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Editors:

David Newey

Amanda Bond

GILLIS DELANEY LAWYERS
LEVEL 40, ANZ TOWER
161 CASTLEREAGH STREET
SYDNEY NSW 2000
AUSTRALIA
T: + 61 2 9394 1144
F: + 61 2 9394 1100
www.gdlaw.com.au

Roadmap for Reform of the Insurance Industry

The Royal Commission into misconduct in the banking, superannuation and financial services industry made 76 recommendations, with 54 directed to the Government, 12 to the regulators and 10 to the industry. 40 recommendations require legislation. The Government has taken on board all recommendations and has announced additional commitments.

The roadmap for legislative reform was announced by Treasury in August and there is ongoing change ahead for the Insurance Industry.

So where are we at when it comes to the Insurance Industry?

What's Happened To Date

The Government has concluded consultations which have addressed:

- ✓ Disclosure in General Insurance: Improving Consumer Understanding
- ✓ APRA Capability Review: Release of Final Terms of Reference and Request for Written Submissions regarding APRA's Capability
- ✓ Enforceability of financial services industry codes
- ✓ Ending Grandfathered Conflicted Remuneration for Financial Advisers: Draft Regulations

There is an ongoing consultation on "Mortgage broker best interests duty and remuneration reforms".

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 with the new regime being phased in.

The Government released the Australian Prudential Regulation Authority (APRA) Capability Review.

ASIC has released a consultation paper which charts the way forward for foreign financial services providers who intend to operate in Australia or offer financial services to Australians. Foreign financial services providers will need an AFSL to provide financial services in Australia.

What's Ahead in the Near Future

Legislation addressing the following will be consulted on and introduced by the end of 2019:

- ✓ Mortgage broker remuneration and best interests duty
- ✓ Ending grandfathered commissions for financial advisers (legislation introduced on 1 August 2019)
- ✓ Removing the exemption for funeral expenses policies from categorisation as a financial product
- ✓ Application of unfair contract terms provisions to insurance contracts
- ✓ Introducing licensing for claims handling and removing the current exemption

And Next Year

Legislation to be consulted on and introduced by 30 June 2020 will address the following:

- ✓ Enforceable code provisions for industry codes of conduct. The Government expects the Financial Services Council and the Insurance Council of Australia to work co-operatively with ASIC to have the relevant provisions of their codes approved as 'enforceable code provisions' as soon as practicable after legislation providing ASIC with these powers
- ✓ No hawking of insurance products
- ✓ Deferred sales model for add-on insurance
- ✓ Caps on commissions paid to vehicle dealers for sale of add-on insurance products
- ✓ Change the duty of disclosure for consumers in Insurance - Duty to take reasonable care not to make a misrepresentation to an insurer
- ✓ Limiting circumstances where insurers can avoid life insurance contracts
- ✓ Restricting use of the term 'insurer' and 'insurance'
- ✓ Disclosure of lack of independence of financial advisers
- ✓ A new oversight authority for APRA and ASIC

Legislation to be consulted on and introduced by end-2020 will address the following:

- ✓ A compensation scheme of last resort
- ✓ Extending the BEAR to APRA-regulated insurers

And Further Down the Track

The Government will be increasing AFCA's role in remediation programs with legislation to be introduced by mid-2021.

Additionally there will be reviews in 2022 as follows:

- ✓ A review by the Council of Financial Regulators and the Australian Competition and Consumer Commission looking at the changes to mortgage broker remuneration and operation of upfront and trail commissions
- ✓ A review of measures to improve the quality of financial advice – Consistent with the Royal Commission recommendations, the review will examine all exemptions from the ban on conflicted remuneration, including for general insurance, consumer credit insurance, timeshare and stockbroking remuneration, and stamping fees
- ✓ A review of each remaining exemption from the ban on conflicted remuneration. This review will occur as part of the review of measures to improve the quality of financial advice
- ✓ An independent inquiry into changes in industry practices
- ✓ Assessment of the effectiveness of changes made by the regulators following the Royal Commission by the (to be established) financial regulator oversight authority

It is an extremely busy agenda for the Government and the Insurance Industry and is sure to introduce challenges over the next 3 years for insurers, underwriting agencies, insurance brokers and claims handlers as well as their advisers.

David Newey
dtn@gdlaw.com.au

Unfair Contract Term Legislation to Hit Insurance Contracts – 18 Months to Ready

On 4 February 2019 the Government announced it would extend the Unfair Contract Term ("UCT") regime to insurance contracts in response to Recommendations of the Financial Services Royal Commission. Between 30 July 2019 and 28 August 2019 there was consultation on draft legislation announced by Treasury.

The storm front is now upon the insurance industry with the application of UCT legislation to insurance policies to be introduced through legislation that will find its way into Parliament before the end of 2019. But there is time to prepare for the change as the new regime will not begin until 18 months after the legislation commences.

When the new legislation commences the UCT regime will apply to insurance contracts entered into, renewed

or varied after the commencement of the legislation. It will apply to all contract terms for renewals and where insurance policies are varied by endorsement or otherwise it will apply to those variations without impact on the terms in place before the legislation commenced.

The obligation to act with the utmost good faith imposed by the Insurance Contracts Act will remain and sit alongside the UCT regime.

UCT legislation is not new to Australia. UCT legislation has applied to all consumer contracts entered into after 1 July 2010 and small business contracts since 12 November 2016. Small business contracts are contracts where at least one of the parties is a small business (employs less than 20 people, including casual employees employed on a regular and systematic basis) and the upfront price payable under the contract is no more than $300,000 or $1 million if the contract is for more than 12 months. UCT legislation applies to Insurance Contracts in the UK and in other jurisdictions.

The UCT laws will apply to consumers and small businesses who are parties to a contract of insurance as well as third-party beneficiaries under the contract. Specifically:

- 'consumer contracts' and 'small business contracts' will include contracts that are expressed to be for the benefit of an individual or small business but who are not a party to the contract; and
- third-party beneficiaries would be able seek declarations that a term of a contract is unfair.

Small businesses and consumers who are third party beneficiaries to an insurance contract where there is an expanded definition of insured incorporating other businesses and individuals as insured parties will have the benefit of UCT protections.

UCT legislation provides that a term in an insurance contract will be void if it is unfair. A term in a contract is unfair if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

In determining whether a term of an insurance contract is unfair a court will take into account such matters as it thinks relevant, but must take into account:

- the extent to which the term is transparent;
- the contract as a whole.

A term is transparent if the term is:

- expressed in reasonably plain language; and
- legible; and
- presented clearly; and
- readily available to any party affected by the term.

The UCT Regime does not apply to terms that define the main subject matter of a contract. The main subject matter of an insurance contract will be limited to the description of what is being insured. This narrow definition of subject matter will ensure most insurance contract terms are up for review.

However the UCT Regime will not apply to terms that set the quantum or existence of the excess or deductible in an insurance contract as long as they are presented transparently.

Exclusions and definitions will come into focus.

Exclusions that operate on the happening of an act and these exclusions will come within the scope of a UCT review even though they concern the risk that is underwritten if the condition disproportionately or unreasonably disadvantages the insured.

Ambiguous or unclear terms that do not use terms with definitions could be called into question.

All general conditions will be up for review under UCT laws.

Conditions which when construed literally result in an unreasonable commercial contract are likely to be seen as lacking clarity and lacking in transparency. For example the general principle governing the operation of a reasonable precautions clause is that an insured must have had actual knowledge of a risk of damage to the insured property and, having such knowledge, either deliberately courted that risk or recklessly disregarded in order to have breached the condition. Interpretations of clauses found in case law may not be enough for a clause to pass the UCT test.

There are often pre-conditions which will be subject to UCT review.

Courts will have the power when dealing with unfair contract terms to make orders:

- declaring a contract void from the start
- declaring a term an unfair term
- declaring terms of the contract are void
- varying terms
- preventing enforcement of terms
- directing refunds of money
- ordering compensation.

UCT laws will cause insurers to carefully review of a range of usual provisions in insurance contracts including:

- cancellation provisions;

- premium refund clauses;
- provisions dealing with the alteration of risk;
- basis of settlement clause; and
- notification clauses, particularly in claims made policies.

The introduction of UCT legislation is not intended to limit the way insurers underwrite, rather it hopes to deliver certainty of cover and eliminate terms that are unfair.

The application of the UCT regime to insurance contracts will result in a major shift in the landscape for insurers and a raft of amendments to insurance contracts as insurers grapple with the risk that clauses in a contract may be found to be unfair and declared void or rewritten by the Courts.

Consumers and small businesses will have protections in addition to those in the Insurance Contracts Act.

Crafting insurance contracts that do not fall foul of the UCT laws will become an art form as insurers develop techniques in scoping insuring clauses and exclusions without disproportionately or unreasonably disadvantaging the insured when regard is had to the nature of cover offered.

The insurance industry will be stepping into a brave new world for Australians as 2019 ends with an 18 month a focus on the review of all insurance contracts and the full impact of UCT regime applying to insurance contracts hitting in 2021.

David Newey
dtn@gdlaw.com.au

Changes to Mortgage Brokers Commission and Will This Set The Scene For the Insurance Industry

The retention of commissions as a form of remuneration for mortgage brokers dealing in consumer credit recently received a shot in the arm with the release of a draft of the National Consumer Credit Protection Amendment (Mortgage Brokers) Bill 2019 and draft Regulations which detail the Government's response to the recommendation of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry that trailing commissions for mortgage broker be banned.

The Draft Bill was released on 26 August 2019 with the Government calling for submissions from stakeholders which must be with Treasury by October 2019.

The draft Bill introduces new concepts which include:

- requiring the value of upfront commissions paid to mortgage brokers to be linked to the amount drawn down by the borrower instead of the loan amount;
- banning campaign commissions and volume based commissions and benefits;
- imposing a duty on mortgage brokers to act in the best interests of the consumer when providing credit assistance.

When the new legislation is introduced mortgage brokers will be obliged to act in the best interests of consumers when giving credit assistance in relation to credit contracts. Where there is a conflict of interest, mortgage brokers must give priority to consumers when providing credit assistance in relation to the credit contract.

Where a credit representative knows or reasonably ought to know there is a conflict between the interests of the consumer and the interests of either a licensee, an associate of the licensee, a credit representative, or its associate, the credit representative must give priority to the consumer's interest when giving the credit assistance.

Mortgage brokers will be prohibited from accepting conflicted remuneration and employers and credit providers and mortgage intermediaries will be prohibited from paying conflicted remuneration.

The Bill seeks to define conflicted remuneration to include:

- any benefit, whether monetary or non monetary, that:
  - ❖ is given to a licensee or representative of a licensee who provides credit assistance to consumers and because of the nature of the benefit or the circumstances in which it is given, could reasonably be expected to influence the credit assistance provided to consumers, or
- any benefit, whether monetary or non monetary, that:
  - ❖ is given to a licensee or representative of a licensee who access an intermediary and because of the nature of the nature of the benefit of the circumstances in which it is given, could reasonably be expected to influence whether the licensee or representative acts as an intermediary or how the licensee or representative acts as an intermediary.

The definition of conflicted remuneration is extremely wide. In an attempt to reduce the impact of such a wide definition the proposed legislation provides that the Regulations to the Act will prescribe circumstances which give rise to conflicted remuneration and those circumstances which do not.

The draft Regulations identify volume based benefits and campaign based benefits as conflicted remuneration. Commission which is not campaign based or volume based is not conflicted remuneration.

A volume based benefit will be one where access to the benefit or the value of the benefit is wholly or partly

dependent upon the total amount of credit available or drawn down under credit contracts or particular classes of credit contracts or where the access to the benefit and the value is dependent on the number of credit contracts.

Campaign based benefits are those provided for arranging credit during a particular limited period (the campaign period).

The bans on accepting conflicted remuneration and paying conflicted remuneration are civil penalty provisions and the maximum penalty will be 5,000 penalty units ($210 per penalty unit) with the maximum penalty $1,050,000.

The Government has breathed life into commissions for mortgage brokers however there is a twist with the introduction of the duty to act in the best interests of a consumer wherever a conflict of interest arises between the intermediary and the consumer and/or the credit provider and the consumer. However volume based commissions and campaign based commissions will be on the nose.

We speculate the approach to mortgage broker commissions provides a window into the Government's approach to commissions in the insurance industry.

If the approach to commissions in the credit industry flows through to the insurance industry, commissions will remain, volume based commissions and overriders could be at risk and there will be an over arching duty imposed on insurance brokers to act in the interests of the consumer, particularly where the insurance broker is acting under a binder with an insurer for a particular scheme.

Interesting and challenging times lie ahead.

It seems we will not get "death of the commission in the insurance industry" however we may well have a prohibition on some forms of remuneration and benefits and we are sure to see enhanced consumer protection to manage potential conflicts of interest between insurers, intermediaries and brokers with a duty to act in the interests of a consumer when intermediaries provide financial services in connection with general insurance.

David Newey
dtn@gdlaw.com.au

Class Actions - Multiple Claims & Multiple Retentions – Appeal Successful

In our December 2018 edition of GD news we reported on the decision of Justice Stevenson of the NSW Supreme Court in *Bank of Queensland Limited ("BQL") v AIG Australia Limited*.

To recap, the issue related to whether BQL was liable to pay multiple retentions for multiple claims, which could result in BQL's liability to pay the retention exceeding AIG's liability to indemnity BQL under the policy.

Representative proceedings were brought against BQL by Petersen Superannuation Fund Pty Limited ("Petersen").

BQL paid $6 million to settle those proceedings.

BQL then sought indemnity under a Civil Liability Insurance Policy issued by AIG, Zurich and Catlin, pursuant to which the insurers were liable in the following proportions:

- AIG - 37.5%;
- Zurich - 37.5%;
- Catlin - 25.0%.

AIG was the lead insurer under the policy.

BQL settled its claim with Zurich.

The remaining claim by BQL was against AIG and Catlin.

The policy provided BQL must pay a retention of $2 million for "each and every Claim" and the insurers were only liable for the amount of "Loss" and "Defence Costs" arising "from a claim" in excess of the retention.

AIG and Catlin denied liability on the basis that the representative proceedings brought by Petersen against BQL constituted multiple claims and thus BQL was liable to pay multiple retentions.

It followed that BQL's liability to pay multiple retentions exceeded the total amount for which BQL sought indemnity under the policy from AIG and Catlin.

BQL commenced proceedings at the NSW Supreme Court and the matter proceeded to hearing before his Honour Justice Stevenson.

Stevenson J noted the question for determination was whether the loss for which the insurers were liable arises from a single claim as defined in the policy (in which case only one retention applied) or from multiple claims (in which case multiple retentions applied).

If the latter, for all practical purposes, the insurers would have no liability to make any payment to BQL.

Stevenson J found in favour of AIG and Catlin and held, as there were multiple claims, BQL must bear multiple retentions.

His Honour noted the division between the parties was whether the representative proceedings constituted multiple claims made by each Group Member despite there being only one proceeding.

Justice Stevenson considered the evidence regarding what constituted a "Claim" under the policy.

In that regard, Stevenson J accepted the submissions by AIG and Catlin that each Class Member Registration Form completed by Group Members constituted a separate claim within the meaning of the policy.

Each person completing a Class Member Registration Form was described as the "claimant".

The forms contained, under the heading "Claimant's Alleged Loss" a statement of the amount the "claimant" has "been unable to recover ..."

His Honour also observed that one form actually referred to the amount which the claimant was "claiming".

His Honour therefore concluded the representative proceedings represented multiple claims on the following basis:

- there was a claim constituted by the representative proceedings; and
- there were 192 claims constituted by each of the class member registration forms.

As multiple retentions therefore applied, BQL's claim against AIG and Catlin failed.

BQL appealed to the NSW Court of Appeal. By a unanimous judgment (Bathurst CJ, Macfarlan & White JJA), the appeal was allowed and the judgment in favour of the insurers at first instance was set aside.

Macfarlan JA wrote the leading judgment in which his Honour recognised that, as the policy was a commercial contract, the Court in construing it must ask what a reasonable businessperson would have understood the relevant terms to mean.

Justice Macfarlan came to the conclusion there were multiple claims for the purpose of construing the policy.

Where his Honour differed from the primary judge was his interpretation of the aggregation clause. In that regard he made the following observations:

> *"The present clause…clearly identifies the relevant question as whether the Wrongful Acts are related.*
>
> *In my opinion, the fact that all of the Wrongful Acts alleged in the FASOC are alleged to have been wrongful on the basis that they were engaged in by BQL as part of Petersen's Ponzi scheme with knowledge of Petersen's fraud is a unifying factor rendering them 'related' for the purpose of the aggregation clause."*

Further, his Honour held:

> *"I thus consider that a reasonable businessperson, having knowledge of the matters alleged in the Representative Proceeding, would conclude that the Wrongful Acts referred to in the FASOC were 'related' in the manner contemplated by the aggregation clause in the Insurance Policy."*

In conclusion, Macfarlan JA confirmed his findings that, for the purpose of the policy definition of "Claim", multiple claims had in fact been made against BQL but because those claims arose out of related Wrongful Acts, the Policy required them to be aggregated such that only one retention of $2 million was applicable.

Bathurst CJ agreed with Macfarlan JA but provided additional reasons for his conclusion that the Wrongful Acts were related Wrongful Acts for the purpose of the aggregation clause.

Justice White disagreed with their Honours regarding the finding that the Representative Proceeding was brought by the applicant and each group member thereby constituting multiple claims for the purpose of the policy. His Honour held the proceeding was not brought by all group members but rather on behalf of them such as to constitute a single, not multiple, claim within the meaning of the policy.

However, White JA agreed with the other appeal judges regarding the effect of the Class Member Registration Forms constituted multiple claims which enlivened for the Court's consideration the aggregation clause under the policy.

On that issue, Justice White concurred with Bathurst CJ & Macfarlan JA.

Accordingly the appeal was upheld and the orders of the primary judge set aside such that only one retention of $2 million was to be borne by BQL under the policy.

The appeal turned on the interpretation of the aggregation clause but the result was significant for BQL as it is now entitled to recover a substantial amount under the policy once the retention is taken into account.

Darren King
dwk@gdlaw.com.au

Damages for Personal Injury - Appellate Review of Non-economic Loss – What is the Standard?

Claims for damages for personal injuries were historically assessed at common law.

Over the years there have been several legislative modifications to common law damages arising from personal injury claims, starting in 1926 with the *Workers Compensation Act*, continuing in 1988 with the *Motor Accidents Act* and more recently in 2002 with the enactment of the *Civil Liability Act*.

It is now a common feature of any non-work related or non-motor accident personal injury claim arising from an accident occurring in New South Wales that damages for non-economic loss (previously known as general damages under the common law) requires the Court to undertake a statutory task of assessing the claimant's injuries and disabilities as a percentage of a most extreme case.

Once that task is fulfilled, the percentage then corresponds with a monetary amount provided for in the legislation.

It can readily be accepted that the judge is required to

undertake an evaluative judgement of the claimant's medical condition and its affect on his or her ability to lead a normal life.

It is notoriously difficult to successfully appeal from a trial judge's assessment of non-economic loss.

Principally, this is because an appeal court will provide a great deal of deference to a trial judge's capacity to observe the oral evidence and demeanour of witnesses at trial, including (usually) the injured claimant, something that is not available to an appeal judge.

What has also been held important, however, is that the judge's task of assessing damages for non-economic loss involved the exercise of a discretion.

That being so, the NSW Court of Appeal has held, since at least 1988 when the *Motor Accidents Act* first introduced the concept of *"…a percentage of a most extreme case…"* that appellate review of a non-economic loss finding was governed by the principles enunciated by the High Court way back in its 1936 decision of *House v The King*.

In that case, the High Court held that an appellate court would intervene and disturb a discretionary finding only if the appellant established that:

- there had been a material error of fact or law;
- irrelevant matters were taken into account;
- relevant matters were not taken into account; or
- if the decision was unreasonable or plainly unjust.

The Court of Appeal has applied the *House v The King* principles to appeals from a trial judge's assessment of non-economic loss for some time.

However, a recent decision suggests a new approach may be on the horizon for which there currently exists some tension between the Court of Appeal judges.

In *White v Redding*, Newbie Redding sustained a significant injury to her left eye when she was 16 years of age when she was hit by a tennis ball at Manly Lifesaving Club during an informal game of indoor cricket.

Redding did not participate in the game but was in the room where it was played. The ball was hit by Scott White. Redding sued White and the Club. She settled her claim against the Club but maintained her claim against White which proceeded to trial in the District Court before Judge Russell SC.

His Honour assessed Redding's non-economic loss as being 55% of a most extreme case under *Civil Liability Act 2002* (NSW) ("CLA"), s16.

The evidence demonstrated that Redding was a gifted gymnast and athlete as a child, and that she was also academically gifted, achieving an ATAR of 97.25 despite her injury.

As a result of her injury she sustained a 97% loss of vision in her left eye.

She was also awarded a sizeable amount for future economic loss. Total damages were assessed at $692,806.

White's appeal to the NSW Court of Appeal was unsuccessful. There was no challenge to the liability findings. Rather, the appeal grounds related to the awards of damages for non-economic loss and future economic loss.

A large part of the appeal judgment relates to the principles governing an appeal from an assessment of non-economic loss.

On this issue, Gleeson & White JJA adopted the traditional *House v The King* approach but Macfarlan JA did not. While the differing approaches produced the same result, Macfarlan JA's approach is worth considering as it may lead to a different approach being adopted in future appeals.

Macfarlan JA was of the view that *House v The King* was decided at a time when juries assessed damages for general damages at common law.

The trier of fact (now judges alone in NSW personal injury actions) are governed by the CLA, s16.

His Honour observed:

> *"As a result, assessment does not occur by the court choosing a figure falling within a range of legally permissible outcomes. The assessment occurs by the court answering a question … to which there is only one correct answer, albeit that arrival at the answer will involve the exercise of a value judgment."*

Justice Macfarlan referred to the High Court's decision in *Warren v Coombes* which held, in 1979, that if the judges of appeal consider the trial judge was in no better position to decide a particular question than they themselves are, or after giving full weight to the trial judge's decision the appeal judges consider it was wrong, the appeal judges must give effect to their own judgment.

According to Justice Macfarlan, this "correctness standard" adopted in *Warren v Coombes* is the approach that ought now be adopted by NSW Courts rather than the "deferential standard" required by *House v The King*.

In support of this finding, Macfarlan JA referred to a 2014 decision of the NSW Court of Appeal in *Hall v State of New South Wales* in which Leeming JA (with whom Meagher J and McDougall J agreed) said the following (referring to CLA, s16):

> *"…while fully acknowledging its inevitable imprecision, the task remains conceptually distinct from the exercise of a discretionary power, and its review on appeal is subject to different principles. The primary judge was not called to exercise a discretionary power, but instead had to make a finding of fact, namely, the severity of a non-*

economic loss by reference to the proportion of a most extreme case."

Justice Leeming, in *Hall* referred to the following *obiter dicta* statements of Spigelman CJ in *Perpetual Trustee Company Ltd v Khoshaba* (2006):

"Where, as here, the first statutory step is clearly a finding of fact, albeit one involving a broadly based value judgment, it may be that the Court should invoke the principles reflected in Warren v Coombes rather than in House v The king. Nevertheless, in most cases it is unlikely that the different tests will lead to different results."

Justice Macfarlan noted that the decision in *Hall* was followed by the Court of Appeal in *McKenzie v Wood* in 2015.

However, in the same year, the Court of Appeal applied the *House v The King* principles when it decided *Hornsby Shire Council v Viscardi*.

Gleeson JA and White JA wrote a separate judgment in which their Honours disagreed with Macfarlan JA's approach (and the earlier Court of Appeal judges who applied the *Warren v Coombes* principles).

Both justices expressed the view that the assessment of non-economic loss under CLA, s16 does not involve an outcome with only one correct decision. Rather, the assessment can fall within a range of outcomes depending on the trial judge's evaluation of the evidence.

Justice Gleeson thus remarked:

"It may be accepted that s16 does not confer a discretionary power…it may also be accepted that s16 calls for a finding of the severity of non-economic loss by reference to the proportion of a most extreme case. However, in my view, given the evaluative nature of the task…such a finding does not call for a unique outcome; it is a decision for which there is not one correct answer.

Consistent with well-established authority, the test for appellate intervention is whether the judge has in some way mistaken the facts or the legal principles to be applied or otherwise demonstrated error, which may be discernible only on the basis that the result is outside a reasonable range."

White JA similarly observed:

"With respect, it is not sufficient justification for applying the principles in Warren v Coombes to a decision under s16 that the decision does not involve the exercise of a discretion…the fact that the assessment involves matters of opinion, impression, speculation and estimation would suggest the House v The King standard of appellate review should apply."

Gleeson JA and White JA noted there has been a divergence of judicial opinion since *Hall*.

While the majority justices in this decision clearly favoured the *House v The King* approach, the divergent judicial opinions created since *Khoshaba* and *Hall* have not gone away noting Justice Macfarlan favoured the *Warren v Coombes* standard.

Time will tell which standard prevails. It may require the High Court to give its imprimatur on the issue!

Darren King
dwk@gdlaw.com.au

Leave to Join Insurer Successful Where Insurer's Reliance on an Exclusion Clause Not Made Out

Applications brought under the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) ("CLTPC Act") to join the insurer of a company in liquidation must establish the following:

- There is an arguable case of liability against the insured;
- There is an arguable case the insurer's policy responds to that liability; and
- If the applicant obtains judgment against the insured the insured will not be able to meet it.

Another example of how a Court applies these principles and the application of the CLTPC Act was recently considered by his Honour Justice Campbell of the NSW Supreme Court in *Margaret Ritchie v Advanced Plumbing and Drains Pty Ltd*.

Ritchie brought a representative proceeding against Advanced Plumbing in which she claimed damages for herself and on behalf of group members for losses suffered as a result of a bushfire which spread from a property in Carwoola near the ACT in February 2017.

It was alleged the fire started as a result of the negligence of employees of Advanced Plumbing who carried out angle grinding work on a property owned by a director of Advanced Plumbing on a day when a total fire ban had been imposed. The use of the angle grinder to cut reinforced steel caused a shower of sparks that ignited nearby long grass causing a large bushfire that spread and caused extensive damage.

In its Defence, Advance Plumbing conceded its foreman was an employee who was operating power cutting equipment and it was known such equipment produced sparks. It was also admitted a fire started on the property.

Advanced Plumbing then went into liquidation. An application was filed on behalf of Ritchie seeking leave under CLCTP Act to join CGU Insurance as its insurer who had issued a liability policy to Advanced Plumbing.

CGU had denied liability to indemnify Advanced Plumbing.

At the hearing of the application to join the insurer, it was not seriously contended that there was an

arguable case in negligence against Advanced Plumbing.

Nor was it contested that Advanced Plumbing would be unable to meet any judgment against it by reason of the company having gone into liquidation.

The real issue was whether there was an arguable case the CGU policy responded to any liability found against Advanced Plumbing in the proceedings.

On that issue, Campbell J confirmed CGU bore the onus of establishing an entitlement to disclaim liability to indemnify under the policy.

CGU relied upon two grounds:

- The occurrence did not happen in connection with the business of Advanced Plumbing; and
- The "welding" endorsement applied and the work was not performed strictly in accordance with AS 1674.1.

In relation to the first ground, CGU argued that the work was not in connection with the business of the insured because it was carried out at the private home of the insured's director. As such, it was private work.

The business of the insured was described in the policy schedule to be *"…principally plumbing and any other activities incidental thereto."*

His Honour quickly rejected this argument noting the definition of "Business" included private work undertaken by the insured's employees for any director of the insured.

An alternative argument mounted by CGU was that the occurrence was not in connection with the business specified in the schedule, rather it was in connection with the extended definition of the business in the policy definitions.

His Honour also rejected the alternative argument advanced on behalf of the insurer. To read the policy in that manner would, according to Justice Campbell, restrict the type of work that would be covered under the policy by reason of the extended definition of "Business".

In relation to the second ground, a key issue for the Court's determination was whether the angle grinder was considered to be "spark producing equipment" within the meaning of the "welding endorsement".

If so, CGU contended its insured had not strictly complied with AS 1674 – Safety in Welding and Allied Processes – Fire Precautions which specified precautions required to be taken prior to and during hot work (including welding and allied processes).

The standard defined "hot work" as including grinding.

However, it was argued on behalf of Ritchie that there was no express reference to grinding equipment or hot work in the welding endorsement. As such, the term "spark producing equipment" had to be read *ejusdem generis* so as to limit that expression to the type of equipment actually specified in the endorsement.

That wording was relevantly in the following terms:

> *"…arising out of or in any way connected with any arc or flame cutting, flame heating, arc or gas welding, electric, oxy-acetylene, laser cutting and/or spark producing equipment…or similar operation in which welding equipment is used…"*

Justice Campbell accepted the submissions presented on behalf of Ritchie.

His Honour held that all of the equipment of the type specified in the welding endorsement involved the direct application of heat in one form or another to perform their function.

As such, his Honour stated:

> *"…'spark producing equipment' does not apply to equipment which may incidentally produce sparks, depending upon the particular use to which it is being put on a particular occasion."*

Further, there was some evidence at the hearing of the application that some precautions were taken. His Honour suggested it was at least arguable, if the endorsement applied, whether the standard had in fact been complied with.

In conclusion, Justice Campbell held that that CGU had failed to discharge its onus of establishing beyond argument an entitlement to disclaim liability to indemnify Advanced Plumbing under the policy.

Accordingly, leave was granted for Ritchie to proceed against CGU.

This decision is consistent with other court decisions in terms of the application of relevant principles governing an application for leave to join an insurer where the insured is in liquidation.

The more interesting aspect of this case was the approach adopted by the Court when interpreting the wording of the welding endorsement to exclude angle grinding in this instance as being spark producing equipment.

However, Justice Campbell emphasised that his findings on these issues relate only to the question of whether or not to exercise the Court's discretion to join the insurer.

The insurer is not precluded from seeking to disclaim liability to indemnify under the policy when the matter comes on for trial.

If this matter proceeds to trial it will be interesting to see if the insurer maintains a denial of liability to indemnify under the policy on the same grounds and, if so, how the trial judge determines those issues.

Darren King
dwk@gdlaw.com.au

Take 2 - Leave to Join Insurer Refused Where Insurer Reserved its Rights Subject to Court Findings

Applications can be brought by Party A seeking leave under *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) ("CLTPC Act") to join the insurer of Party B where B would not be able to satisfy a judgment entered against it in favour of A.

Section 5 of the Act gives the Court a discretion to grant or refuse leave to join an insurer.

Applications are often brought by a party seeking relief in Court proceedings from an insurer of a bankrupt individual or a deregistered company where such person or company had a policy of insurance that extended cover for the person's or company's liability for the claim.

However it seems that there may be a different outcome to the application for the joinder of an insurer depending on whether an insurer denies indemnity or simply reserves its rights leaving a potential indemnity dispute for the future.

What if the person or company has already been sued in Court proceedings and the insurer has determined indemnity by reserving its rights under the policy and at law, pending the Court making findings in the proceedings against its insured?

Further, what if the Court proceedings are already listed for hearing and the hearing date is imminent? Can an insurer be joined in those circumstances where its liability to indemnify the insured would be dependent on the outcome of the substantive proceedings in any event?

These questions were considered in a single justice decision of his Honour Justice Leeming of the NSW Supreme Court in *In the matter of Reed Constructions Australia Pty Ltd (in liquidation) – Walley v Chubb Insurance Australia Ltd*.

The liquidators of Reed brought proceedings against former company directors for declarations and orders for payment of money pursuant to *Corporations Act 2001* (Cth), s588M for debts incurred by the company while it was alleged to have been insolvent.

The claim is for $11.795m.

Those proceedings are listed for hearing in October 2019.

In June 2019, the liquidators filed a Motion seeking leave under the CLTPC Act to join Chubb as insurer of Geoffrey Reed, one of the company director defendants in the substantive proceedings.

Chubb issued a policy to the company which relevantly provided cover for directors and officers up to $11m inclusive of defence costs.

No issues arose concerning proper notification of the claim to Chubb.

Further, there was no issue that the director, Geoffrey Reed, would not be in a position to meet any judgment against him in the substantive proceedings owing to him having entered into an insolvency agreement under *Bankruptcy Act 1966* (Cth), Part X.

Critically, in 2015 the trustee purported to terminate the insolvency agreement but Consent Orders were made in the Federal Court, binding Reed, the former liquidator and Chubb, which provided that no steps would be taken to enforce any judgment or settlement against Reed regarding the insolvent trading claims the subject of the substantive proceedings in the NSW Supreme Court otherwise than by resort to the proceeds of the insurance or indemnity under the Policy.

In other words, if Reed was not entitled to indemnity under the Chubb policy, the liquidators had earlier agreed to be bound by the Federal Court orders not to pursue him personally for any judgment against him in the insolvent trading proceedings.

As to Chubb's position about policy coverage, correspondence had been sent by the insurer in response to Reed's notification of the claim that:

> *"Having reviewed the documentation and information provided to us, we are pleased to confirm that cover is available under the Policy for the advancement of reasonable Defence Costs incurred by you on account of the Insolvent Trading Proceedings, subject to the terms and conditions of the Policy, as set out below."*

Further, Chubb stated:

> *"Noting the nature of the allegations in the Insolvent Trading Proceedings, and without in any way imputing wrongdoing on your part, to the extent that there is a finding by a Court that you wilfully breached your director's duty to [the Company] then the prohibition on indemnification under sections 199B and 199C will apply and the carve out under paragraph (iv) of the definition of Loss will be triggered. Accordingly, Chubb specifically reserves its rights on the potential application of the carve out under paragraph (iv) of the definition of Loss."*

In short, Chubb agreed to advance defence costs to Reed during the course of his defence of the substantive proceedings, but reserving its rights as to the possibility they may need to be repaid depending on the Court's findings.

The liquidators contended that leave should be granted to join Chubb to the proceedings avoid the risk, and consequent advantages to them, of any later dispute which might involve not only delay but separate proceedings between insured and insurer which might impact upon their rights to indemnity.

Further, as Chubb has been funding Reed's defence costs in circumstances where Reed has no real financial interest in the outcome of the proceedings, the insurer ought not be permitted to shelter behind

Reed with its potential exposure capped at the limit of the Policy.

That is, the liquidators (so it was contended) ought to be able to be put in a position where they can seek costs against Chubb directly, if the liquidators are successful, and that should not be limited by the cap under the Policy.

Chubb argued that such a purpose was foreign to the CLTPC Act.

In the event, Justice Leeming refused to grant leave to join Chubb. His Honour referred to earlier decisions of the NSW Supreme Court which he found to be squarely on all fours with the current position regarding Chubb's stated position on indemnity.

In those earlier decisions, the Court noted the insurer had made provision for defence costs subject to:

- A specific preservation in relation to the possible operation and exclusion;
- The repayment obligation of defence costs if the exclusion operates; and
- A general reservation under the D & O Policy and at law.

That is precisely what Chubb had done in this case.

Further, Leeming JA observed from the earlier decisions that leave to join the insurer was refused where the insurer had admitted liability to indemnify the insured albeit subject to a reservation of rights that, for the purposes of determining liability under the policy, would await the outcome of Court proceedings.

His Honour noted that the outcome of the substantive proceedings would not be affected if the insurer was joined and whether there might later be proceedings against an insurer was a matter of speculation.

His Honour concluded:

> *"I do not think it is appropriate to grant leave under the [CLTPC] Act in circumstances where there has not been demonstrated to be any controversy between insured and insurer."*

This case illustrates that an insurer will not be joined when it has already extended indemnity under the Policy to an insured who is involved in litigation, even if the liability to indemnify is qualified on a reservation of rights basis.

The situation might be different if the insurer had declined indemnity outright and its insured had not sought to join the insurer seeking indemnity under the Policy.

But where the insurer is already funding the defence costs of a claim against its impecunious insured and liability to indemnify under the Policy is otherwise reserved, a Court is more likely to refuse leave to join the insurer directly to the proceedings.

Darren King
dwk@gdlaw.com.au

CONSTRUCTION ROUNDUP

Appeals from NCAT Decisions

The NSW Civil and Administrative Tribunal provides a valuable resource for parties to agitate (and hopefully resolve) home building claims involving small amounts within a relatively short time frame and without needing to incur the often substantial costs of formal legal representation.

NCAT's processes are administered in a relatively flexible manner (taking into account the fact that many of the parties are not legally represented and lack the skills or training required to efficiently conduct litigation). However, NCAT is still a formal tribunal, subject to the limits of the jurisdiction provided to it under the *Civil and Administrative Tribunal Act 2013* and the general common law principles of justice.

On occasion, an issue arises when a non-legally represented party attempts to pursue a claim or alleged rights in a manner that is inconsistent with either NCAT's jurisdiction or its formal processes. This was illustrated in *Long v. Metromix Pty Limited* [2019] NSWCATAP 198.

Mrs Long had made an application to NCAT with respect to an allegedly defective slab constructed by Metromix at her property. On 30 October 2018 the Tribunal issued an order that Mrs Long could elect for Metromix to carry out certain works to rectify the defects, or her claim would be dismissed. The Tribunal also separately ordered that Mrs Long pay the costs of two other respondents to her claim.

Mrs Long appealed from that decision to the Appeal Panel of NCAT. On 15 March 2019 the Appeal Panel ordered that Metromix was (again at Mrs Long's election) to carry out the rectification works, and Mrs Long had leave to renew the proceedings within 12 months pursuant to Schedule 4 clause 8 of the Act if Metromix did not comply with the work order.

On 4 April 2019 (while the Appeal Panel was still considering the parties' submissions on the costs of the appeal), Mrs Long commenced separate renewal proceedings under Schedule 4 clause 8. In these renewal proceedings Mrs Long sought $20,000 (later amended to $22,862) on the basis of an agreement she had reached with Metromix.

At a directions hearing in the renewal proceedings on 30 April 2019, and after some further discussion between the parties outside the presence of the Tribunal Member, the Tribunal made an order with the consent of the parties that Metromix pay Mrs Long the agreed sum of $22,862. This brought the renewal proceedings to an end.

In the meantime, the Appeal Panel issued its decision on the costs of the earlier appeal proceedings, ordering that Mrs Long pay Metromix's costs.

On 23 May 2019, Mrs Long lodged another set of renewal proceedings under clause 8 of Schedule 4. In these proceedings Mrs Long sought an order that Metromix pay her $30,000 to fix the defective slab, that she did not have to pay the other parties' costs, and for payment of her own disbursements. The Tribunal told Mrs Long that based on the material she lodged with her application she was seeking to challenge the Appeal Panel's earlier decision and therefore her application could not be processed as a renewal application. They suggested that she obtain legal advice, including whether to appeal to the Supreme Court.

Mrs Long appealed from both the orders made on 30 April 2019 and the Tribunal's refusal to process her application on 23 May 2019.

The Appeal Panel noted that in *Prendergast v. Western Murray Irrigation Limited* [2014] NSWCATAP 69 it had set out a non-exhaustive list of the questions of law that would permit an internal appeal. These included considerations such as a lack of procedural fairness or a wrong principle of law being applied.

However, the circumstances in which the Appeal Panel may grant leave to appeal from a decision made by the Consumer and Commercial Division of NCAT are limited to those set out in clause 12(1) of Schedule 4 of the Act. In such cases, the Appeal Panel must be satisfied that the appellant has suffered a miscarriage of justice on the basis that the Tribunal's decision was not fair and equitable or was against the weight of evidence, or that significant new evidence had arisen.

Even when clause 12's requirements have been satisfied, however, the Appeal Panel is still required to consider whether it should actually exercise its discretion to grant leave to appeal. This discretion is to be exercised only in matters that involve issues of principle, questions of public importance, a clear injustice, an unreasonable and clear factual error, or where the Tribunal had acted in an unorthodox manner which had led to an unfair result: *Collins v. Urban* [2014] NSWCATAP 17.

The Appeal Panel refused to consider the materials provided by Mrs Long that related to her initial claim. This was because this claim had already been decided on appeal and thus could not be reconsidered in the context of the current appeal.

The Appeal Panel therefore turned to the consent orders made on 30 April 2019, which Mrs Long sought to have set aside. The Appeal Panel noted that at common law such consent orders may be set aside on the same basis as the underlying agreement may be set aside. Reasons for setting aside such an agreement may include: illegality; misrepresentation; non-disclosure of a material fact; duress; mistake; undue influence and the like.

At the appeal hearing, Mrs Long said that the consent orders should be set aside because:

- she was under duress;
- she had told the Tribunal Member that she had changed her mind about the agreement;
- she was rushed;
- she did not think the orders had been made;
- she had not received legal aid;
- she was suffering from depression; and
- the consent orders were unfair.

She relied on a report by a psychologist which stated that Mrs Long suffered from Major Depression and which gave the opinion that Mrs Long had signed the consent orders while "under duress and emotional distress".

The Appeal Panel considered the transcript of the hearing. This transcript showed that Mrs Long had:

- fully participated in the hearing;
- had been given time to have a further discussion with Metromix's representative;
- told the Tribunal Member that the parties had agreed on the payment of $22,862; and
- corrected the Tribunal Member on the wording of the order.

The Appeal Panel also noted that Mrs Long had played an active part in the settlement negotiations prior to the commencement of the renewal proceedings and the directions hearing on 30 April 2019. Further, Mrs Long had not sought any legal advice, and had not sought an adjournment in order to obtain legal advice before signing the consent orders.

Accordingly, the Appeal Panel considered that there was no basis for setting aside the consent orders.

The Appeal Panel also looked at whether NCAT's refusal to process Mrs Long's application on 23 May 2019 had the effect of denying her procedural fairness. The Appeal Panel commented that the Tribunal's decision not to process the application as a renewal application was in effect a summary dismissal of the application, apparently on the basis that the Tribunal considered that the application was misconceived. However, such a decision should not have been made without a hearing, or seeking submissions from the parties. Accordingly, Mrs Long had been denied procedural fairness.

However, in her oral submissions in the current appeal Mrs Long had indicated that she thought that in renewal proceedings her original application could in effect be heard all over again. Therefore, she was seeking to re-agitate matters that had been previously determined, and thus her application appeared to be misconceived.

Importantly, the Appeal Panel could not re-determine the original proceedings that had been determined on

appeal, and it held that there was no basis for setting aside the consent orders that had disposed of the earlier renewal proceedings. Therefore, while Mrs Long had been denied procedural fairness when NCAT had refused to process her most recent application, the Appeal Panel concluded that even if her application had been properly dealt with, it would still have resulted in the proceedings being dismissed. Accordingly, it would be futile to order that the matter be remitted back to the Tribunal for a hearing, and her appeal was dismissed.

In this case Mrs Long appeared not to understand the process or context of renewal proceedings or the limitations of appeals from the Members' decisions. She also appeared to have difficulty in accepting the finality of her agreement with Metromix. If she had obtained legal advice, she may have had a better appreciation of her rights of appeal, and the effect of signing the consent orders.

At Gillis Delaney Lawyers we have expert lawyers who can provide specialist advice about construction claims (including limited advice if required) regarding claims in NCAT proceedings.

Linda Holland
lmh@gdlaw.com.au

EMPLOYMENT ROUNDUP

Important Personal Leave Decision

The extent of an employee's entitlement to personal/carer's leave continues to become increasingly complex.

In *Mondelez v AMWU* [2019] FCAFC 138 the Full Court of the Federal Court of Australia has reached a decision on personal leave entitlements which potentially impacts many, many employers and employees.

Mondelez operates four food manufacturing plants in Australia, including a Cadbury plant in Tasmania. It is a national system employer, so that relevant provisions of the *Fair Work Act 2009* (Cth) (***FW Act***) apply to it and its employees.

Section 96 of the FW Act establishes the entitlement of employees to paid personal/carer's leave and sets out the rate of accrual of such leave:

96 Entitlement to paid personal/carer's leave

Amount of leave

(1) For each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer's leave.

Accrual of leave

(2) An employee's entitlement to paid personal/carer's leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.

The employer and its employees entered into an enterprise agreement, approved by the Fair Work Commission, in 2018.

Clause 32 of the Enterprise Agreement describes the ordinary hours of work and how they are to be arranged for day workers, continuous shift workers and non–continuous shift workers. It provides that the ordinary hours of work are 36 hours per week. Clause 32 provides that shift lengths may be eight hours or twelve hours.

Ms Triffitt and Mr McCormack each work 36 hours per week, averaged over a four week cycle. They work their ordinary hours in 12-hour shifts.

Clause 24 of the Enterprise Agreement provides that five day workers accrue 80 hours of paid personal leave over year; and that shift workers like Ms Triffitt and Mr McCormack, accrue 96 hours.

Mondelez brought an application seeking to have the Court determine how the entitlement to paid personal/carer's leave is quantified under s 96(1) of the FW Act. The key question was whether that 96 hour provision in the Enterprise Agreement satisfied the shift workers entitlement under section 96(1).

The employer's argument

Mondelez argued that the entitlement to "10 days of paid personal/carer's leave" in s 96(1) must be construed according to the "industrial meaning" of the word "day". That meaning was said to be a "notional day", consisting of an employee's average daily ordinary hours based on an assumed five-day working week—that is, average weekly ordinary hours divided by five.

For example, an employee who works 36 ordinary hours per week works an average of 7.2 hours per day over an assumed five-day working week. The "notional day" is 7.2 hours and the employee is entitled to 10 such days, or 72 hours, of paid personal/carer's leave for each year of service.

If the employee takes a day of personal/carer's leave, the employee is paid 7.2 hours' wages, and 7.2 hours is deducted from the employee's accrued leave balance. On this basis, all employees who work the same average weekly ordinary hours are entitled to receive the same number of hours of paid personal/carer's leave.

The Minister for Small and Family Business, the Workplace and Deregulation (**the Minister**) was granted leave to intervene in the proceeding, and supported the employer's argument.

The union/employee argument

The employee's union argued that "day" in s 96(1) of the FW Act has its ordinary meaning of a "calendar day", or a 24 hour period, and that it allows every employee to be absent from work without loss of pay on 10 calendar days per year.

The difference in the arguments

The different constructions produce different practical outcomes between, on the one hand, employees who work the same number of hours each day over a five-day week, and, on the other hand, employees who work shifts that compress their weekly hours into a shorter number of days, or who work different hours on different days of the week.

For example, Mondelez' employees each work 36 ordinary hours per week. Some work 7.2 hours per day, five days per week. Others work 12 hours per day, three days per week.

On the employer's argument, under s 96(1) of the Act, each employee is entitled to accrue 72 hours of paid personal/carer's leave over a year; but a 7.2-hour employee's entitlement will be used up over ten calendar days, whereas a 12-hour employee's entitlement will be used up over six calendar days.

On that construction, a 12-hour employee who is unable to work after the sixth day would lose income, whereas a 7.2-hour employee would not.

In contrast, on the union's argument, the 12-hour employee is entitled to more hours of paid personal/carer's leave than the 7.2-hour employee, but neither would lose income over a period of ten calendar days.

In other words a five day employee would get 72 hours paid leave per year, but a three day shift employee would get 120 hours leave per year.

The Full Court's decision

Mondelez' submission that a "day" in s 96(1) is a "notional day" consisting of an employee's average daily ordinary hours based on an assumed five day working week was rejected.

In reaching that view that Court concluded:

- A "day" in s 96(1) of the FW Act refers to the portion of a 24 hour period that would otherwise be allotted to work (a "working day").
- A "day" of "paid personal/carer's leave" under s 96(1) is an authorised absence from work for a working day for a reason set out in s 97.
- Under s 96(1), an employee accrues an entitlement to be absent from work for a reason set out in s 97 for ten such working days for each year of service.
- The entitlement to paid personal/carer's leave under s 96(1) is not an entitlement to take such leave, which only arises when one of the conditions in s 97 is satisfied.
- For every day of paid personal/carer's leave taken, a day is deducted from the employee's accrued leave balance.
- Under s 96(1), the accrual is of part-days of paid leave, not only full days.
- An employee may take a part-day of paid leave, and an equivalent part-day is deducted from the employee's leave balance.
- The expression "ordinary hours of work" in ss 96(2) and 99 distinguishes ordinary hours from overtime hours.
- The expression "ordinary hours of work" is used in s 96(2) to indicate that part-days of paid leave entitlement are calculated on the basis of ordinary hours.
- The purpose of paid personal/carer's leave is as a form of income protection for employees during periods of illness, injury or unexpected emergency set out in s 97.
- Paid personal/carer's leave accrues over the whole length of employee's employment with a particular employer, to the extent that it is not taken.
- The amount of paid personal/carer's leave that may be taken in a year is limited to the amount that has been accrued, but is not otherwise limited.

The take away

This is a bit of a landmark decision. Many thousands of employers and employees will be affected.

It is critical to review all enterprise agreements, and assess past history of payments for leave taken, particularly for shift workers.

There is little doubt that claims will be made seeking further payment for the entitlements identified in Mondelez.

David Collinge
dec@gdlaw.com.au

No anti-bulling order where employer's conduct was reasonable management action

The Fair Work Commission has capacity to make an anti-bullying order if it finds an employee has been bullied at work.

Section 789FF of the *Fair Work Act 2009* provides the Commission may make an order if the Commission is satisfied:

- the employee has been bullied at work by an individual or a group of individuals; and
- there is a risk the employee will continue to be

bullied at work by the individual or group of individuals.

The Commission may make any order it considers appropriate (other than an order requiring the payment of a pecuniary amount) to prevent the worker being bullied at work by the individual or group of individuals.

Section 789FD provides that a worker is bullied at work if an individual or group of individuals repeatedly behave unreasonably towards the worker and that behaviour creates a risk to health and safety.

In August 2019 Deputy President Lake in a judgment *NB (anonymised)* in the Fair Work Commission refused to make an stop bullying order as it was found the actions taken by the employer were in fact reasonable management actions.

On 3 May 2019 the applicant made an order for stop bullying under Section 789FC of the *Fair Work Act 2009*. The applicant had previously made an application under Section 372 of the Act alleging contraventions to the general protections provision not involving dismissal during the course of her employment. That application did not proceed.

The applicant was a cleaner at a shopping centre on the Gold Coast from about September 2018. The alleged bully was a business manager for the employer.

The applicant alleged she had raised a number of concerns regarding health and safety including that the staff were not receiving sufficient training and that she was feeling belittled and intimidated by another cleaner.

The applicant complained she was bullied between December 2018 and February 2019.

The Commission has previously found the bullying conduct itself must be unreasonable. Determining whether management action is reasonable requires objective assessment of the action in the context of the circumstances and knowledge of those involved at the time. Without limiting that assessment the Commissioner stated the considerations might include:

- the circumstances that led to and created the need for the management action to be taken;
- the circumstances while the management action was being taken; and
- the consequences that flowed from that management action.

The test is whether the management action was reasonable, not whether it could have been undertaken in a manner that was "more reasonable" or "more acceptable".

In general terms this is likely to mean that management actions do not need to be perfect or ideal to be considered reasonable. A course of action may still be "reasonable action" even if particular steps are not. To be considered reasonable, the action must also be lawful and not be "irrational, absurd or ridiculous". Any "unreasonableness" must arise from the actual management action in question, rather than the applicant's perception of it."

Consideration must be given as to whether the management action involves a significant departure from established policies or procedures, and if so, whether the action was reasonable in the circumstances.

The Commission has previously held that all the requirements above must be read together. This means the Commission must consider whether the alleged bully has repeatedly behaved unreasonably towards the applicant whilst the applicant was at work and whether that behaviour created a risk to health and safety.

On 13 December 2018 the applicant alleged she was excluded from joining a Christmas party due to a heavy workload. The Commissioner could not conclude the employer took unreasonable action against the applicant by requesting the applicant take a break later that day thereby missing her Christmas lunch. The Commissioner noted on certain occasions the circumstances of rosters will change in workplaces consistent with workload allocation requirements.

The Commissioner found the incident appeared isolated and not systemic. As such, he concluded this conduct did not satisfy the statutory requirement so as to say the applicant was bullied at work.

The applicant complained she was not allowed to take leave over the public holidays between December 2018 and January 2019..

The Commissioner was unable to determine whether refusal to allow the applicant leave on public holidays amounted to bullying. There was some confusion regarding clarification of the company's policy on taking leave on public holidays.

An email clarifying the company's position on taking leave was sent to the applicant by email in early January 2019 as well as a meeting between the applicant and the alleged bully.

In late January 2019 the employer issued the applicant a letter of allegation claiming she brought her children to work, she was absent from her designated work area for approximately 30 minutes to locate her children and that she took a one hour lunch break instead of the allocated 30 minute lunch break. Three weeks later the employer added to the allegations claiming she was late for her shift which was not reflected on her timesheet.

The applicant was able to respond to the letter of allegations. However, the applicant did not attend a scheduled meeting on 22 February 2019 as she had lodged a workers compensation claim that she was unable to work because of her psychological state.

The Commissioner was satisfied the applicant's

version of events did not satisfy the requirement for her to be bullied at work.

The Commissioner considered the actions taken by the employer were reasonable management actions and as such precluded a finding the applicant was bullied at work.

Employers are sometimes faced with allegations of bullying when they are taking disciplinary action against employees. The allegations of bullying must be dealt with by employers separately from any disciplinary action so as to avoid a claim the that the employer has failed to deal with the bullying allegation which could lead to the a finding the employer has acted unreasonably.

Michael Gillis
mjg@gdlaw.com.au

WORKERS COMPENSATION ROUNDUP

Work Injury Damages - Costs, Cross Claims & Interest

In New South Wales costs in a work injury damages claim are governed by Schedule 7 of the *Workers Compensation Regulation* 2016.

As part of the pre-litigation process it is necessary for matters to proceed to mediation in the Workers Compensation Commission (unless liability is wholly denied by the defendant).

Section 318(B)(2) of the *Workplace Injury Management and Workers Compensation Act 1998* (the "Act") requires a mediator to issue a certificate certifying the final offers of settlement made by the parties at the conclusion of the mediation where a case does not resolve.

The effect of a 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 97 provides that if a mediation is not held because a defendant wholly denies liability then the claimant's offer is deemed to be the amount claimed in the Pre Filing Statement and the defendant's offer is deemed to be nil.

What happens if there is no mediation and the claim in the Pre Filing Statement is exceeded due to payment of interest? What effect does this have in relation to costs?

This issue was recently considered in the District Court in the decision of *Palmer v Allianz Australia Workers' Compensation (NSW) Limited*.

In claims for work injury damages a claim for interest is made pursuant to Section 151M of the *Workers Compensation Act 1987*.

Section 151M of the *Workers Compensation Act 1987* provides that:

"4(a) Interest is not payable (and a Court cannot order the payment of interest) on damages unless:

(i) information that would enable a proper assessment of the plaintiff's claim has been given to the defendant and the defendant has had a reasonable opportunity to make an offer of settlement (where it would be appropriate to do so) in respect of the plaintiff's full entitlement to all damages of any kind but has not made such an offer; or

(ii) the defendant has had a reasonable opportunity to make a revised offer of settlement (where it would be appropriate to do so) in the light of further information given by the plaintiff that would enable a proper assessment of the plaintiff's full entitlement to all damages of any kind but has not made such an offer; or

(iii) the defendant has made an offer of settlement, the amount of all damages of any kind awarded by the Court (without the addition of any interest) is more than 20% higher than the highest amount offered by the defendant and the highest amount is unreasonable having regard to the information available to the defendant when the offer was made.

(b) the highest amount offered by the defendant is not unreasonable if, when the offer was made, the defendant was not able to make a reasonable assessment of the plaintiff's full entitlement to all damages of any kind;

(c) for the purposes of this sub-section, an offer of settlement must be in writing."

In that decision Palmer had solely commenced proceedings against his employer. As the employer was deregistered on 28 March 2001 Allianz was sued pursuant to Section 601AG of the *Corporations Act* 2001. The employer was Workforce, a labour hire company engaged by Downer EDI to provide traffic management services at the Broadwater Sugar Mill. The host employer Downer EDI was not a defendant to

the proceedings however a cross claim was issued by Allianz against Downer EDI and Downer's subcontractor, Cambra Holdings.

Weber SC DCJ initially handed down reasons on 4 April 2019 and subsequently on 24 July 2019.

Palmer had claimed work injury damages totalling $1,416,026.00 in the Pre Filing Statement, along with interest and costs. As no mediation had occurred the offer was deemed to be the claim in the Pre Filing Statement.

The damages awarded by the Court totalled $1,553,000.10, including interest totalling $142,227.63 as Palmer satisfied the requirements of section 151M. It was the interest award that brought the damages above the claim in the Pre Filing Statement.

Palmer argued the interest ought to be taken into account when considering costs; Allianz argued that it should not.

Judge Weber SC stated:

> *"In my view, the plaintiff's alternate approach should be accepted. To achieve a comparison of "like with like", it is in my opinion necessary to achieve comparability, not only in qualitative and quantitative terms, but also in temporal terms; by which I mean that interest must be determined as at both the date of the filing of the Pre Filing Statement, and the date of judgment. While it is true that at the pre filing stage, the plaintiff's entitlement to interest has not been established by judgment, its quantum, if established, is capable of calculation at this time."*

The Court also had to deal with one final issue – whether the damages recoverable on the cross claim against Downer EDI were capped at $750,000.00. The District Court has unlimited jurisdiction to hear work injury damages claims (see Section 44(1)(d)(i)) of the *District Court Act 1973*) however other claims are subject to a jurisdictional limit of $750,000.00.

Downer argued that the cross claim brought by Allianz against Downer was subject to the Court's usual jurisdictional limit of $750,000.00. Downer argued the cross claim sought to exercise a statutory right to contribution arising out of the provisions of Section 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* and was therefore not a work injury damages claim.

This argument was not accepted. Judge Weber SC stated:

> *"It seems to me that a cross claim for contribution pursuant to Section 5 of the LRMPA, which cannot exist absent an established right in a plaintiff to damages in tort, must take its character from those proceedings, and thus for present purposes, the quality of the principal proceedings' description as a work injury damages claim in respect of which the Court has jurisdiction without limits, provides definition to the cross claim, which is parasitic to it. The evident purpose of Section 22 of the Civil Procedure Act is to bind the party served as a cross defendant to the judgment in the principal proceedings (Section 22(3)(b)(ii)). Its design is to create a res judicata between the plaintiff, the defendant and the third party. This has been accepted since the third party's procedure was introduced ..."*
>
> *"In this case, it is my view that the legislature should be taken to have intended that when it vested this Court with an unlimited jurisdiction in respect of work injury damages claims, it intended that such jurisdiction be exercised in accordance with its usual procedures and powers, and thus would extend to determining cross claims validly brought in respect of work injury damages claims without monetary limit."*

The cross claim against Downer EDI was therefore not subject to any jurisdictional issues.

The decision is an interesting one in relation jurisdictional issues and costs. In this case due to the passage of time since the injury substantial interest was awarded which meant the claim in the Pre Filing Statement was exceeded.

Amanda Bond
asb@gdlaw.com.au

Work Injury Damages - "Materially Different" Pre-Filing Statements - Start Again

In NSW before Court proceedings can be commence a claimant must comply with a number of procedural requirements including service of a Pre Filing Statement. Section 318(1) of the *Workplace Injury Management and Workers Compensation Act 1998* (the "Act") provides that a claimant is not entitled to file a Statement of Claim that is materially different from the proposed Statement of Claim that formed part of the Pre-Filing Statement, except with leave of the Court.

The legislation does not define the meaning of "material" in this context and there is no indication given as to how many material differences there must be for a Statement of Claim to be dismissed.

The concept of "material difference" was the focus of a recent District Court decision of His Honour Justice Abadee DCJ in *Petreski v The Ors Group Pty Limited* [2019] NSWDC 417.

The plaintiff alleged negligence arising out of sustained workplace bullying by several colleagues and her managers. The particulars of negligence against the employer were particulars of a direct claim of failures on the employer's part to take adequate precautions for the plaintiff's safety, adequately investigate the plaintiff's allegations of bullying and harassment, adequately supervise the plaintiff, provide a safe and secure work environment and failure to adhere to a grievance handling policy.

The defendant filed a Notice of Motion seeking an order the plaintiff's proceedings be struck out pursuant to Section 318(1)(a) of the Act.

Judge Abadee observed there were matters which if proved would amount to a breach of the employer's non delegable duty of care.

Counsel for each party agreed there was a range of authorities which considered cases where the evidence the plaintiff relied upon in the proceedings differed from that which had been served in the Pre-Filing Statement. It was also agreed there was no authority to deal with situations where there were differences simply between the way in which the plaintiff articulated his or her claim in the Pre-Filing draft pleading and the Statement of Claim that was filed.

By reference to the Australian Concise Oxford Dictionary His Honour noted that whether something is "material" means something that is "important, essential or relevant". The statutory context directed attention towards the content of a pleading.

His Honour looked to Part 14 of the Uniform Civil Procedure Rules 2005 ("UCPR") observing that a pleader must state only a summary of the material facts on which they relied and not the evidence by which the facts were to be proved.

Further, the Rules indicated a plaintiff must specifically plead in the Statement of Claim any matter that if not specifically pleaded, may take the defendant by surprise.

Reference was made to the Court of Appeal decision in *Kirby v Sanderson Motors Pty Limited* where it was held the word "material" meant those facts that were material to the claim and the cause or causes of action that were relied upon. That requirement did not exclude allegations of legal categories such as duty of care, fiduciary duty, trust and contract. The general requirement to avoid surprise meant the material facts must be stated on or in such a way that a defendant could understand how they were material to the causes of action.

By reference to the case at hand His Honour found there was at least one material difference in the pleadings in the Statement of Claim in that it was alleged the employer was vicariously liable for the conduct of its servants and/or agents, which was not alleged in the Pre-Filing Statement. The Pre-Filing Statement only identified a case of direct liability on the part of the employer. His Honour held the plaintiff sought to make a different and perhaps alternative case to the case of direct liability, being that the employer was vicariously liable for the conduct of its employees acting within the course of their employment. This was because it was necessary for the avoidance of surprise for the claimant to identify the source of liability when linked to the facts giving rise to it.

It was therefore held that Section 318(1) required the case of vicarious liability to be pleaded in the Pre-Filing Statement.

His Honour disagreed with the plaintiff's Counsel that it was axiomatic that when a claimant made a claim against the employer it specifically contemplated it was made on the basis of vicarious liability. His Honour noted the definition of "work injury damages" in Section 250(2) indicated it was only an inclusive possibility that the claim against the employer may be one of vicarious liability. In His Honour's opinion there was a material difference between an action in direct liability and one of vicarious liability.

Whilst that determination disposed of the issues His Honour went on to comment all of the other differences identified by the defendant were not "material" differences. In His Honour's view the insertion or amendments to the version of pleading that made their way into the Statement of Claim in comparison with the Pre-Filing Statement, were matters of evidence which were unnecessary to insert.

The decision highlights the importance of a plaintiff, and also defendants, taking care to ensure all allegations of negligence and heads of defence are clearly and specifically pleaded in the pre-filing documents which precede the commencement of proceedings in the District or Supreme Court. Plaintiffs need to give attention to pleading vicarious liability as an alternative to direct liability by a defendant, even where the defendant is a corporate entity. It may however be permissible to make changes that reflect matters of evidence rather than changes to the causes of action relied upon. The general element of avoiding surprise seems to be material to determination of whether a subsequent pleading is 'materially different" to the pre-filing statement.

Belinda Brown
bjb@gdlaw.com.au