarly, the architect Elenberg Fraser submitted that as a tier 1 builder (or close to a tier 1 builder) LU Simon would be expected to know the material aspects of the BCA relevant to its construction obligations. Under its design and construct contract, LU Simon had been required to manage the design process, which included selecting a compliant design/product. The architect submitted that when LU Simon had selected the material it ought to have known that the ACPs (and in particular ACPs with polyethylene cores) were combustible. In this regard (they submitted), LU Simon may well have relied on the consultants to advise them to the contrary, but they were negligent as a builder not to undertake a more detailed investigation of the materials and design.

Unsurprisingly, the owners argued against a finding that LU Simon had failed to take reasonable care. Such a finding would open up the possibility of LU Simon being entitled to a reduction in its liability to the Owners as a "concurrent wrongdoer" within the meaning of the proportionate liability scheme set out in Part IVAA of the *Wrongs Act*.

In this regard, the owners pointed out that if the court found that the choice of Alucobest was a failure to take reasonable care, the result would be "*effectively to open the doors to such an argument in almost every case; as a decision that is subsequently found to be incorrect could almost always be constructively treated as if the decision-maker, by making the wrong choice, had failed to exercise reasonable care*".

Woodward J noted that the evidence had showed that in 2011 there had been a poor understanding among building professionals (at least in Australia) of the fire risks associated with ACPs. Further, there was no reason to expect that builders would have a better knowledge or understanding about this issue than, for example, architects and building surveyors. In fact, the reverse was more likely true, given the consultants' level of qualifications and the nature of their responsibilities.

Woodward J held that while LU Simon had clearly made an error in using non-compliant ACPs in the construction of the Lacrosse Tower, and this error gave rise to a breach of the statutory warranties under the Act and rendered it liable to compensate the owners for that breach of warranty, this did not necessarily mean that it was negligent.

His Honour cited Bray CJ in *Jennings v. Zilahi-Kiss* [1972] 2 SAS4R 493 in which the Chief Justice of the Supreme Court of South Australia had stated that a professional person "*is only liable for the use of ordinary care and skill*" and "*is not bound to guarantee against all mistakes and omissions*".

LU Simon submitted that despite its breach of the BCA, it had acted reasonably in constructing the Lacrosse Tower using combustible ACPs because:

- it was unaware of the fire risks associated with ACPs;
- the act of installing the ACPs was in furtherance of its obligations under its design and construct contract;
- it relied on the consultants to ensure compliance with the BCA.

In this regard, LU Simon pointed out that:

- it had not specified the use of ACPs in the design (this had been the architect);
- the compliance with the BCA of the design and proposed construction was the responsibility of the building surveyor; and
- the fire engineer, Thomas Nicolas, had issued a number of fire reports, none of which identified any problem with the use of ACPs as part of the external walls of the building.

Woodward J accepted LU Simon's submissions. In his Honour's view, there was no evidence that any of LU Simon's conduct in installing the ACPs as required under its contract and as approved by the building permit involved a failure to take reasonable care. Further, his Honour agreed that an important part of LU Simon's acquittal of its obligation to exercise reasonable care was its engagement of each of the architect, building surveyor and fire engineer under their various consultancy agreements.

His Honour stated that each of the building professionals engaged in the process of the construction of the Lacrosse Tower had been an important link in the chain of assurance and compliance with the BCA. However, in his Honour's view, the builder sat in a different category to the other building professionals. While LU Simon bore "front-line responsibility" to the developer and owner, it sought to cover its acknowledged shortcomings in its own expertise by engaging highly skilled professionals to direct and supervise its work.

Woodward J commented that his findings would not of course mean that a substantial builder would be inoculated against a finding of negligence, so long as it could show that it had complied with the specifications and instructions given by other building professionals. In this regard, his Honour J noted that the relationship between a builder and those other professionals was analogous to a developer and a building professional (and would thus be dependent on the facts of each case and the respective expertise of each of the parties).

As a consequence of Woodward J's findings as discussed above, LU Simon was held to have breached the statutory warranties it had mandatorily made to the owners, and LU Simon's entitlement to be indemnified by the consultants for its resultant liability to the owners was not affected or diminished by any failure on its part to take reasonable care.

Woodward J's analysis of the builder's role, its warranties and its responsibility for the non-compliant ACPs provides ammunition both for owners corporations and for builders in dealing with the fallout of a discovery of combustible cladding on a building.

If:

- the ACPs are found to be combustible within the meaning of the BCA,
- the building was completed less than six years ago; and
- the builder is still trading,

the owners would be likely to have good prospects in a claim against the builder for breaching its statutory warranties, and the builder would be likely to be held 100% liable for the cost of either replacing the cladding with a compliant façade, or at least retrofitting it to meet a "performance solution" under legislation such as the *Building Products (Safety) Act 2017* (NSW).

The builder in turn should (in principle) be able to fend off allegations that it was not entitled to merely rely on its consultants to advise it on the type of façade that would comply with the BCA and other relevant legislation, and would not cause it to breach its statutory warranties.

If your building has cladding which has been found (or you suspect) to be combustible, then the owners are likely to have an obligation to either replace the cladding or carry out retrofit works to make it compliant with the BCA. At Gillis Delaney Lawyers we can provide expert advice and assistance to guide you through this process, including (if necessary) making a claim against those who designed, built or certified the building in order to recover the rectification costs. Similarly, if you have received a claim with respect to work you have carried out on a building with combustible cladding, we can provide legal advice and representation in your management and defence of the claim.

Postscript: On 9 May 2019 the UK Prime Minister announced that the UK Government would pay £200 million ($373 million) to remove and replace aluminium composite panels on numerous buildings (including highrise apartment buildings) across the UK.

The UK Government was stirred into action by criticism that several landowners were refusing to replace the cladding, putting leaseholders and occupants at unnecessary risk despite the length of time since the tragic Grenfell fire when the issue of combustible ACPs had been widely publicised.

Given the potentially prohibitive cost of replacing cladding and the difficulties many unit owners would have in contributing to a special levy to cover this cost,

it is likely that the Australian Government will need to follow the UK's example and provide its own form of bailout scheme.

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An exercise in precision – how the court looks at claims of fraud

Any claim in court proceedings that another party has acted in a fraudulent manner is treated very seriously by the court. Such a claim can have grave negative repercussions on the party's reputation (particularly a construction contractor) and on its ability to obtain future work (particularly on government projects).

Therefore, any claim of fraudulent dealings is required to be precisely articulated in the claimant's pleadings and the claimant is required to stay within the confines of its articulated claims when prosecuting its case.

The precision of the court's analysis of whether an allegation of fraud by a subcontractor had been proven was illustrated in the recent NSW Court of Appeal decision in *YTO Construction Pty Limited v. Innovative Civil Pty Limited* [2019] NSWCA 110.

YTO was the principal contractor in the development of a residential and commercial project at Ashfield, NSW. YTO engaged Innovative to carry out (amongst other things) the bulk excavation work for the project.

The subcontract between the parties included an allowance for the excavation by Innovative of all virgin excavated natural material (VENM), but specifically noted that YTO was to prepare the site beforehand and remove any general solid waste (GSW).

During the course of the project, Innovative submitted a payment claim which included a variation claim for $490,000 for the cost of removing 70 truckloads of GSW from the site at a rate of $7,000 per load.

In response to this claim, YTO simply disputed that Innovative was contractually entitled to any adjustment to the contract price for the extraction of GSW from the site.

Innovative applied for adjudication of its payment claim pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW), but also amended its claim on the basis that it hauled 66 truckloads of GSW (rather than 70).

In support of its adjudication application, Innovative included copies of dockets issued by its own subcontractor, Elkordi Earthworx Pty Limited, who hauled some of the spoil from the site. Innovative said that these dockets showed that 38 loads of materials were hauled between 28 August 2017 and 12 September 2017. However, the dockets did not specify whether the material that was carried in the trucks was GSW or VENM.

Innovative also included a copy of an invoice issued by Elkordi for the haulage; however, this invoice had been redacted by Innovative to conceal the unit price and total amount charged for the work.

The adjudicator accepted that Innovative was entitled to be paid for (amongst other things) the excavation and removal of GSW, and determined that it was entitled to the full amount claimed in its adjudication application.

YTO commenced proceedings in the Supreme Court of NSW seeking orders that the adjudicator's determination should be set aside on the basis that it had been procured by fraud. YTO's claim was on two bases:

- Innovative had claimed that it had removed 66 loads of GSW from the site in circumstances where it knew (or had concluded in its assessment of Elkordi's own claim) that a number of those loads were not in fact GSW;
- Innovative had falsely represented that $7,000 was the cost to it of removing each load of GSW.

The primary judge (Rein J) dismissed YTO's application, holding that YTO had, during the trial, departed from its pleaded case, and it had not proven that pleaded case.

Rein J held that YTO needed to prove the falsity of the representations made by Innovative, and to do so they would need to prove that all 66 loads were not in fact GSW. His Honour stated that because YTO had asserted in its submissions that it was not necessary to conduct any physical assessment of any given truckload (which his Honour said was a case not actually articulated in its pleading), it had not provided sufficient evidence of what was in fact in each and every truckload.

Rein J also found that YTO had departed from its pleaded case when it had sought in its closing submissions to argue that Innovative's representation that $7,000 was the cost to it of removing the GSW was false. In this regard, his Honour had found that this did not constitute a representation of an actual cost to innovative of $7,000, but was instead a value (or in other words the cost to YTO) of that amount.

YTO appealed from the Rein J's decision.

The Court of Appeal partly upheld the appeal, holding that the primary judge had erred in his assessment of what evidence was required to prove YTO's claims.

White JA (with whom Macfarlan JA and Emmett AJA agreed) stated that although it was not disputed that a Technology and Construction List Statement filed in the Equity Division of the Supreme Court of NSW was not technically a pleading, it was nonetheless incumbent on YTO to articulate precisely the fraud that was alleged, and to strictly prove the fraud (*Quarter Enterprises Pty Limited v. Allardyce Lumber Company Limited* [2014] 85 NSWLR 404).

YTO had pleaded that Innovative had falsely represented to the adjudicator that all 66 truckloads were GSW and that none contained VENM. Therefore, YTO needed firstly to establish that this representation was false. However, this could be done by establishing that one or more of the 66 truckloads did not include GSW and it was not necessary to establish the contents of all 66 truckloads. White JA held that Rein J had erred in not addressing the evidence adduced by YTO on this issue.

In its closing submissions before the primary judge, Innovative had appeared to accept that the documents in support of its claim in the adjudication did not support its contention that 66 loads of GSW material had been removed from the site. Nonetheless, it continued to contend that more than 66 loads of GSW had been carted out. However, Rein J had not resolved this issue in his judgment.

Instead, Rein J had stated that as a consequence of YTO's submission that it was not necessary to assess the physical qualities of the material in each truckload removed from the site, "*the assertion that Innovative falsely represented that each of the 66 loads of excavated waste removed was GSW has been excised and the allegation of 'falsely representing' cannot be airbrushed out of YTO's case* …" and thus YTO was attempting to articulate a different case from that which it had pleaded.

However, the Court of Appeal disagreed with the primary judge. They said that what YTO had submitted was that it was not necessary to assess the physical qualities of each truckload in order to determine whether they were all for the removal of GSW if the contents of the truckloads could be established from the documents – and this was not a departure from YTO's pleading.

Accordingly, Rein J should have considered the documentary evidence to determine whether it supported YTO's case that at least some of the truckloads had not contained GSW. To do so, his Honour should have made a finding of fact about the waste carried by Elkordi for which it claimed remuneration as GSW, and which Innovative had disputed – which he had not done.

With respect to YTO's claim that Innovative had falsely represented that the cost of removing each truckload was $7,000, the Court of Appeal agreed with the primary judge that YTO's case had been inadequately pleaded, because it had not pleaded that Innovative either knew that its representation was false or was reckless as to its truth or falsity.

Rein J had not been persuaded that Innovative had been asserting that its claim was based on its actual costs to remove the GSW, since this would not have included any profit margin (as is usual in the industry). Nor did it appear from the adjudicator's determination that this was how she had understood Innovative's claim.

Instead, a representative of Innovative had given evidence that he understood the $7,000 per load claimed by Innovative to be the commercial rate for removal of GSW, and this evidence had not been challenged.

The Court of Appeal noted that where fraud is an issue the question is whether the representor honestly believed the representation to be true in the sense in which the representor understood it, or in the sense in which the representor knew that the representee might understand it. The question is not whether the representor honestly believed the representation to be true in a sense that a court, considering the matter objectively, would assign to it (*John McGrath Motors (Canberra) Pty Limited v. Applebee* (1964) 110 CLR 656 at 659-660; *Krakowski v. Eurolynx Properties Limited* (1995)183 CLR 563 at 576-577).

Since YTO's List Statement had pleaded that Innovative's representation was that $7,000 per load was the additional cost that Innovative had incurred for the removal of the GSW material, the primary judge had not erred in concluding that this was not the representation that had been conveyed and was not the representation that Innovative had intended to convey. Instead the Court of Appeal noted that the effect of the statements made by Innovative in its payment claim and adjudication application, in the context of industry practice and the parties' dealings, was that the rate of $7,000 per load that Innovative sought to charge YTO bore a "reasonable relationship to the additional cost incurred" in removing the GSW material. Since YTO had not pleaded that Innovative knew that the representation of an actual cost of $7,000 was false (or that Innovative had been recklessly indifferent to the truth of this representation), YTO had not sufficiently pleaded that this representation was false in the sense required to establish fraud.

The Court of Appeal ordered that the matter be remitted back to the primary judge for assessment of the evidence as to whether any of the 66 truckloads contained anything but GSW as claimed, and thus to make a finding as to whether the representation by Innovative that every truckload contained GSW was factually false. If such a finding were to be made, then YTO could still succeed on its claim that that part of Innovative's claim was fraudulent.

This case illustrates how carefully the courts look at the parties' pleadings and positions (and the evidence) when assessing whether fraud has been established. If a party to a contract believes that a fraudulent claim has been made, it is imperative that they seek expert legal advice at the first possible opportunity.

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EMPLOYMENT ROUNDUP

Reinstatement Available to Injured Workers After Dismissal

In New South Wales, Section 241 of the Workers Compensation Act 1987 provides that a worker who is dismissed because he is not fit for employment as a result of a work injury may apply for reinstatement in the 2 year period following the dismissal. The worker is entitled to apply for reinstatement to employment of a kind that is no more favourable than the employment the worker was engaged in when they first became unfit for employment.

A claim for reinstatement must be supported by a certificate given by a medical practitioner certifying fitness for the employment of the kind sought by the worker.

If an employer does not reinstate the worker immediately the worker can bring a claim for reinstatement in the Industrial Relations Commission. Proceedings must be commenced within two years of the dismissal however in special circumstances an extension to that period can be sanctioned by the Industrial Relations Commission.

The Industrial Relations Commission can reinstate the worker to employment of the kind requested by the worker or employment of less advantage to the worker including employment that is part time requiring the worker to undergo rehabilitation.

In a reinstatement application the Industrial Relations Commission can also order compensation in the form of back pay to the date of the application for reinstatement was first sought.

The Workers Compensation Act 1987 provides that in reinstatement applications brought by injured workers it is presumed the injured worker was dismissed because he or she was not fit for employment as a result of the injuries sustained.

Reinstatement will be available where the injury is a substantial and operative cause in the dismissal of the worker and it is incumbent on the employer to rebut this presumption if it is to argue the injury was not the cause of the dismissal.

Reinstatement proceedings will focus on four issues:

- the reasons for the dismissal of the worker;
- the kind of employment to which the worker seeks to be reemployed;
- the workers fitness at the time of their application for reinstatement;
- whether reinstatement has been offered by the employer.

The reasons for the worker's dismissal from employment enliven the Industrial Relations jurisdiction to order reinstatement.

Where the worker is dismissed for reasons other than his or her fitness for employment reinstatement will not be available, as was seen in the recent decision in the Industrial Relations Commission in *Hibbard v Lithgow City Council*.

Hibbard had worked for the Council for approximately 17 years. He contended in 2014 he suffered a nervous breakdown due to work stress and was off work for three months. In 2016 he had a problem with a particular supervisor and lodged a grievance complaint in April 2016.

In September 2017 his Union lodged a petition signed by 21 workers including Hibbard complaining about Hibbard's supervisor.

The Council wrote to Hibbard requiring him to attend an interview and discuss the petition and assertions made in it. Hibbard was directed to maintain confidentiality in relation to the matters being discussed and was warned a breach of confidentiality could result in disciplinary action.

During a meeting with Council, Hibbard was informed allegations had been made against Hibbard that he had breached the direction to maintain confidentiality in relation to the investigation into matters arising from the petition.

Council was concerned Hibbard had spoken with co-workers about the petition despite the confidentiality warning.

This led to the Council writing to Hibbard advising he would be suspended immediately without pay pending investigations into the allegations he had deliberately ignored explicit verbal and written instructions not to discuss the ongoing investigation into very serious matters raised in the petition.

Following his suspension five days later Council wrote to Hibbard setting out allegations made against Hibbard and sought a response. Five days after that Hibbard responded through lawyers denying the complaints. The next day Hibbard attended a medical practitioner and a doctor diagnosed Hibbard as suffering from anxiety and depression which was stated to be the direct result of bullying and allegations made at the workplace.

A workers compensation claim was made by Hibbard and Council proceeded with its investigations into the complaints made against Hibbard that he had approached other employees to encourage them to maintain the allegations made in the petition.

On 6 December 2017 Council informed Hibbard in writing it had found a number of the complaints made

against Hibbard substantiated and Hibbard was invited to show cause why his employment should not be terminated.

On 18 December 2017 Council wrote to Hibbard informing him that his employment was to be terminated due to Hibbard:

- deliberately ignoring specific and repeated directions to maintain strict confidentiality; and
- Hibbard breaching Clause 3.1(a) to (f) and 3.6 of the Council's Code of Conduct.

The letter from Council stated the disciplinary action was not related to the workers compensation claim nor was it due to the worker being a signatory on the petition.

Hibbard then commenced proceedings in the Industrial Relations Commission and the claim for reinstatement was heard by Commissioner Sloane. An unfair dismissal claim that had been commenced by Hibbard before the reinstatement application was not pressed.

The focus of the hearing of the reinstatement application was the reason for termination.

The Commissioner observed that there are a number of precursors to a claim for reinstatement.

Firstly the worker must be injured and have been dismissed because he or she was not fit for employment as a result of the injury received.

Secondly, the worker must have made an application for reinstatement to "employment of a kind specified in an application" and produced a certificate given by a medical practitioner to the effect that the worker is fit for employment of that kind.

Thirdly, the jurisdiction of the Commission is activated when the employer does not immediately reinstate the worker.

The onus is on the employer to demonstrate the reason for dismissal was not because of unfitness for employment as a result of the injury received.

The actual reasons of the employer for dismissal are taken into account in determining whether or not the presumption that the dismissal was as a result of the injury received has been rebutted.

The question which the Court will look at is why the employer dismissed the worker.

The question is whether the injury was a substantial and operative cause of the worker's dismissal which is a question of fact to be decided by reference to all circumstances including the employer's evidence.

The inquiry is directed to the reason of the decision maker and the test is a subjective one, not an objective one.

An employer seeking to rebut the presumption that the dismissal was due to injury must adduce evidence from the decision maker to rebut that presumption.

In this case Hibbard and the Council manager who dealt with the dismissal gave evidence. After cross examination of both witnesses the Commissioner observed the evidence provided a consistent narrative as to the seriousness with which the allegations and the petition were regarded by the Council and the action it took (namely dismissal).

Council argued the reasons for dismissal had been substantiated by the Council through evidence of the decision maker and there was no basis for not accepting the evidence of the manager which was supported by contemporaneous correspondence dealing with Hibbard's conduct and the Council's concerns about his conduct. That submission was accepted by the Commission.

The Commissioner was satisfied the injury suffered by Hibbard was not a substantial and operative cause of the dismissal and the Council had discharged its onus of displacing the presumption.

The Commissioner concluded Hibbard was not dismissed because he was not fit for employment as a result of the injury.

As can be seen from Hibbard's case the focus of the Commission's inquiry in a reinstatement application where an employer seeks to argue the worker has been dismissed for reasons other than fitness for work will require the decision maker to give clear cogent evidence of the circumstances leading to the termination and the reasons for that termination.

Where an employer terminates an injured worker for reasons other than their injury and unfitness for work, provided those other reasons are the substantive and operative cause for the termination, reinstatement of an injured worker will not be ordered pursuant to Section 241 of the Workers Compensation Act 1987.

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Employee Unfairly Dismissed for Refusing to Consent to Biometric Fingerprint Scanning

It is well established that employees are bound to follow lawful and reasonable directions from their employer. A failure to follow a lawful and reasonable direction can lead to disciplinary issues for an employees up to and including termination of their employment.

In the matter of *Lee v Superior Wood Pty Limited*, the Full Bench of the Fair Work Commission heard an appeal against the decision of Commissioner Hunt who had found Lee's dismissal was not in all the circumstances harsh, unjust or unreasonable.

Superior Wood operated two sawmills in Queensland. Lee was employed as a casual general hand and had

three and a quarter years of service.

On 12 February 2018 Lee was dismissed because he did not comply with Superior Wood's site attendance policy by refusing to use a newly introduced fingerprint scanner to sign on and off for work at the site.

Lee claimed ownership of the biometric data contained within his fingerprint. He claimed the biometric data was sensitive personal information under the *Privacy Act 1988* and his employer was not entitled to require that information from him and as such his refusal to give the information to his employer was not a valid reason for his dismissal.

On 1 November Lee was directed to attend a meeting to register his fingerprints. He did not provide his fingerprints and continued to sign in and out using the site's sign in and sign out book.

The next day Lee expressed concern about the control of his biometric data and the inability of his employer to guarantee no third party access or use of the data once stored electronically.

There were further meetings regarding Lee's ongoing refusal to use the scanner.

On 21 December 2017 his employer introduced the Superior Wood site attendance policy.

On 19 January 2018 Lee was given a verbal warning for refusing to use the scanner.

On 11 and 17 January 2018 written warnings were issued to Lee advising a continued failure to follow the policy would result in termination of his employment.

Lee's employment was terminated on 12 February 2018.

The Full Bench noted it was not in dispute Lee was aware of the policy and had refused to comply with the policy and his refusal was the reason for his dismissal.

There was no issue Lee's contract of employment required him to comply with the various policies, procedures and work rules that exist. The policy was introduced on 2 January 2018 making it compulsory all employees use the biometric scanners to record their attendance at the site. It was reinforced in the policy that biometric scanners do not take a fingerprint.

It was noted by the Full Bench the *Privacy Act 1988* reflected Parliament's concerns to recognise and protect individual privacy within the framework of a complex statutory régime. There are exceptions to the general obligation to comply with the Australian Privacy Principles which include the collection, use or disclosure of personal information where:

"1. it is unreasonable or impractical to obtain the individual's consent to that collection, use or disclosure; or

2. there is reason to suspect unlawful activity or serious misconduct and a reasonable belief that such collection, use or disclosure is necessary for the purposes of taking appropriate action."

Section 7B(3) of the *Privacy Act 1988* contains an exemption in relation to employee records. It states an act done, or a practice engaged in, by an employer that is directly related to a current or former employment relationship between the employer and the individual and an employee record held by the organisation relating to the individual is exempt from the obligations to comply with the Australian Privacy Principles.

Employee record is a defined term and in relation to an employee, means a record of personal information relating to the employment of the employee.

Australian Privacy Principle 3 deals with the collection of solicited personal information. It prohibits the collection of sensitive information about an individual unless the person consents to the collection of the information and the information is reasonably necessary for one or more of the entity's functions or activities. Sensitive information includes biometric information that is to be used for the purpose of automated biometric verification or biometric identification. It was not in dispute the collection of fingerprint data collected by the scanners met the description of sensitive information.

The Full Bench noted an express requirement of Principle 3 was to obtain an individual's consent before an entity collects sensitive information.

The Full Bench concluded the Commissioner was correct to find Lee was entitled to refuse to provide his biometric data under the policy.

It was also noted Superior Wood did not issue Lee with a privacy collection notice as required by Principle 5 and did not have a Privacy Policy as required by Principle 1.

The Full Bench concluded the direction to Lee to submit to the collection of his fingerprint data, in circumstances where he did not consent to that collection, was not a lawful direction.

The Full Bench also noted the employee record exemption only applied to employee records already obtained and held by an organisation. It noted a record is not held if it has not yet been created or is not in the possession or control of the organisation. The exemption does not apply to a thing that does not exist or to the creation of future records.

The Full Bench concluded the direction to Lee to submit to the collection of his fingerprint data in circumstances where he did not consent to that collection, was not a lawful direction. Further, the Full Bench considered any consent he might have given once told he faced discipline or dismissal would likely have been initiated by the threat. It would not have been genuine consent.

As such, it was not necessary for the Full Bench to consider whether the direction was reasonable.

It was noted a necessary counterpart to a right to consent to a thing is a right to refuse it. A direction to a person to give consent does not vest in that person a meaningful right at law. The Full Bench stated such a direction in the circumstances of this case was unreasonable.

The matter was referred back to the Commission for determination of a remedy having found the dismissal was unfair.

Employers should be aware when they seek to collect personal information from employees they should obtain their employee's consent and have in place a privacy policy and have a privacy collection notice.

However, the employee exemption does not apply to information to be collected. As such, consent must be obtained from an employee to collect their personal sensitive information.

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WORKERS COMPENSATION ROUNDUP

Section 39 - Retrospective Payments Barred

In NSW injured workers are entitled to weekly compensation payments for an aggregate period of 260 weeks where their injury has resulted in an impairment assessed at less than 21% whole person impairment. This limitation was introduced by Section 39 of the *Workers Compensation Act 1987* which acts as a bar to the recovery of weekly payments for those workers who have impairment below the relevant threshold. However this bar is lifted if a worker is assessed as having a degree of permanent impairment of more than 20%.

But what happens when after 260 weeks of weekly compensation a worker's impairment is assessed at greater than 20%. Is the worker entitled to weekly payments backdated to the time his weekly payments ended or is there an entitlement to weekly compensation from the date the worker demonstrates the impairment is greater than 20%.

On 18 April 2019 the President of the Workers Compensation Commission delivered his decision on this issue in *RSM Building Services Pty Limited v Hochbaum.*

The crucial issue considered by the President was:

> *"If the assessment is made at a point in time after the cessation of the aggregate 260 weeks, is the worker entitled to back payments of compensation between the cessation date and the date of assessment of permanent impairment greater than 20%?*

The issue required an analysis of Section 39 and the intent behind its introduction.

The President ultimately determined the bar provided by Section 39(1) to the payment of weekly compensation benefits continues to operate until such time as it is lifted by Section 39(2).

Section 39(2) restores a worker's statutory entitlement to weekly payments of compensation beyond the aggregate period of 260 weeks in certain circumstances. It provides Section 39 does not apply to a worker whose injury results in permanent impairment if the degree of permanent impairment resulting from the injury is more than 20%.

In the case at hand, the worker was injured before section 39 commenced and the transitional provisions in the legislation required weekly payments to continue to 25 December 2017, beyond the 5 year limitation, however at that point section 39 then came into play.

On 2 August 2017 the insurer gave the worker notice his weekly payments would cease on 25 December 2017 pursuant to Section 39 of the 1987 Act as he had reached the 260 week limit.

On 6 April 2018 the injured worker claimed continuing payments of compensation relying on a report of Dr Patrick who assessed 49% whole person impairment. The insurer disputed the claim. The injured worker referred the matter to the Workers Compensation Commission and on 16 July 2018 Dr Mark Burns, approved medical specialist, issued a Medical Assessment Certificate assessing the injured worker at 21% whole person impairment. The insurer commenced paying weekly compensation from that date, as the assessment was greater than 20% whole person impairment.

Shortly thereafter the injured worker lodged an Application to Resolve a Dispute claiming weekly payments of compensation for the period 26 December 2017 to 23 July 2018.

At first instance the arbitrator determined Section 39(2) should be interpreted such that once an assessment of more than 20% is obtained, Section 39 in its entirety never applied and the worker is entitled to back payments of weekly compensation benefits from the date payments ceased.

The employer challenged this decision asserting that Section 39 only permitted weekly payments after the end of the aggregate 260 week period once the assessment determined the impairment was above the threshold.

In his decision the President observed that Section 39(2) must be read in the context of Section 39 as a whole. Section 39(1) only ceases to apply once an assessment has been obtained in accordance with Section 39(3).

Where there is a dispute as to the extent of impairment this requires a Medical Assessment Certificate to be issued by an AMS in accordance with Section 65 of the 1987 Act and Chapter 7 of the *Workplace Injury Management and Workers Compensation Act 1998*.

Consequently in the absence of an assessment of impairment evidencing more than 20% whole person impairment Section 39(1) bars recovery of weekly payments of compensation.

If at some time after the impact of section 39 comes into play the worker satisfies a scheme agent that they have an impairment greater than 20% whole person impairment or an AMS certifies the impairment is greater than 20% whole person impairment, weekly payments of compensation will be reinstated but not backdated to the day payments stopped.

Whilst the worker argued Section 39 should be interpreted beneficially, the President determined the overall Parliamentary intention was to bring to an end weekly compensation after an aggregate of 260 weeks and Section 39(2) was an excepting provision and did not warrant a beneficial interpretation.

The bar in section 39 can be lifted with an assessment of impairment of greater than 20% whole person impairment. The ongoing entitlement to weekly payments will then be subject to the work capacity determination regime. However there will be no weekly payments recoverable from the day payments ceased after payment of 260 weeks of weekly compensation until satisfaction of the section 39(2) exception which occurs when the Scheme Agent accepts the worker has greater than 20% whole person impairment.

Will this be accepted by workers or will there be another challenge. We will have to wait and see.

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