Insurance Matters

Sparke Helmore Lawyers

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Looking over the horizon

In the last issue of *Insurance Matters* for the year, we look at the rising recreational and commercial use of drones and the risk factors insurers and operators need to consider when developing or obtaining appropriate insurance cover for drone operations.

We review the amendments to the NSW workers' compensation scheme that partially came into effect in October 2015—with the remaining changes to come into effect in mid-2016—and highlight how these changes will impact employers, workers and insurers.

The courts have clarified the approach to identifying which jurisdiction a mobile worker's compensation claim falls under in the decision of *Ethnic Interpreters and Translators Pty Ltd v Sabri-Matanagh* [2015] WASCA 186, providing greater clarity for employers and their insurers on workers' compensation entitlements.

We examine a study conducted by Matthew Spittal of the University of Melbourne and Marie Bismark and David Studdert of Stanford University, recently published in *BMJ Quality & Safety*, which has developed an algorithm to estimate future risk of complaints against medical practitioners for malpractice, otherwise known as a PRONE score.

With the Christmas party season upon us, we also provide you with some tips to make sure potential risks to work health and safety are addressed, so that employers and employees can enjoy the festivities safely.

Looking forward to 2016, there is growing concern about the threats, both to the financial system and the global economy posed by cyber attacks. This is no different for the insurance industry where we are seeing a growing number of insurers entering the market with products to mitigate cyber risks. Nationally, we are also seeing a growing numbers of significant work injury liability claims affecting multiple defendants and employment practices liability claims for activities such as wrongful termination, discrimination and sexual harassment. We will be examining these topics in future issues of *Insurance Matters*.

If there are any additional topics that you'd like us to explore, please send me an email: james.johnson@sparke.com.au

I hope you enjoy this issue of *Insurance Matters* and have a safe new year.

Sincerely,

James Johnson
Insurance National Practice Group Leader
Sparke Helmore Lawyers

Insurance Matters | Issue 8

Game of drones: The rise of the machines

By Kevin Bartlett

The military use of drones is well known. However, there has been rapid growth in the recreational and commercial use of drone technology because of its relatively low cost and the diversity of its emerging applications.

The key challenges arising from this growing industry are how to successfully integrate drone operations into our busy airspace and how to manage the emerging and potentially significant third party risks. While collaboration between regulators, manufacturers and operators will be important to achieve safe operations, insurance will be a major component of the risk management process.

Like computer and smart phone technology, drone technology has become commonplace and an integral part of doing business. Drones are now: delivering medicine to remote areas; undertaking courier services within large cities; monitoring severe weather such as storms and cyclones; undertaking data gathering in the agricultural, marine and mining industries; assisting with law enforcement and border patrol; and carrying out photography and filming.

But it has not all been plain sailing. Drones have had near misses with passenger aircraft, hit power lines resulting in loss of power to approximately 200 commercial and industrial businesses, interfered with a police response to a siege and caused unwanted invasions of privacy—resulting in the inevitable media scrutiny.

Liability considerations, particularly third party liabilities, are increasingly important to operators and insurers. Potential damages and the costs associated with third party claims will play a significant role in the availability and cost of insurance. The ability to identify and assess these types of risks will therefore be important to the insurance industry in developing appropriate insurance cover and risk-based pricing.

Risk factors

In August this year, Lloyd's of London released an emerging risk report into drone technology, "Drones take flight", and identified five key risks facing the industry:

- negligence of the pilot (the drone operator)
- inconsistent international standards
- enforcement that has not kept up with the rapidly growing industry
- vulnerability to cyber-attack, and
- privacy infringement.

The report identified the "human factor" as a key concern for insurers. Several jurisdictions have introduced, or are introducing, comprehensive training and certification schemes that will be linked to the mandatory licensing of operators. This will allow insurers to better assess insured operators' competence as part of their underwriting requirements. Additionally, effective airspace control and collision avoidance technology could become a prerequisite for obtaining insurance cover.

The history of aviation attests to the benefits of uniform international regulation. Drone technology is developing rapidly and is portable. Cooperation between drone manufacturers and regulators on the one hand and between regulators and insurers on the other hand, will ensure there is some consistency in the approach taken by regulators in different jurisdictions and an appropriate suite of insurance cover is developed to address the emerging risks.

The report highlights that regulatory enforcement has fallen behind the pace of drone technology development. It suggests that manufacturers should continue their research into a tracking and monitoring technology that can be incorporated into the drone design, which could assist enforcement and minimise the risk of future infractions.

Drones will become a target for hackers, according to the report, as jamming equipment is currently available at a relatively low cost. As the number of commercial use applications grow, so will the urgency of this issue for manufacturers and regulators.

Privacy issues related to drone use continue to be an area of concern. Where a drone has surveillance capability, it is proposed that an operator should first carry out a privacy impact assessment before permission is given to use the drone for surveillance purposes.

Regulation in Australia

Since mid-2014, the civil aviation regulator, Civil Aviation Safety Authority (CASA), has been working with the industry on proposed changes to the regulations that apply to remotely piloted aircraft. There is an intention to relax the restrictions on the use of small drones by commercial operators. Currently, the regulations prohibit a person from operating a drone:

- within 30 metres of a person or building
- above 400 feet
- above a populous area
- out of the person's line of sight, and
- within five kilometres of an airport or airfield.

If the drone is to be used for commercial operations, the person must obtain an operator's certificate. Any individual operating a drone for commercial gain must have a controller's certificate. The regulations are more onerous if the drones are larger in size and mass.

CASA expects to release a revised set of regulations in 2016.

Australia does not specifically regulate to protect the privacy of individuals regarding the use of drones. In 2014, the Commonwealth Government undertook a review of the privacy issues in the digital era. The review recommended the introduction of a new statutory cause of action for serious invasions of privacy. If enacted, the new cause of action could potentially apply to the operation of drones. Outside of the statutory regime, those affected by intrusive drones need to explore the common law causes of action of trespass and nuisance.

What does this mean for insurers?

Insurers need to continue to develop and tailor their policies to meet the growing demand and emerging risks associated with this dynamic sector. The standard insurance will no doubt cover third party risks and may extend to cover professional indemnity liability (i.e. damages and legal costs associated with third party claims for breach of privacy), directors' and officers' liability, product liability, employment liability and terrorism cover.

Insurers will need to closely follow technological advancements to ensure safer operations. The regulation of passenger aircraft in the wider aviation industry already requires mandatory liability insurance. It is expected that mandatory cover for third party risks arising from drone use might be imposed by regulation and new anti-collision avoidance technology could become a prerequisite for obtaining cover. Insurers will also need to be nimble in identifying and addressing the emerging risks from new industry sectors that drones will operate in. Cooperation between manufacturers, regulators and insurers will be key to successfully managing the risks of this new frontier.

NSW workers' compensation scheme reforms increase workers' benefits and reward employers

By Kerry Haddock

Further changes to the New South Wales workers' compensation scheme are under way following the NSW Government's $1 billion reform package announcement in August 2015. Some of the amendments made by the *Workers Compensation Amendment Act 2015* began at the end of October 2015, while the balance should be in effect by mid-2016.

The reform package has three elements:

- premium reductions for employers with good safety and return to work records
- the division of WorkCover NSW's functions between Insurance and Care NSW (icare) for insurance, the State Insurance Regulatory Authority (SIRA) for regulation and SafeWork NSW for work health and safety regulation, and
- enhanced benefits for workers.

It's important for insurers to note the incentives available to eligible employers, to understand the allocation of WorkCover NSW's functions across the newly introduced bodies and to be aware of the scheme's key changes for workers.

Benefits for employers

Under the reforms, a performance discount of 5% to 20% off premiums will apply to high performing employers. The reform package defines high performing employers as those who have low workers' compensation claim costs as a result of their good safety systems and who actively support injured workers to safely return to suitable duties.

The reforms have also introduced the Employer Safety Incentive, which is a 10% discount for medium to large employers to encourage them to invest in safety and support systems. These employers will also receive discounts for remaining claim free for four years and for successfully returning injured workers to work.

New insurance and regulatory arrangements

icare, SIRA and SafeWork NSW started operating on 1 September 2015. The separation of functions under these different regulatory bodies is a response to concerns about the inherent conflict of WorkCover NSW acting as both the Regulator and the Nominal Insurer.

icare has assumed the responsibilities of the Nominal Insurer, as well as those of the Lifetime Care and Support Authority, Dust Diseases Authority, SICorp and Sporting Injuries Compensation Authority.

SIRA now regulates workers' compensation insurance, CTP insurance and home building compensation, while SafeWork NSW is the Health and Safety Regulator.

Benefits for workers

Workers with high needs and highest needs

Workers were previously defined as "seriously injured workers" for the purposes of compensation if they were assessed as having whole person impairment (WPI) of more than 30%.

Under changes to the scheme, injured workers may now be defined as those with high needs and those with highest needs. Where they fall on the scale of WPI will determine their category and the limit on payment of their medical expenses. The new definitions are:

- High needs – greater than 20% WPI.
- Highest needs – greater than 30% WPI.

Medical expenses

Medical expenses will be paid to workers with 10% or less WPI for two years after the date of claim or from the date when their weekly benefits stop. Workers with 11%-20% WPI will have their medical expenses paid for five years after the date of claim or from the date when their weekly benefits stop. For workers with high or highest needs there are no time limits on payment.

Changes to s 59A of the *Workers Compensation Act 1987* (NSW) do not affect the provision of crutches, artificial members, eyes or teeth; other artificial aids or spectacles (including hearing aids and batteries); modification of homes or vehicles; or secondary surgery. This means that workers will be able to claim for those items, regardless of whether they are workers with high needs or highest needs.

Weekly benefits

Weekly benefits are now payable for one year after a worker reaches retirement age.

Workers with high needs are no longer required to work for at least 15 hours per week to be entitled to weekly benefits after the first 130 weeks. They will also be entitled to up to $8,000 for the cost of education or re-training after more than 78 weeks of weekly benefits.

Lawyers will be able to charge for legal advice on certain reviews of work capacity decisions and the Government will provide for this by regulation.

The Government has called for submissions on the proposed regulation and it expects that the new regulation will be finalised and implemented no later than June 2016.

Lump sum compensation

The lump sum payable on a worker's death has been increased from $528,400 to $750,000. Funeral expenses have increased from $9,000 to $15,000. The new amounts apply when the death occurs on or after 5 August 2015.

Increased benefits are to be paid for workers with WPI and the benefits are to be indexed. The increased benefits apply to injuries that occur on or after 5 August 2015.

The increase is greatest at the higher end of the scale. For example, for a worker with 55% WPI the compensation received increases from $143,000 to $242,010. A difference of only 1% WPI can make a considerable difference to the compensation payable. For instance, a worker with 56% WPI is entitled to $309,020, which is $67,010 more than a worker with 55% WPI receives.

Transitional arrangements

The 2015 amendments apply to injuries received and claims made before the amendments, with some exceptions:

- they don't apply to compensation paid or payable before the amendments
- the lump sum amendments don't apply to injuries received before the amendments commenced
- the amendments relating to medical expenses don't apply to weekly benefits claims made before 1 October 2012, unless the worker was an existing recipient of compensation at that date, and
- the amendments to payments after retirement age don't apply to a claim made before 1 October 2012.

Effect of the amendments

There is likely to be an increase in disputes about WPI. For example, the difference between 20% and 21% WPI affects whether medical expenses are paid for five years only or have no time limit. An assessment of 21% WPI also affects the payment of weekly benefits after 130 weeks. The difference of 1% may mean an extra $60,000 or more in lump sum benefits.

Cram Fluid Power Pty Ltd v Green [2015] NSWCA 250

In the wake of the NSW Court of Appeal decision in *Cram Fluid Power Pty Ltd v Green*, the Government has made a new regulation to enable workers who have made a claim for WPI before 19 June 2012 to make one further claim if their condition deteriorates. The *Workers Compensation Amendment (Lump Sum Compensation Claims) Regulation 2015* commenced on 13 November 2015.

Workers who aren't affected

Apart from the increased death benefits, the amendments don't apply to police officers, paramedics and fire-fighters. None of the amendments, including the increased death benefits, apply to coal miners.

Mobile workers and state of connection

By Greg Guest and Miriam Browne

Workers' compensation benefits are payable under the legislation applicable in the state or territory to which the particular worker's employment is connected, except where a worker is covered under the federal scheme. To promote consistency between different schemes, the cross-border provisions are substantially similar in each of the states and territories.

Given this, the decision of the Western Australian Court of Appeal in *Ethnic Interpreters and Translators Pty Ltd v Sabri-Matanagh* [2015] WASCA 186 is particularly important in setting out the approach to identifying which jurisdiction a mobile worker's claim falls under, and provides greater certainty for employers and their insurers on mobile workers' compensation entitlements under the relevant state or territory's legislation.

Where is an employee located?

Mr Sabri-Matanagh was injured in the course of his employment as an interpreter. At the time of his injury he was working on Christmas Island, but historically his time was equally spent between Christmas Island and Victoria. Further, he had no separate base of work.

In all states and territories, a series of sequential or cascading tests are used to determine the state of connection issue. In working his way through the first and second of these tests, the primary judge considered whether there was any one state or territory in which Mr Sabri-Matanagh usually worked or was usually based. He observed the well established principle that "usually" meant customary and did not require a measure of the time spent at a particular location.

He concluded on the evidence that there was no one such location where he usually worked or was based and the judge moved to the third, "principal place of business" test. He observed that the employer had offices in both New South Wales and Victoria and accepted there was no one state or territory in which the principal place of business was located.

He then applied the fourth and final test, finding that Mr Sabri-Matanagh's employment was connected with Christmas Island—being the Territory in which he was injured.

The employer appealed the decision, submitting that the judge ought to have found that the third, "principal place of business" test identified New South Wales as the state of connection. It was submitted on behalf of the employer that the third test required an assessment of the location from where the business activities of the employer were principally controlled and managed.

The appeal was unanimously upheld, with the Court accepting the interpretation advanced by the employer. In this case, the employer's sole director worked at an office in Parramatta and made all operational decisions from that location. Consequently, the Court concluded that Mr Sabri-Matanagh's employment was connected with New South Wales, as the head office was based there.

Why is this decision important?

This decision highlights that employers must take out a policy in the state or territory to which each mobile employee is connected.

This is easier said than done and, in a workplace environment increasingly characterised by remote access and national and international mobility, it is not surprising that the "usually works" and "usually based" tests are less helpful than they used to be.

With increasing reliance on the third "principal place of business" test, the decision in Mr Sabri-Matanagh's case has brought clarity and a sense of predictability to the result.

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Now, in this context, an employer's principal place of business is the principal place from which the business activities are managed or controlled, colloquially known as the "head office".

How has this issue been decided in other jurisdictions?

The decision in *Ethnic Interpreters* is consistent with that of the ACT Court of Appeal decision in *Avon Products Pty Ltd v Falls* (2010) 5 ACTLR 34, where the location of the head office also dictated the result of the "principal place of business" test.

It is also consistent with the decision in *Weir Services Australia Limited v Allianz Australia Insurance Limited* [2013] NSWSC 26 where the NSW Supreme Court confirmed that the principal place of business in this context is not the same as the principal place of business registered with ASIC under the *Corporations Act 2001*. In *Weir Services*, it was held that the expression "principal place of business" means the chief, most important or main place of business from where the employer conducts most or the chief part of its business.

What are the implications of this decision

On the face of it, the decision in *Ethnic Interpreters and Translators Pty Ltd v Sabri-Matanagh* consolidates and clarifies the law in this area and provides employers and brokers with a measure of certainty regarding the compensation entitlements of a mobile workforce.

We say only a measure of certainty because it seems unlikely that the test, as it currently stands, will be readily applied to all possible commercial arrangements. For instance, it is possible to envisage a structure where senior management with strategic responsibilities are located in one state or territory and operational activities are managed, at an equally high level, from another.

No doubt the law in this area will continue to evolve, keeping pace albeit slightly behind the evolution of employment and commercial arrangements in Australia.

Identifying complaint "PRONE" medical practitioners: Mitigating or multiplying risk?

By Mark Sainsbury

Medical malpractice insurers and health complaint commissions are all too familiar with the detrimental impacts of so called "frequent flyer" clinicians. Arguably, a history of complaints against individual clinicians suggests a failure to implement (or successfully implement) strategic intervention to prevent the recurrence of claims.

Intervention tends to be reactive following a complaint or claim. From the clinician's perspective, intervention actions are likely to be resisted or simply ignored due to time constraints and other factors.

Regulatory bodies, complaint commissions, insurers and the like would undoubtedly welcome the use of a tool to accurately assess the future risk of complaint against individual clinicians, allowing for proactive steps to be taken where necessary.

The PRONE score research

A project by Matthew Spittal of the University of Melbourne and Marie Bismark and David Studdert of Stanford University, recently published in *BMJ Quality & Safety,* sought to develop a relatively simple and reliable algorithm that can estimate the future risk of complaints being brought against practitioners as a means for facilitating proactive intervention.

The study was carried out with the assistance of Australian health service commissions from all states (except South Australia) and used a data set of 13,849 complaints made against 8,424 doctors over a 12-year period (from 2000 to 2011). The study found that:

- Sixty percent of complaints were related to clinical aspects of care with the most common being treatment (39%), diagnosis (16%) and medications (8%).
- Approximately 20% of complaints were related to communication issues such as the attitude or manner of doctors (13%) and the quality or amount of information provided (6%).
- Nearly 50% of doctors complained about were general practitioners and 15% were surgeons.
- Seventy-nine percent of doctors complained about were male.
- Eighty percent of doctors complained about were aged between 35 to 65 years.
- For doctors who were the subject of more than one complaint, on average, 398 days elapsed between the first complaint and the next.

From this, an algorithm was developed to produce a PRONE (Predicted Risk of New Event) score indicating the likelihood of a future complaint against an individual clinician using only the following four variables:

- the doctor's speciality
- whether the doctor was male or female
- number of previous complaints, and
- time since the last complaint.

The PRONE scores produced for clinicians using these four variables alone were reported as having performed well in predicting subsequent complaints (determined by reviewing the historical data supplied by the health commissions).

PRONE score limitations

The study concludes that the PRONE score exhibited strong predictive properties and has considerable potential to determine the likelihood that doctors named in complaints will be the subject of future complaints. However, the following limitations were noted:

- Variables not incorporated into the algorithm can also be used to predict complaints, including characteristics of individual patients and doctors, the doctor-patient relationship and the environment where the doctor works. Factors such as these affect patient satisfaction and resulting complaints, but are difficult to measure and to include into a tool intended for routine use.
- Exposure to complaint risk arising from the volume of patients treated by an individual clinician or the type of procedures performed was not incorporated.
- The extent to which the PRONE tool might actually be applied is unknown. For example, it is suggested that use in a limited data catchment setting (such as a single hospital) may undermine the accuracy of risk prediction.

The study also points out that even if the PRONE score is adopted and used effectively, it is insufficient on its own to improve the quality and safety of care and should be considered as a front-end strategy for subsequent intervention to take place.

Potential benefits and risks

A relatively simple, effective tool such as the PRONE score would be of interest to regulatory and complaint bodies, as well as medical malpractice insurers involved with risk prevention and public safety in the healthcare industry.

Arguably, the methodology might be best applied to large data sources, such as those held by long-term medical malpractice insurers, complaint commissions or large healthcare facilities. Generating PRONE scores from a review of claim/complaint data may complement other risk analysis methodologies already used.

However, the PRONE score recipient would then need to determine what steps, if any, are to be taken for those clinicians with a score predicting a high likelihood of future complaints. If active intervention was considered appropriate, options might include:

- recommending or requiring targeted "Continuing Professional Education" sessions to be undertaken
- increasing insurance premiums or adding specific preconditions, endorsements or exclusions to the subject policies, or
- implementing conditions of practice, if warranted.

Questions relating to public safety might arise if this tool is put into practice. For example, what are the obligations of an insurer, health service commission or hospital to disseminate high PRONE scores to other organisations so that appropriate precautions are taken to reduce risks to public health and safety?

A tool that identifies and quantifies the risk of future complaints against clinicians... would undoubtedly be welcomed.

It is worth considering the implications of a plaintiff obtaining PRONE score data for an individual clinician via disclosure (or some other means) during litigation. Questions would undoubtedly be asked of any facility or employer that was aware of an elevated PRONE score for the defendant clinician.

It is also conceivable that a mid to high PRONE score held by a clinician after a single prior complaint might alter the way in which a complaint agency responds to a further (as yet unsubstantiated) claim against that clinician.

If this methodology were adopted, it seems inevitable that the gathering and use of complaint data and the accuracy of resulting PRONE scores would be challenged by some clinicians, particularly if those scores were used to place restrictions on practice.

What does this mean for insurers?

Medical malpractice insurers are acutely aware of the cost of defending claims against clinicians, including the limited opportunity to recover costs when a claim is successfully defended.

A tool that identifies and quantifies the risk of future complaints against clinicians and thereby creates an opportunity for intervention would undoubtedly be welcomed. However, such analysis and intervention at the individual clinician level could prove to be difficult to manage, very costly and not without additional risks.

Office Christmas parties…'tis the season to think before you drink

By Daria McLachlan

It's beginning to look a lot like Christmas…and office parties are in full swing! Unfortunately Santa's gift to employers tends to be an increase in workplace claims arising from sexual harassment, bullying, discrimination and work health and safety breaches. This is unlikely to make any employer jolly, but there are steps you can take to reduce the risk of such claims arising.

The obligations of employers

The legal obligations of employers continue to apply during work Christmas parties. Employers owe a duty of care to their employees and must take reasonable steps to reduce potential risks to their health and safety. This includes protecting them from the heightened likelihood of sexual harassment, bullying, discrimination and safety breaches that tend to come hand-in-hand with alcohol consumption.

The general position is that employers will be vicariously liable for employees' misconduct unless the employer can show it has taken all reasonable steps to prevent the conduct from occurring. The case law makes it clear that this obligation extends to work Christmas parties and other work-related functions.

Lessons learnt from the courts

The decision of *Ewin v Vergara (No 3)* is an example of where an employer was found to be vicariously liable for sexual harassment. In this case, it was held that inappropriate sexual conduct that took place in a taxi and at a hotel was connected to employment because the behaviour was part of a course of conduct that had started in the workplace.

Employers owe a duty of care to their employees and must take reasonable steps to reduce potential risks to their health and safety.

A recent decision before the Fair Work Commission has highlighted the difficulties employers can experience when disciplining misbehaving employees if they do not have appropriate controls in place before work functions are held. In *Keenan v Leighton Boral Amey Joint Venture*, the Commission held that dismissing an employee for drunken and inappropriate conduct at a work Christmas party where the supply of alcohol was unlimited and unmonitored was unfair. During the party a male employee made offensive comments to a number of his co-workers and later attended a public bar with his colleagues where he swore at his boss and made unwelcome sexual advances to a female co-worker. As a result of this conduct, the employee was dismissed.

The employee filed for unfair dismissal and was successful in part because the employer had provided him with unlimited alcohol, despite his obvious intoxication. This was held to be a mitigating factor for his conduct as he could not be held accountable for his behaviour to the degree necessary for dismissal. This decision confirms that employers may not be in a position to insist on appropriate standards of conduct at functions if they serve unlimited amounts of free alcohol.

In the decision of *Canny v Primepower Engineering*, an apprentice suffered serious burns to 60% of his body when he was engulfed in flames at a birthday party at work. The employer provided 11 kegs of beer at the party. A number of intoxicated employees subsequently started working on an engine using flammable liquids, which resulted in the apprentice's injuries.

The apprentice sued the employer for damages on the basis that it had been negligent in allowing employees to work on the engine while intoxicated. The Court held that the employer had breached its duty of care by providing free-flowing alcohol at

work and that it had failed to provide a safe system of work by not adequately supervising the employees.

Tips to reduce your risk

To avoid a Christmas party legal hangover, we recommend the following:

1. Before your function, remind your employees that it is a work event and that appropriate standards of behaviour, as set out in your workplace policies, are expected.
2. Identify any potential hazards by performing a risk assessment of the party venue.
3. Warn employees about the potential consequences of inappropriate behaviour.
4. Set a start and finish time for the function and make it clear that events/activities that occur outside of this time frame are not endorsed by the employer.
5. Ensure a senior employee is assigned to stay sober and monitor behaviour and alcohol consumption. This role may require taking action to address escalating behaviour, such as sending someone home or closing the bar.
6. Comply with responsible service of alcohol requirements and provide sufficient food and non-alcoholic drinks at the event. If an employee is visibly intoxicated then cut off their alcohol supply.
7. Ensure you have up-to-date policies and procedures on bullying and harassment, discrimination, social media, work health and safety, and drug and alcohol use. You should also have policies that set out your complaints process so that any incidents can be swiftly and appropriately addressed.
8. Communicate your policies and procedures to your employees and ensure appropriate training is provided.
9. Immediately deal with all complaints in a professional and confidential manner.
10. Review your applicable insurance policy to assess whether the proposed Christmas function is covered.

There is no need to be a Grinch when it comes to your Christmas party. It is simply a matter of being prepared and having systems in place to ensure you can manage and address any issues that may arise during your event.

We wish you a happy and liability-free Christmas!

Recent developments

There have been a range of recent legal developments that affect decision-makers in insurance organisations, self-insureds and reinsurers. Click on the links below to read these articles.

Full Federal Court widens definition of work-related injury

The Full Court of the Federal Court of Australia has clarified that a person making a claim for a work-related injury is not required to establish a "sudden or identifiable" psychological change to meet the definition of injury under s 14 of the *Safety, Rehabilitation and Compensation Act 1988*.

The decision of *May v Military Rehabilitation and Compensation Commission* [2015] FCAFC 93 represents a significant shift in the approach to determining when an injured worker has sustained an injury in the course of their employment. The Full Court's approach suggests that determining whether a person has suffered an "injury" under workers' compensation legislation need not be a matter for medical evidence; it may be established by an injured employee's account of physiological changes, if those changes occurred at work. *Click here to read more...*

The High Court re-examines when a cause of action arises in mesothelioma cases

The High Court's decision in *Alcan Gove Pty v Zabic* [2015] HCA 33 has re-examined when a cause of action arises in respect of the condition of mesothelioma. The High Court held that a cause of action for mesothelioma is accrued when initial mesothelial cell changes commence, as opposed to when there is a "trigger" and these cell changes develop into the disease of mesothelioma. *Click here to read more...*

Jury's finding of contributory negligence set aside by trial judge

In the Victorian County Court in *Cowan v Marine 1 Pty Ltd* [2015] VCC 1414, Judge Bourke set aside a jury verdict of 27.5% contributory negligence where the Plaintiff lost control of a boat during testing. This decision has significant implications for self-insurers. Trial judges in Victoria may be reluctant to find contributory negligence on the part of an employee whose actions or omissions might be characterised as a mere inadvertence. Also self-insurers should be mindful that, even if there appears to be evidence to support a finding of contributory negligence on the part of an employee, there must also be evidence sufficient to prove that the negligence was a contributing cause of the employee's injury. *Click here to read more...*

Supreme Court rules on impairment benefits double dipping

A Supreme Court decision handed down by Justice Zammit on 14 September 2015 will prevent Victorian workers from double dipping for physical impairment benefits claims in the event of total loss injuries. Her Honour concluded that the Appellant was not entitled to be compensated under both s 98C and s 98E of the *Accident Compensation Act 1985* (Vic). We represented Arrium Limited, the successful Respondent. *Click here to read more...*

Determining liability for work-related injuries

The Federal Court of Australia has rejected an argument that the High Court decision in *Comcare v PVYW* set out a new test for determining liability for all work-related injuries. The *O'Loughlin v Linfox* decision has confirmed that the legal test for determining liability for injuries that occur during ordinary work hours is unchanged by *Comcare v PVYW*. *Click here to read more...*

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