

**THE CLA, PIPA AND WORKCOVER AMENDMENTS: REFORMING THE REFORMS**

**ADDENDUM TO PAPER GIVEN ON 20 JULY 2010**

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1. At paragraph 94 of my paper, I mention the lack of “sting” or “teeth” in relation to subsection 292(13) of the WCRA introduced by the 2010 WCRA Amendments. In particular I referred to the lack of indication as to what happens to costs when the offer was “beaten”.
2. I ought to have made mention of section 316A of the WCRA, introduced by the WCRA 2010 Amendments, which provides as follows:-

**“316A Principles about order as to costs**

- (1) This section applies to the extent proceedings in a court relate to a contribution claim.
  - (2) Subsections (3) to (5) apply if the contributor or other party (including an insurer) made an offer that was not accepted.
  - (3) If the court later awards an amount of contribution that is equal to or more than the other party’s written final offer, the court must order the contributor to pay the other party’s costs on the indemnity basis from the day the written final offer was made.
  - (4) If the court later—
    - (a) dismisses the contribution claim; or
    - (b) makes no award for the contribution; or
    - (c) makes an award of contribution of an amount that is equal to or less than the contributor’s written final offer; the court must order the other party to pay the contributor’s costs on the standard basis from the day the written final offer was made.
  - (5) If an award of contribution is less than the other party’s written final offer but more than the contributor’s written final offer, each party bears the party’s own costs.
  - (6) This section applies to a written final offer whether or not it is made as a separate offer or as part of a joint or consolidated offer.
  - (7) In this section—  
*written final offer* means a written final offer under section 292”.
3. The difficulty with this provision, and what lies behind my comments, is that it does not deal with, at least expressly, the costs which the WorkCover Defendant will have to pay the Plaintiff and they may be on a indemnity basis if the Plaintiff beats an offer.

4. This is dealt with only in subsection 292(13)(b) and is left solely to the Court's discretion.
5. Whilst section 316A provides what will happen to the costs if a contributor does not beat the WorkCover Defendants offer, it only relates to the WorkCover Defendant's costs which, at least arguably, are not the costs which the WorkCover Defendant may have to pay the Plaintiff. It is only costs between the Defendants. That gains some support from such a distinction being drawn in subsection 292(13) itself.
6. Often the costs between contributors do not amount to a great deal in comparison to the costs which the parties spend on contesting the issues with the Plaintiff. A low offer from a contributor may have forced the matter to trial and exposed the Defendant to indemnity costs.
7. Of course the Court could order that such costs which the Defendant has to pay the Plaintiff be paid by the contributor, in its discretion, directly under a "Sanderson" type order or indirectly through a "Bullock" order. However such a result is not mandated or regulated and it is difficult to discern why!
8. In this respect, I suggest that subsection 292(13) is not in harmony with section 316A.
9. It is this which lies behind my comments and, I suggest, is another potential gap in the amendments.