The News As We Know It

Welcome to the Spring 2014 edition of the News As We Know It. Hopefully you are all surviving our wet and cold winter, and looking forward to what spring will bring us.

For those of us who live and die by workers compensation, spring is certainly going to be an interesting time, with the Return to Work Bill 2014 before Parliament, heralding the most significant changes to the state's workers compensation scheme in a generation (more on that below).

In this edition we highlight a less well known area of our practice, involving the heavy vehicle transport industry, and Neville John's recent, and well publicised, success defending a truck driver who was being prosecuted for excessive driving hours.

We'll also have our usual round up of recent legal news and events, a new employee to introduce to you, and tell you about what we've been up to as a firm in the last several months.

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Truckies time up

We continue to appear in the courts representing truckies and trucking companies as the authorities' ramp up enforcement, and in turn State revenues!

You may have seen Neville on TV and in the Advertiser recently after successfully securing no conviction and a minimal fine for a driver, despite serious driving hours' breaches over three separate days. Relying on the truck's clock and GPS warning system, both of which were malfunctioning, the driver breached the maximum driving hours on each occasion, resulting in critical and substantial risk offences. He faced a maximum $25,000 fine and three convictions. If convicted he would have lost his dangerous goods licence and potentially his job.

The magistrate took into account Neville's submissions in mitigation and imposed a fine of $1,550 with no convictions recorded.

The case attracted the media's attention , not only for its novel facts, but to highlight the number of extremely harsh penalties and consequences faced by those in the road transport chain of responsibility, even when an offence may otherwise be considered trifling.

Often a conviction, for either a company or individual, is of far greater and long lasting impact than any monetary penalty. While a guilty plea may be unavoidable at times, a well presented submission regarding penalty can significantly impact on the outcome.

Return to Work Bill

Unless you have been living under a rock in the last six months, you will have already heard and read a lot about the SA government's proposed changes to the state's workers compensation scheme. Indeed the

changes are intended to be so profound that not only is the name of the proposed legislation to change to the *Return to Work Act*, but the whole emphasis of the proposed Act will change.

Compensation will become almost a by-word, with the new legislation to have its emphasis firmly rooted in early intervention, recovery, return to work, and retraining.

We'll leave it to others to engage in the political machinations that will now occur before the proposed Bill becomes law. What we will point out is that there is a fair chance that the ability of workers to sue their employer for damages (as opposed to compensation) will be reinstated for the first time in over 20 years.

Common law entitlements have been an ongoing issue with workers compensation schemes for many years. They have been susceptible to change from time to time – especially with the imposition of thresholds for entitlements. We've even seen this recently in SA, where the framework for common law re-introduction has changed with the ongoing re-drafting of the current Bill. It stands to reason that what has been put into parliament recently may or may not be the end result.

What is certain is that if common law claims are reintroduced, then employers would be well served now to review their work, health and safety environment, policies , procedures and actions. A well written WHS policy will be a good start with injury prevention and the defence of any possible common law claim, but continued follow-up of all aspects of WHS is imperative if the risk of injuries occurring are to be minimised, and thus the risk of an employer being found to be negligent at common law is to be reduced. A well written policy won't create a defence to a common law claim if that policy is not enforced, and is causative of a work injury.

With the introduction of the new legislation not slated until 1 July 2015, employers have plenty of time to re-address their WHS, and get rid of any 'bad habits' that can often unintentionally creep in to a workplace. We recommend employers undertake a top to bottom review in this regard over the next 6 months.

Workplace Investigations

As an adjunct to the above, the re-introduction of common law claims will also have an impact on the way an employer responds to a workplace injury, and particularly with the investigation of any such incident. Workplace injuries will give rise to not only a possible common law claim being pursued by the injured worker, but the existing situation of SafeWork SA also investigating the incident, and pursuing a prosecution of the employer for a breach of the WHS legislation, will of course remain.

Employers will need to review their systems for the reporting and investigation of incidents, and take steps to best protect their interests. This will involve consideration of whether accident investigation will take into account the risk of the employer being sued or prosecuted, and therefore whether any such investigation should be the subject to legal professional privilege – where the dominant purpose of the investigation is to obtain information for the purpose of seeking legal advice on the possibility of some form of third party action/litigation. If steps are not taken to undertake an investigation in the correct context, then an employer can be at risk of being required to disclose potentially damaging information to a worker, their solicitor, or SafeWork SA investigator.

Steps can be taken to incorporate appropriate procedures surrounding the establishment of legal professional privilege into your WHS systems. We can advise on this issue for you.

It is something prudent employers should address over the coming months.

Return to work obligations

Another significant change to the workers compensation system is likely to be the enhanced obligations on employers to provide injured workers with suitable work and appropriate wages while they are rehabilitating from a work injury. Workers will have enhanced rights in this regard, including seeking the intervention of the proposed Employment Tribunal to enforce requests for the provision of work.

This area of the proposed legislation is likely to create some tension between federal workplace laws and the state law, especially when it comes to reinstating dismissed employees. As always the devil will be in the detail in this regard, but as these changes are passed into law, claims and risk managers should be alerting their HR teams to the new expectations on employers. This is an issue that we will address again in more detail as the draft Bill progresses into law.

Other important news: Bullying and Harassment – some Fair Work Commission clarity

In considering a recent application for a 'cease bullying' order, the Fair Work Commission took the opportunity to clarify several issues regarding what it considers to be bullying, and how it arrives at its conclusions. Some important matters to note from the decision were the following:

1. The bullying alleged will need to be more than a one-off event;
2. An assessment of whether bullying occurred in the case will be an objective one;
3. The behaviour complained of must present a real risk to the possibility of danger to a person's health and safety (much like a 'near miss incident' presents a real risk to WHS);
4. The bullying complained of does not have to be the only cause of a risk to health – but needs to be the substantial cause in that regard;
5. There is an expectation that employers will investigate bullying complaints in an open, fair and responsive way; and
6. The understanding that a bullying complaint may be resolved does not mean that all parties should not give attention to ensuring the ongoing relationship in the workplace remains appropriate.

The actual case, *In Application by Ms SB*, can be found at [2014] FWC 2104 (12 May 2014).

Comcare opens its arms

Just as we are getting our heads around a new state workers compensation scheme, the federal government has announced changes to the Comcare scheme. The changes are not so much to the scheme itself (although there are a few new provisions that address compensability), but in relation to employer eligibility to access the scheme.

In announcing the new legislation in March the federal government indicated that it wished to expand coverage of the scheme to more 'national employers', by easing the test for eligibility, and to give employers the ability to also come under the federal WHS scheme at the same time – thus only having to deal with the one WHS and workers compensation scheme regulator: Comcare.

As we go to print the proposed changes have not progressed a great deal, presumably as the federal government has had an array of

other issues that it is trying to sort out. While progressing to one regulator for both WHS and workers compensation is certainly attractive if you are a national employer, the Commonwealth scheme is quite different in many respects to the SA scheme, especially with respect to the ability to finalise tail claims. Your tail claim risk profile as an employer therefore becomes an important issue to consider as part of any possible move to the federal scheme in the future.

KJK Legal news

On the professional front, KJK Legal continues to be busy. So far this year we've addressed several conferences including issues relating to noise induced hearing loss (SISA), and the pending changes to employer obligations under the new workers compensation legislation (AILA/NIBA). We've just addressed the latest REG SA meeting on the issue of the *Return to Work Bill* as well. As always, if you are on our mailing list we'll be publicising such events should you wish to attend.

When it comes to our involvement in the wider community, our team has been supporting a number of events and causes, including:

1. The annual Maxima Employer awards 2014;
2. SISA's Closing the Loop 2014 conference;
3. Mandy Madgen's and Daryl Higginson's various fundraising Bash efforts for the Variety Club;
4. Part sponsoring a defibrillator machine for the Unley Jets Football Club, in conjunction with Bendigo Bank.

As a firm effort this September, we've made a commitment of taking part in the Cerebral Palsy Alliance's "Steptember" campaign, raising funds to improve the lives of, and finding a prevention and cure, for those suffering from cerebral palsy. Look out for emails from us seeking your support in this regard.

Our (new) Employee of the Month

Finally, in a case of last but definitely not least, we'd like to introduce you to our newest team member, Carly Manuel, who joined us recently as a graduate lawyer. Carly will be working across the firm in support of all our senior team members in our various fields of practice, so hopefully it won't be a case of having too many masters!

Carly has a passion for law and is thrilled to be part of the KJK Legal team. She enjoys travelling and is outside being active and catching the rays at every opportunity.

If she ever shakes her shopping addiction, she hopes to save enough money to backpack around the globe.