Insurance Matters

Sparke Helmore Lawyers

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Are you ready for a cyber breach?

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If you have any questions or suggestions about *Insurance Matters* contact the editor, Malcolm Cameron, on +61 2 9373 1485 or malcolm.cameron@sparke.com.au

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Looking over the horizon

In the first issue of *Insurance Matters* for 2016, we look at the increasing susceptibility of private companies to cyber attacks and ways of preventing and addressing legal, technical and operational breaches.

We sit down with Berkshire Hathaway Specialty Insurance Australasia's President, Chris Colahan, to talk about being a new player operating in the Australian insurance market, the challenges faced during the company's first year and its goals for the future.

With the growing number of employment practices liability (EPL) claims for activities such as wrongful termination, discrimination and sexual harassment, we discuss EPL insurance—its benefits and what to consider in such policies.

We examine a recent Victorian Civil and Administrative Tribunal decision in which a mental illness exclusion in a travel insurance policy was deemed unlawful discrimination based on a failure to rely on data and what this decision means for insurance policy drafting.

We explore the effect of the repeal of the Newman amendments on work injury liability claims in Queensland, including the avenues workers now have for recourse under the common law and in negligence.

On another note, I would like to congratulate our client Emergence Insurance for its Cyber Event Protection policy being awarded the "Broker's Pick" Award late last year by *Insurance Business* magazine. The policy, which we helped draft, provides an easy to understand policy guide for the SME market.

I would also like to welcome Partner Catherine Power to our Insurance Group in Canberra, who joined us from DLA Piper in January. Catherine has more than 15 years' experience in insurance litigation across areas including public liability, professional indemnity, medical negligence and property damage, and has significant expertise advising on CTP and major claims.

A warm welcome to Special Counsels Jessica Bristol and Maxine Feletti, and Consultants Colin Blain, Andrea Boyd-Boland and Carl Burraston who have also joined the Insurance Group.

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*.

Sincerely,

James Johnson
National Insurance Group Leader
Sparke Helmore Lawyers

Are you ready for a cyber breach?

By Mark Doepel and Steven Canton

In today's digital age, it's not just governments and military bodies that are susceptible to being hacked. On 1 March 2016, the White House announced that it was using cyber attacks to disrupt Islamic State communications and overload its networks.

Individuals can also be susceptible to cyber attacks. In March, digital protection company ESET discovered malware on Android phones that could steal an individual's banking details. It appears that the malware took over control of a phone when a customer tried to open a banking app. It would then re-direct the customer to a fake login screen that the customer could not exit until they entered their log-in details. Once these details were provided, those behind the malware were free to log into that customer's account and transfer money out of it.

Private companies are being hacked more frequently than ever. Such attacks generally have one of three purposes in that they either:

- get information that hackers can reuse, i.e. the theft of credit card information or industrial information
- affect the business's performance, i.e. where hackers seize control of operating systems, or
- seize control of systems, i.e. where hackers infiltrate systems and use them to send out spam or scam emails.

In recent months, cyber attacks against eBay, Target, Google, The New York Times, Twitter, and the Dow Jones and US Stock Exchange have been reported in the media. The hacks on these companies have received media attention because of their notoriety and public standing.

It would be a mistake to think that small to medium-sized businesses are not being hacked or subjected to cyber attacks. In fact, hacking is happening at such an alarming rate, that it is almost inevitable that these businesses will be attacked. This then raises the question, are you ready for a breach? Business owners and managers need to identify and manage pre-breach issues to best protect themselves if an attack does happen.

Strengthening the shield–pre-cyber attack preparation

Before a cyber attack occurs, it is important that a company has action plans from three perspectives—legal, operational and technical.

The legal front

From a legal perspective, this involves pre-breach actions and planning for post-breach events. You should ensure that you are properly insured for any loss that may occur, or liability that may arise, from an attack. This should include a review of your insurance policy's wording to ensure it provides adequate cover.

Post-breach planning should cover notification. This could include contacting your insurer and activating a cyber insurance policy, and also deciding whether to notify customers of a cyber attack. Be aware that failing to notify customers of a cyber attack could have a considerable impact on your business's reputation and goodwill.

Notification might also relate to whether ASIC, the ASX or the Privacy Commission (amongst other government organisations) must be notified of an attack. Notification laws are currently being developed and an exposure draft of new legislation that could make breach reporting mandatory, the *Privacy Amendment (Notification of Serious Data Breaches) Bill 2015*, has been released.

The operational front

From an operational perspective, you should develop a cyber attack policy as part of your overall disaster recovery plan. This policy, amongst other factors, should outline who is responsible for dealing with an attack, how key IT personnel or IT providers will be engaged, how the business will function if one or more of its servers are offline, from where the business will operate if its premises are

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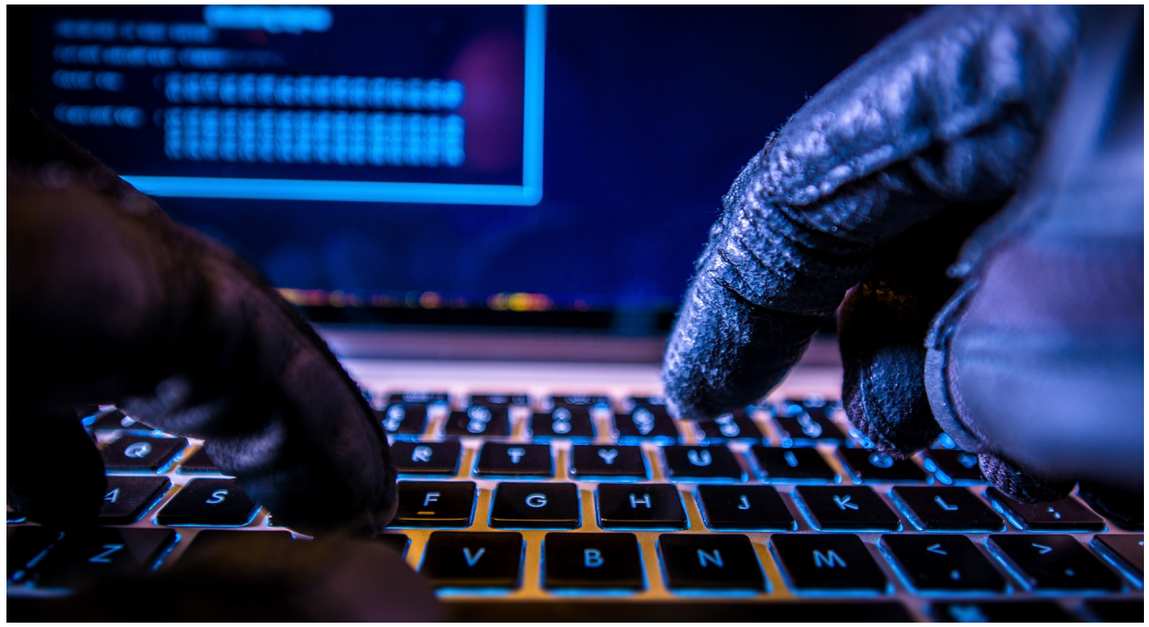

unavailable and how the board of directors and corporate officers are to be kept up-to-date to fulfil their corporate duties.

Additionally, you should also be aware of, or take advice about:

- cyber security compliance—particularly about ASIC and privacy protocols
- mitigation of your risk through contractual provisions that ensure IT professionals are robustly monitoring your systems
- any multi-jurisdictional issues that arise out of information being stored and used internationally
- obligations regarding the retention of data
- compliance training—training your staff so that they are aware of what a potential attack might look like, and
- working with legal and IT specialists to conduct a cyber fitness test so your business is ready against an attack.

The technical front

Making sure that your systems are kept up-to-date has a significant effect on vulnerabilities. The Australian Signals Directorate estimates that 85% of targeted cyber intrusions can be prevented from just four mitigation strategies: application whitelisting, patch applications, patch operating system vulnerabilities and restricting administrative privileges. There is an additional mitigation strategy of having management and all your staff understand these strategies.

Additionally, technical preparation includes working with IT professionals to conduct a cyber check-up so that IT systems are capable of withstanding or still functioning if an attack happens. IT professionals can also conduct penetration testing to see how systems respond in the event of an attack and to further develop protocols to limit the impact of a cyber attack.

It is also important to engage IT professionals so that, when an attack occurs, there is a first-strike team ready to immediately respond to the attack to prevent as much damage as possible and to ensure any systems that are taken offline are back up as soon as possible.

The reality

It is easy to dismiss cyber security as either an unimportant issue related to mere computer viruses or as something that happens only as part of major government operations or hacks on large multinational corporations. In reality, cyber attacks occur frequently on all types of businesses and especially on small to medium-sized businesses.

We would like to acknowledge the contribution of Colin Pausey to this article.

An interview with Chris Colahan

By Kristy Shardlow

After spending 10 years overseas in various roles, most recently as Regional CEO – Asia at RSA Insurance, Chris Colahan was ready to return to Australia when the role of Berkshire Hathaway Specialty Insurance (BHSI) Australasia's President came up.

"While it would have been a dream scenario to set up the business with its headquarters in the Gold Coast, we've now got offices in Sydney, Melbourne, Brisbane and Auckland and we've got the beginnings of a great product offering. We've sown the seeds and, from this year on, we'll start to see them turn into something else and it's really exciting to be a part of that."

Chris says the most enjoyable and fulfilling part of BHSI's journey since it began operating in April 2015 has been working with its New Zealand Country Manager, Cameron McLisky, to map out what they wanted the business to look like and bringing the team together. "So far we've handpicked 54 people from 21 different companies and it's been a dream scenario to be able to go and hire who we see as the industry's best and to put them all together into an empowered and autonomous team," he said.

While Australia is a somewhat sophisticated insurance market, it would seem to be a relatively small pool of players compared with other overseas insurance markets. Why did BHSI choose to open an operation in Australia ahead of other larger, more varied markets?

Our aim at BHSI is to be a world-leading property and casualty insurance company that offers a gold standard to our customers. We realised early on that we would need to have a global footprint to service the global needs of our multinational international customers.

> We're operating in an incredibly dynamic world where entire industries are being constructed or overhauled almost overnight. For us that creates enormous opportunities if we are responsive...

Australia is a big, very interesting market by world standards with a large premium pool and commercial customers that we think our brand and our offering will be attractive to.

How do you see BHSI differentiating itself in a crowded insurance market here in Australia?

Our brand and our balance sheet are the strongest in the industry, but it's what we do locally for our customers on the ground that really is going to matter. We started with a blank sheet of paper with no legacy systems, processes, or people, which meant we could build the business with less bureaucracy, an absolute focus on creative simplicity over complexity and on returns. We're creating a highly responsive organisation with flexible insurance and risk transfer solutions for our customers and can do it at a very low cost.

What have been the challenges from your first year in your role?

Incumbency and longevity of insurer relationships with brokers and with end customers is extremely powerful in our industry. If you think about it in a positive way it also tells you that we're in an industry where loyalty and longevity of relationships are important, but if you put a more negative lens on it you'd say that people are risk averse and wary of change. Having said that, we've been fortunate to build 500 customer relationships, which has exceeded our expectations and means that our message, brand and proposition is resonating with those customers.

The Australian insurance market is one of the most highly regulated in the world. How do you find it operating here compared to other countries?

After working in six different countries, you realise that while there are challenges of dealing with a regulator in Australia the grass is definitely not greener on the other side. Dealing with regulators is challenging everywhere. In Australia, we know the rules and what we need to do to comply. Importantly, we can communicate with the regulator directly. All in all, insurers need to operate to a high standard in Australia and that is good for us.

What do you see as the biggest challenges and opportunities for the insurance industry in Australia?

We're operating in an incredibly dynamic world where entire industries are being constructed or overhauled almost overnight. For us that creates enormous opportunities if we are responsive to the changing needs of our customers. It's also a massive threat and the industry needs to respond to new and evolving risks and add value to our customers to justify the premiums that we are paid.

Do you think the insurance market and consumers understand and see products addressing cyber risks as being of practical necessity?

Five to 10 years ago, no-one would talk about cyber risks. Over the past 3-4 years both customer and industry awareness have massively escalated, which I think reflects an increased threat and a demand for solutions. It creates an opportunity for insurers to help customers with emerging risks, but we've got a long way to go before we can really understand those risks and how to create an offering that can genuinely lead to a risk transfer for customers.

When you give the toast to celebrate BHSI having been in Australia for 50 years, what do you think you will reflect on at that moment as the greatest indicator of BHSI's success in the marketplace?

Thinking that far ahead is a part of our ingrained philosophy and is what makes us different. We won't be measuring success based on any market share targets or any position on a leader board—for us it will be whether we have a gold standard offering. I think we'll be better positioned than anybody to be offering that given the absolute focus we have on customers and on creating an organisation that can be highly responsive to their needs. And, with a bit of luck, our head office will be on the Gold Coast!

Chris Colahan
President of Berkshire Hathaway Specialty Insurance Australasia

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The rising risk of employer liability

By Roland Hassall and Sandra Kaltoum

Employers' liability and associated costs are increasing and there's no sign that trend will diminish.

The Fair Work Commission records data about the number of unfair dismissal applications made in a particular year. In 2014-2015 there were 11,125 unfair dismissal applications conciliated in Australia and 1,527 that were arbitrated. This is almost double the figure of 10 years ago. This increase reflects the ease with which, for example, unfair dismissal applications may be brought against employers in Australia in the Commonwealth system.

Perhaps even more significantly, the costs associated with employment law breaches are also increasing. Many recent legal developments indicate that the costs associated with mistakes, such as a failure to adequately respond to allegations of sexual harassment or workplace bullying, have become cripplingly expensive. For example, the decision in the *Oracle* case (*Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82) demonstrated a shift in judicial opinion toward the granting of large damages awards in sexual harassment cases.

In *Oracle*, the Full Court of the Federal Court increased the compensation for non-economic loss awarded to an employee from $18,000 to $100,000, and an additional $30,000 for economic loss. In this case, the employer had conducted a formal investigation into Ms Richardson's complaint of sexual harassment against Mr Tucker. The investigation verified Ms Richardson's complaint. Contact between Ms Richardson and Mr Tucker continued throughout the investigation. At the conclusion of the investigation, Ms Richardson received a written apology from Mr Tucker. Shortly after this, attempts were made to reposition Ms Richardson within the company. She argued that the new role diminished her responsibilities and she resigned instead. The Full Court decision highlighted that the damages amount awarded at first instance did not align with "prevailing community standards". In particular, it was noted that the community now more readily appreciates the "value of loss of enjoyment of life occasioned by mental illness or distress caused by" sexual harassment.

In the recent case of *Mathews v Winslow Constructions (Vic) Pty Ltd* (*Mathews*) [2015] VSC 728, Ms Mathews was subjected to abuse and sexual harassment from both Winslow employees and subcontractors throughout her employment. When Ms Mathews complained to her immediate supervisor, he laughed at her. When she complained to a more senior member of staff he said "leave it with me", however, Ms Mathews never observed anything being done. Ms Mathews was awarded more than $1.3m as a result of workplace sexual harassment that was inadequately addressed by her employer.

Also, in *Collins v Smith* (*Human Rights*) [2015] VCAT 1992, the Tribunal awarded $332,280 in damages to a sexually harassed postal worker, after considering the submissions of the Victorian Equal Opportunity and Human Rights Commission.

Reducing the cost of claims

If a claim is made against an employer, significant disruptions to the workplace can arise, particularly if the employer does not have adequate processes in place to react efficiently and effectively. For example, a large claim can disrupt workplace efficiency by drawing resources away from core business, it may create bad publicity if the proceedings are mishandled and it may also lead to significant adverse financial consequences. Employment practices liability (EPL) insurance can limit this exposure.

EPL insurance indemnifies employers (and often their senior managers) against a wide variety of claims brought by their employees. Generally, this includes accusations of unfair dismissal, adverse action, sexual harassment and even breaches of contract. EPL insurance can cover the legal costs associated with defending a claim brought by an employee against their employer, as well as coverage for damages that may be recovered if the claim is successful. This type of insurance can ensure that companies are legally supported throughout difficult and drawn-out proceedings.

Insurance policies vary widely and EPL insurance policies are no exception. Finding the right policy, however, can reduce the cost and burden of employment law claims for an employer.

There are a number of factors to consider when choosing an EPL policy. Business needs may vary greatly and these differences should be reflected in the policy. For instance, directors' and officers' coverage may not be required in some workplaces that are traditionally blue collar.

Most insurance policies have exclusions. For example, some policies prevent employers from claiming cover for pre-existing issues. A policy may also specifically exclude particular types of claims or claims arising as a result of a particular arrangement. For example, breaches of specified period employment contracts or underpayment claims are often excluded. Any criminal behaviour in the workplace that may give rise to an industrial claim is also often excluded.

Policies include limitations on the claim amount and may include limitation periods. A policy may only protect an insured while the policy is in force.

It is common that policies will require an insured to notify the insurer of a potential claim as soon as reasonably practicable. An insurer may also have clauses that allow them to have input regarding the conduct of any proceedings and, generally, the insurer will require their approval be given to any settlement agreement.

What are the benefits of EPL insurance?

EPL policies can be purchased as a safety net to supplement company policies, rather than as a remedy after an incident has arisen.

EPL insurance protects companies against the unexpected results of human resources mismanagement. The insurance can also alleviate the stresses attached to lengthy litigation. Although effective policies and procedures are necessary to reduce exposure to claims (and some insurers offer "hygiene checks" that review the current work environment and suggest alterations to practices to further protect companies), they do not completely eliminate the human resources risks. Finding an insurance policy that suits a business's needs reduces the negative consequences of employment law-related complaints. However all policies should be reviewed carefully and legal advice should be sought around exclusions and other issues as appropriate.

As the damages awarded for breaches of employment law continue to increase, there's no doubt businesses need to manage this risk. The best protection they can get combines excellent employment practices and procedures and the right EPL policy. With this combination, both the risk of claims and the negative impact of any unforeseen employment law complaints can be significantly reduced.

Rethinking mental illness exclusions in the context of the Ingram decision

By Colin Pausey

In a recent VCAT decision, QBE Insurance (Australia) Ltd was held to have engaged in unlawful discrimination when it refused to indemnify a claimant under a travel insurance policy, relying on a mental illness exclusion in the policy. This decision is a reminder to the insurance industry that if legislation requires the industry to rely on actuarial or statistical data when dealing with mental illness exclusions in policies, that data must exist at the time the particular policy was issued to the market. It also reinforces the importance of history and information management, and the retention of data that underpinned why an exclusion or term was introduced in a policy.

The fact that the exclusion is common in the market is not a defence.

Background and Ms Ingram's claim

In late 2011, Ms Ella Ingram elected to join a school trip to New York scheduled for March and April 2012 and purchased a travel insurance policy issued by the insurer. In early 2012, Ms Ingram was diagnosed with, and received treatment for, depression and the decision was made for her to withdraw from the trip. In May 2012, Ms Ingram made a claim for the costs of cancelling her trip, which was denied by the insurer that relied on a general exclusion clause preventing claims directly or indirectly arising from mental illness.

Ms Ingram began proceedings against the insurer in the Human Rights division of VCAT. She contended that her mental illness should be regarded as a "disability" and therefore an attribute that invokes the protection of the *Equal Opportunity Act 2010* (Vic.) (EOA). Ms Ingram argued that by including the mental illness exclusion in the policy and then refusing to indemnify her on the basis of that mental illness, the insurer treated her unfavourably because of her disability and directly discriminated against her, contrary to ss 44(1)(b) and 44(1)(a) of the EOA.

QBE's defence and the Tribunal's findings

The insurer conceded that Ms Ingram had a disability in August 2012 when it refused to indemnify her but argued she had no symptoms or diagnosis when the policy was purchased in 2011. However, Member Dea noted that the statutory definition of "disability" under the EOA includes disabilities that may exist in the future.

The insurer argued that if it did discriminate as alleged, then that discrimination was lawful because an exception contained in the EOA and/or *Disability Discrimination Act 2004* (Cth) (DDA) applied:

- when the policy in question was first issued in March 2010 and when indemnity was denied in August 2012, the acts of discrimination by the insurer were based on actuarial or statistical data [s 47(1)(b) of the EOA and s 46(2)(f) of the DDA], and
- the insurer would have suffered unjustifiable hardship if it had not included the mental illness exclusion in the policy (s 29A of the DDA).

The insurer ultimately failed to make out either defence because there was no evidence that it relied upon particular actuarial and statistical data, as required under s 46 of the DDA. The evidence it relied upon mostly post-dated the issuance of the policy and the insurer could not prove that it relied upon the data that pre-dated the issuance date.

With regard to the first defence, Member Dea inferred that the insurer must have had a rational reason for including the exclusion. However, the insurer's provision of predominantly retrospective evidence led her to conclude that it had failed to establish that any person involved in the drafting of the policy wording had any knowledge of, or regard to, information relevant to the actuarial and statistical data exception.

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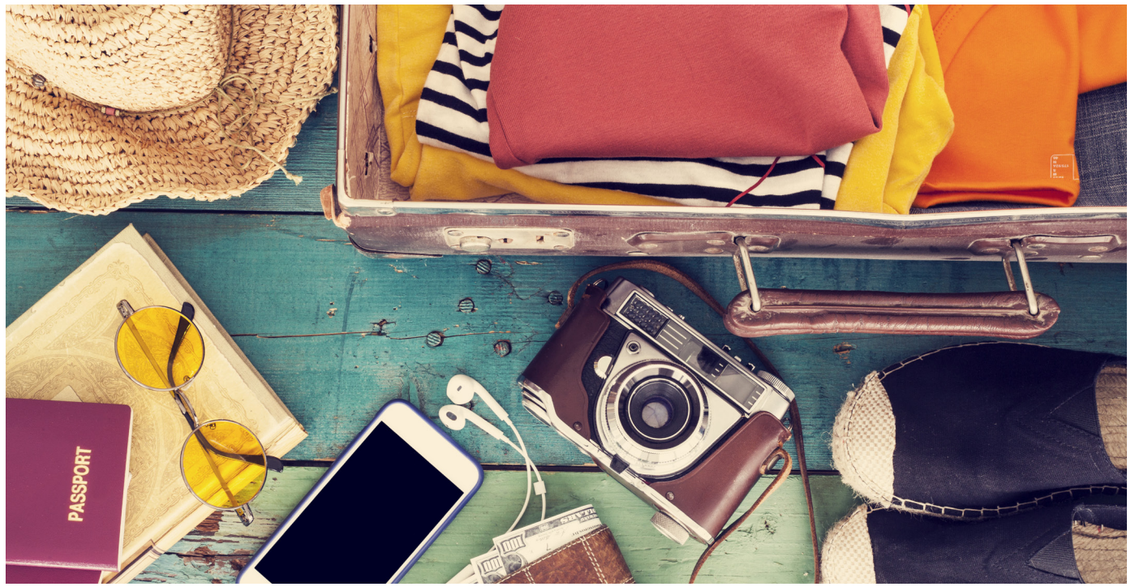

When considering the insurer's second defence, Member Dea again concluded that there was insufficient material for her to determine that it would be an unjustifiable hardship for the insurer to be unable to rely on the mental health exclusion. She held that Ms Ingram was entitled to economic loss in the value of her cancelled trip as well as $15,000 for hurt and humiliation and a portion of her costs.

What this means for the insurance industry

The insurer submitted that the inclusion of a blanket mental illness exclusion is general industry practice. Only a minority of insurers do not rely upon a similar exclusion in travel policies.

Like many policy exclusions, the mental illness exclusion has crept into personal accident and travel policies without a proper understanding of why the exclusion was introduced, the effect of s 46 of the DDA and that, absent of actuarial and statistical information, the exclusion constitutes discrimination.

One argument raised by the insurer was that it had no actuarial or statistical data because, given the mental illness exclusion, it does not receive claims or, if someone believes they have a claim, it will be denied on the basis of the mental illness exclusion. Many insurers will find themselves in a similar position.

So what can be done to prevent a repeat of the outcome? With adequate information management, it should be possible to identify the historical reason why an exclusion, such as the mental health exclusion, is introduced.

But are insurers keeping this historical data? The second issue is that when someone drafts a policy wording, the mere fact that an exclusion is commonplace or market accepted may not be good enough. Both insurers and lawyers vetting policies should enquire why the exclusion is there.

Does this open the floodgates to claims? This is possible, although Member Dea sought to limit the decision to the particular facts. The legislation is clear and has been known to the industry for more than two decades. The challenge for the industry is to use statistical and actuarial data that it has to price the cost of removing the exclusion, to avoid the allegation of discrimination. Most probably that will involve an increase in premium for all buyers of travel insurance but it treats all buyers equally without discrimination.

The argument flows that you unlawfully discriminate if you do not rely upon actuarial and statistical data—so make sure you use that data to properly price products.

We would like to acknowledge the contribution of Natalie Goodall to this article.

Back to the future for work injury claims in Queensland

By Yvette McLaughlin

Workplace injuries can be problematic for employers to deal with, especially where there are two or more defendants joined to the action. This can be common in workplaces that involve labour hire, apprenticeships, construction sites, or the transport industry.

Historically, Queensland plaintiffs have had full common law rights across the public liability, workers' compensation and motor accident/CTP regimes. But following amendments to the *Workers' Compensation and Rehabilitation Act 2003* (WCRA) in October 2013 (the Newman amendments), a threshold of more than 5% degree of permanent impairment (DPI) was introduced for a worker to be able to make a common law claim against their employer.

After a change of Government last year, the threshold was repealed in September 2015, with the repeal being made partially retrospective to 31 January 2015 (the day after the election outcome). However, as a result of the repeal, workers injured in Queensland have no recourse to common law damages against their employers for the period on or after 15 October 2013 to 30 January 2015. It is worth noting that no such threshold applies to the injured worker for claims of negligence against other parties involved in the accident under the *Personal Injuries Proceedings Act 2002* (PIPA) or CTP regime. Workers are thus free to pursue any other identifiable respondent for damages, regardless of whether they meet the workers' compensation threshold.

It's important for insurers, brokers and employers to understand how the Newman amendments and consequent repeal have affected workers seeking common law claims and claims in negligence against employers.

What's the impact?

The ramifications of the threshold introduced in 2013 have been manifold for PIPA respondents and their insurers and brokers:

- PIPA claims have increased against host employers, principal contractors, occupiers and other parties who may have some exposure in a work accident
- contractual indemnity claims have been more robustly agitated, and
- PIPA respondents were more likely to be precluded from seeking contribution from the employer or WorkCover Queensland.

The consequent legislative amendments have further increased the burden on the PIPA regime and non-employer respondents, including:

- increased claim numbers
- increased damages exposure, due to the absence of the employer contribution to claims and contractual claims by other respondents
- significant delays to claims while workers wait to establish whether they will satisfy the threshold
- the potential for uninsured liability in circumstances where worker exclusion clauses or contractual indemnity exclusion clauses apply, denying the respondent indemnity from their public liability insurer for the claim by the worker or by another respondent
- the inability to seek contribution from the employer and WorkCover Queensland, and
- increased claims costs associated with complex contractual indemnity claims.

How has the case law affected claims?

In the matter of *Bonser v Melnacis* (*Bonser*), the Queensland Court of Appeal restricted the joinder of an employer in negligence. The injured worker in this case was precluded from claiming common law damages from the employer because they had not exercised their election to either accept lump sum compensation or to seek damages.

This reasoning can be applied where an injured worker cannot claim common law damages from an employer due to the worker being awarded a DPI of 5% or less.

For claims in negligence, if *Bonser* applies, third parties will be precluded from joining an employer to an action unless the injured worker has obtained a DPI of greater than 5%.

A principal contractor who may not have been joined to an action by a worker and who may otherwise have been exposed for 5% to 10% of the total damages, may therefore find itself exposed to pay 100% of the claimant's damages, with no recourse against the employer or WorkCover unless a contractual indemnity claim can be maintained.

Byrne v People Resourcing (Qld) (*Byrne*) involved an all too common scenario: an injury to an employee of a labour hire company that occurred while the employee was working at the site of a customer (the host employer). The employee sued the host employer for the injury. The host employer in turn sued the employer, People Resourcing, and relied on a contractual indemnity. Chief Justice Carmody considered whether People Resourcing was covered by WorkCover for its liability to the host employer under that indemnity. Relying in part on the decision of the High Court in *SGIO (Qld) v Brisbane Stevedoring*, his Honour determined that People Resourcing's liability to the host employer was in **substance** a legal liability to pay damages for an injury to an employee suffered in the course of employment. As a result, his Honour held that WorkCover was obliged to cover People Resourcing's liability to the host employer, even though as a matter of legal **form** that liability was under a contractual indemnity.

Unresolved issues arising in case law

- Whether the contractual indemnity extends to heads of damage, which WorkCover is not obliged to pay due to the interplay between the WCRA and the PIPA regimes, including gratuitous assistance, common law general damages and costs.
- Whether the interplay between the decisions in *Byrne* and *Bonser* preclude a PIPA respondent from seeking a contractual indemnity from an employer, in circumstances where an injured worker does not meet the common law threshold.
- If a PIPA respondent can seek a contractual indemnity from an employer, whether WorkCover Queensland is obliged to indemnify the employer for that claim pursuant to the WCRA.

If the reasoning in *Byrne* is applied, WorkCover may now be required to cover an employer for a contractual indemnity claim, even if the employer has no direct liability to pay damages to the injured worker.

The decisions in *Nigel Watts Fashion Agencies Pty Ltd v GIO General Insurance Ltd* and *Multiplex Constructions Pty Limited v Irving and Ors* involved matters where judgment hadn't been entered against the employer in favour of the worker. It is possible that the same reasoning could be applied to cases (where the principle in *Bonser* applies) and that a different conclusion from that in *Byrne* could be reached in cases where an injured worker is not entitled to seek common law damages from the employer.

Back to the future

Following the repeal of the Newman amendments in September 2015, all workers who sustain injury at work on or after 31 January 2015 have had their full common law rights restored, regardless of the assessment of impairment. The Statutory Adjustment Scheme has been introduced to partially compensate workers who were unable to pursue common law rights during the application of the threshold. WorkCover and self-insurers in Queensland are now obliged to pay additional lump sum compensation to certain workers. It is unclear how this payment will impact on damages payable in a PIPA claim relating to the same injury, but it should at least reduce any award for interest on damages recovered.

For injuries on or after 31 January 2015, PIPA respondents are also restored to a position where they can seek contribution from employers where a worker has sought damages against the employer and employers can seek indemnity from WorkCover for contractual indemnity claims by other parties.

It remains to be seen the extent to which WorkCover resists claims for contractual indemnity, and the extent of the indemnity, so this issue will remain a focus for insurers and brokers for the foreseeable future. To date, no legislative amendments have been contemplated to address the unresolved issues arising from the *Byrne* decision.

Recent developments

There have been a range of recent legal developments that affect decision-makers in insurance organisations, self-insureds and reinsurers.

Significant changes to personal injuries legislation in Victoria

The *Wrongs Act 2015* (Vic.) has recently been amended, with several important changes being made to personal injuries legislation in Victoria. The changes are based on a number of recommendations made by the Victorian Competition and Efficiency Commission in its final report on Victoria's personal injuries legislation, *Adjusting the Balance: Inquiry into Aspects of the Wrongs Act 1958*. The amendments are significant as they provide claimants with access to increased damages awards and compensation. The amendments apply retrospectively. *Click here to read more...*

It's a new era for litigation in Victorian County Courts

A new Practice Note (PNCL-2016) *Operation and Management of the Lists within the Common Law Division* came into effect on 3 December 2015. The purpose of the changes is to create an efficient, effective and streamlined Common Law Court process that will involve fewer documents, and will reduce the "life expectancy" of litigated matters and legal costs. Serious injury claims will be significantly affected by the changes, with a further list established within the Common Law Division to expedite particular serious injury claims. *Click here to read more...*

All roads lead to Roman–Considering who in a road authority knew about a risk

The majority of the Court of Appeal in *Nightingale v Blacktown City Council* [2015] upheld the decision in *North Sydney Council v Roman*. For the statutory immunity not to apply, a person within the roads authority who has the authority to carry out the necessary repairs must have the relevant actual knowledge. *Click here to read more...*

Who is the beneficiary nominated in your life insurance policy?

Some life insurers require the life insured to nominate a beneficiary under the policy. Many people hold life insurance policies for many years during which a number of life circumstances may change.

If personal circumstances change, most people immediately change their will. Section 4 of the *Succession Act 2006* (NSW) says a person may dispose by will the property to which the person is entitled to at the time of the person's death. If there is a nominated beneficiary in the life insurance policy, then the proceeds of the life insurance policy is not property to which the deceased person or their estate is entitled to, at the time of the person's death.

So beware. If you change your will, then make sure you also identify the correct nominated beneficiary under your life insurance policy. *Click here to read more...*

Consistent surveillance defeats "good days, bad days" argument in workers' compensation matter

On 18 December 2015, Judge Campton of the County Court delivered judgment in the matter of *Wishart v Brambles Limited*. The case highlights the importance of surveillance to demonstrate consistent activities over consecutive days to defeat the usual "good days and bad days" explanation for observed activities on an individual day. It also highlights the significance of medical and vocational assessment evidence to support the contention that the Plaintiff had a capacity for lighter alternative employment. *Click here to read more...*

Sparke Helmore represented the Defendant in this matter.

About the contributors

Yvette McLaughlin, Partner

Yvette has more than 18 years' experience in personal injuries and insurance litigation. She also has significant experience in motor vehicle claims, workers' compensation claims, public liability and general insurance.

Mark Doepel, Partner

Mark has extensive experience in professional indemnity litigation, directors' and officers' liability and reinsurance. He has practised in these areas for more than 17 years in London and Sydney.

Roland Hassall, Partner

Roland is the National Employment Service Line Leader of the Workplace Group. He guides and assists executives and managers in diverse industry sectors to manage and resolve employment issues.

Colin Pausey, Consultant

Colin works with life insurers and accident and health underwriters, advising on claims issues, policy wordings and compliance-related issues. He has operational management experience and has acted on behalf of insurers, reinsurers and brokers.

Steven Canton, Lawyer

Steven is a lawyer in our Insurance team. He is primarily involved in professional indemnity, directors' and officers' liability, and reinsurance matters. He routinely assists clients in resolving a variety of professional, corporate and financial disputes.

Sandra Kaltoum, Lawyer

Sandra is a lawyer in our Workplace team. She assists lawyers in the team with advising employers about potential employment liability and a range of employment law matters.

Kristy Shardlow, Senior Communications Executive

Kristy has worked in communications and publishing in the legal, defence and educational fields in Australia and the United Kingdom for more than 10 years. She specialises in corporate and internal communications. Kristy is based in our Sydney office.

sparke HELMORE LAWYERS

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