THE CLA, PIPA AND WORKCOVER AMENDMENTS: REFORMING THE REFORMS

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1. Two significant amending acts have been passed this year.

2. The first in time was the *Civil Liability and Other Legislation Amendment Act 2010* (Act No. 9 of 2010) which was assented to on the 17th of March 2010.

3. The second was the *Workers Compensation and Rehabilitation and Other Legislation Amendment Act 2010* ("Act No. 24 of 2010) assented to on the 17th of June 2010.

4. These Acts contain some considerable procedural, but also some substantive, reform to the provisions of each of those Acts.

5. Unfortunately, in Queensland, it remains the case that there are three different systems which govern personal injuries: the *Workers Compensation and Rehabilitation Act 2003* ("WCRA"), the *Motor Accident Insurance Act 1994* ("MAIA") and the *Personal Injuries Proceedings Act 2002* ("PIPA").

6. The interface between each of those Acts has not been entirely harmonious and despite the recommendations made by a Government Committee chaired by Mr. R J Douglas SC to ameliorate some of the procedural inconsistencies, the situation remains unchanged.

7. Indeed, as I shall point out in the course of this paper, some further anomalies and inconsistencies now arise.

8. In this paper I do not propose to cover every single amendment that has been made in each of the Acts. I will not deal with the indexation of the ISV in the *Civil Liability Act 2003* ("CLA") or its introduction to injuries covered by the WCRA.

9. Rather, I propose to deal with some of the more substantive amendments that may be of general interest and, further, concentrate on some areas where the interface between the various pieces of legislation is not harmonious or may be anomalous.

CIVIL LIABILITY AND OTHER LEGISLATION AMENDMENT ACT 2010

Section 5

10. It will be recalled that section 5 of the CLA provides for when the CLA does not apply. An amendment has been made to allow for the statutory "*CSR v. Eddy*" damages to be claimed in dust and tobacco cases but otherwise section 5 has not been amended.

11. Nor has it been amended in the WCRA Amendment Act 2010 mentioned below which introduces substantial reforms into the WorkCover system and, relevantly, the introduction of the ISV and other restrictions on the assessment of damages which are materially identical to their CLA counterparts.

12. This creates the first and most obvious lucuna and, with respect, on the face of it, there appears to be no obvious policy reason for it.

13. Subsections 5(1)(a) and 5(1)(b) of the CLA will continue, in their unamended form, to exclude the operation of the CLA (including the ISV) to any "injury" for which compensation is payable under the WCRA except for the occasions when such compensation is payable for "journey" or "recess" claims.

14. Consequently, the odd situation ensues where the CLA ISV does not apply to the non-WorkCover Defendants but the WorkCover Defendant, the employer, now has the benefit of the WorkCover version of the ISV, if an accident occurred involving both non-employer Defendants and an employer Defendant!

15. Many odd or obtuse outcomes can be envisaged.

16. It will also be a significant incentive to Claimants in such cases to sue the non-employer Defendants along to get unfettered general damages, care and costs. As a reduced immunity from joining an employer, not pursued by a worker, arising from *Bonser*[1] still prevails, the non-employers insurers may "carry the can" but then may look for more inventive ways of drawing the employer in[2]. It may also lead to contractual indemnities being insisted upon by non-employers and pursued. As WorkCover maintains that such losses are not covered by it, and contractual losses are

[1] *Bonser v. Melnacis* [2002] 1 Qd R 1 but see *Phipps v. ALHG* [2007] 2 Qd R 555.
[2] *Bass v. Visy Paper Pty Ltd* [2003] 2 Qd R 241.

excluded by most broadform policies (unless an endorsement is secured and paid for), there will be a lot of uninsured claims raised by set off and a lot of cranky employers.

17. When all Defendants are involved, this will cause a significant disparity in compensation (such disparity is even greater when it is remembered that there is a statutory almost complete immunity from *Griffith v. Kerkemeyer* damages against an employer) and will make apportioning percentages and converting them into amounts at settlement conferences, mediations and trials complex. In a dependency claim, for example, the 3% tables will apply to the non-employees and the 5% tables to the employer. The difference could be enormous. This will unnecessarily hamper negotiations rather than assist.

18. The Bar Association of Queensland has recently written to the Attorney General drawing attention to this anomalous situation.

New section 59A-59D

19. The most significant substantive reform is the introduction of a statutory "*CSR v. Eddy*" type damages.

20. It will be recalled that in *CSR Ltd v. Eddy*[3], the Plaintiff claimed damages for the need of replacement for gratuitous services caused by the inability of the injured Plaintiff to provide gratuitous personal and domestic assistance to his disabled spouse. The High Court rejected the claim, overruling a line of Queensland (*Sturch v. Willmott*[4]), New South Wales (*Sullivan v. Gordon*[5]) line of authority to the contrary and concluded that damages recoverable cannot include an amount to compensate a person for the cost of services gratuitously provided to replace the services provided by an injured Plaintiff to another.

21. In New South Wales, the result in *CSR v. Eddy* was overturned and replaced by amendments introduced by the *Civil Liability Amendment Act 2006* in New South Wales which introduced a new section 15B into the *Civil Liability Act 2002* (NSW).

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[3] (2005) 226 CLR 1.
[4] [1997] 2 Qd R 310.
[5] (1999) 47 NSWLR 319.

22. Queensland has now followed suit with the introduction of section 59A which provides for statutory damages, called "section 59A damages", and allows a Court, subject to section 59B, to award to an injured person damages for loss of the person's capacity to provide gratuitous domestic services to someone else.

23. Sections 59A and 59B are not without difficulty and will likely give rise to a significant body of case law in due course.

24. Section 59A(2) contains a threshold for when the damages can be awarded and it must either that the injured person died as a result of the injuries or the general damages are assessed before allowing for contributory negligence at the amount prescribed under section 58. Section 58 itself was amended to remove the reference to $30,000.00 to provide for indexation under a regulation. The regulation was simultaneously amended to provide for the loss of consortium threshold to be $35,340.00 which means that the section 59A damages will also have that threshold.

25. The explanatory note, confirming that section 59A is a response to *CSR v. Eddy*, does not explain why one of the thresholds, in the absence of death, is a linkage to damages more than that which are prescribed under section 58 for loss or consortium or servitium. There is no obvious or evident reason.

26. A recipient person who resided in the injured person's usual residence or was an unborn child "at the relevant time".

27. The legislation has avoided using the original drafting technique of "a member of the injured person's household", and for good reason. That would have provided a significant source of debate[6]. "Relevant time" is defined in section 59A(5) to be, generally, when the injury happens or if the symptoms of the injury were not immediately apparent when the nature and extent of the injury became known. The explanatory note gives the example of mesothelioma. The relevant time to assess when the recipient resided at the usual person's residence is at the time of diagnosis.

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[6] cf:- *Calvert v. Mayne Nickless (No. 1)* [2006] 1 Qd R 106 at [103]-[105].

28. The next ingredient is that before the “relevant time”, the injured person provided the services to the recipient or, in the case of an unborn child, would have provided such services had the recipient been born.

29. However, by the next integer, the recipient must be incapable of performing the services themselves to be allowed to claim the value of those services because of the recipient’s age or physical and mental incapacity. The purpose of this requirement, according to the explanatory note, is to ensure that the services which the injured person has lost the capacity to provide are “necessary”. For example, an adult child with no particular disabilities or incapacities would be capable of cooking their own meals and doing their own washing, notwithstanding that prior to the injured, the injured parent performed the task for them. Consequently, the statutory damages are not available to such a recipient.

30. The next requirement is that there be a “reasonable expectation” that if not for the relevant injury, the injured person would have provided the services to the recipient for at least six hours and for a period of at least six months. No doubt that threshold will be construed in the same fashion as appears in *Kriz v. King*[7].

31. The same problem arises then with that provision because it does not require it to be for consecutive months and can be cumulative.

32. Indeed, there is no reason why, like its CLA counterpart, section 59, it cannot be provided in the future and the threshold thereby passed if the evidence can establish that.

33. The last ingredient is that the need for the services for the six hours and six months continue at the time of the assessment of the entitlement to the award and that the need is “reasonable in all of the circumstances”. Subsection 59B(2)(e) is said to be to ensure that damages are only awarded if the recipient has an ongoing need for significant services in the explanatory note.

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[7] [2007] 1 Qd R 327.

34. It is to be observed that the historically undemanding test of "reasonable" in all of the circumstances is the only additional hurdle in that regard. It posits a test, I suggest, with a lower threshold than the explanatory note would have it.

35. Subsections 59A(3) and 59A(4) add to the curiosity because they purport to allow a Court to disregard certain periods of time when the recipient would not have been in the care of the injured person when determining whether the services would have been provided to the recipient for at least six hours a week for a period of at least six months. The examples are perhaps more illuminating than the difficult wording. The examples include a recipient would have spent part of their school holidays with a non-custodial parent or the recipient is an elderly parent and is placed in short term or occasional respite care.

36. It is to be observed that there is <u>no</u> definition of "domestic services". According to the explanatory note, this is deliberate. The note states "the particular domestic services it might be reasonable to claim will depend upon the circumstances of the case". There is a definition of "gratuitous domestic services" but that focuses on the gratuitous aspect rather than the definition of the services which are simply said to be "of a domestic nature".

37. The New South Wales Court of Appeal considered the meaning of "domestic services" in the context of section 15B of the New South Wales Act recently in *Liverpool City Council v. Laskar*[8]. In New South Wales, however, there is a distinction between "attendant care services" and "gratuitous attendant care services", as well as "domestic services". The Court rejected a construction argument that domestic services should be given a narrow meaning within the Act and held that it should be given it ordinary meaning. The Court[9] stated:-

> "There will be limits of course to the reach of the phrase. In *CSR Ltd v. Eddy*, in examining the nature of a *Sullivan v. Gordon* claim, the joint decision of Gleeson CJ, Gummow and Heydon JJ referred to the difficulty of marking the outer limits of domestic services. The judgment queried without deciding (at paras 61-62) whether domestic services should be extended 'to the wide range of educative services healthy parents supply their children of an academic, sporting or cultural kind'. It is not necessary in this decision to test or explore those outer limits."

[8] [2010] NSWCA 52.
[9] Whealey J, with whom Beasley JA and Macfarlane JA agreed subject to their own comments.

38. In that case, the capacity to provide services which were lost were services which were being provided to a disabled child who needed virtually 24 hour care. Her needs were extensive. Whealey J stated[10]:-

> "In my opinion it could not be said that these activities fell outside the boundaries of the provision of domestic services to a dependant whose physical disabilities made it impossible for her to do these things for herself. Section 15B speaks in its own terms and it should be interpreted free from any supposed fetters arising from consideration which led to the enlargement of other concepts, or for the purposes of defining, or for that matter, delimiting, other heads of damage dealt with in the legislation".

39. Consequently, I suggest, the capacity for a claim for "domestic services" to be significant is self evident. Difficult questions arise as to whether, for example, it would include the capacity to care for the recipient's pets or significant property or properties.

40. An earlier decision of the New South Wales Court of Appeal in *Amaca v. Novek.*[11] considered a case where the deceased, who died from mesothelioma, lived in the same household as her daughter and son-in-law. Both worked full time and the deceased cared for their two children. The trial judge found that it was intended that, but for her illness, the deceased would have continued to look after the children. The grandchildren were thereby dependants of the deceased. The Defendant appealed on the basis that the trial judge should not have found that the grandchildren were dependants of the deceased and that the services were not provided to the grandchildren but to their parents and therefore the provision of the services were not reasonable.

41. The New South Wales provision contains concepts which are not directly germane here but the proposition which emerges from the unsuccessful appeal by the Defendant that it was wrong to ascribe the services as being provided to the parents and not to the children was that:-

> "There is no legal reason why some particular action could not count as the providing of services to more than one person. There are some sorts of domestic services such as those involved in the performance of cooking, cleaning or home maintenance that confer the same type of benefit and all members of a household or several of the members of the household (sometimes including the person who carries out the services). The fact that several members of the household benefit provides no reason for concluding that it is

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[10] At paragraph [64].
[11] [2009] NSWCA 50.

> erroneous in law to say that the person who performed such a service provided a service to some particular one of those household members".[12]

42. Consequently, the fact that it may be provided to more than one recipient does not mean that the person is not a recipient entitled to claim damages for that service.

43. Section 59B is concerned with avoiding double recovery between section 59A damages and other compensation or damages received such as damages for gratuitous services under section 59 of the CLA, rehabilitation services provided under the MAIA and damages recovered by the recipient as part of a dependency claim or loss of consortium action.

44. Subsection 59C(1) of the CLA sets out how section 59A damages are assessed. A Court will be required to take account, for example, of the Claimant's capacity to provide the services before the relevant injury happened and to make an allowance for the vicissitudes and contingencies of life. The example given in the explanatory note is an injured person who at the time of the relevant injury was already suffering from Parkinson's Disease. It might reasonably be expected that that person have a declining capacity to provide the services.

45. Subsection 59C(2) allows the Court to award damages for the "lost years", subject to the injured person's life being shortened by an unrelated event under subsection 59C(3).

46. Subsection 59C(4) endeavours to avoid double compensation by disallowing damages also being awarded on that footing under general damages.

47. Section 59D is also directed at avoiding double recovery. It seeks to prevent a person including a recipient from recovering damages for a loss if the injured person had previously recovered section 59A damages in relation to the loss.

48. At this point it is also important to remember that sections 59A-D appears in the CLA, the application of which is governed by the aforementioned section 5.

49. If, by the operation of section 5, in its interaction with the WCRA, the CLA is displaced, <u>then the new statutory *CSR v. Eddy* damages will also not be applicable.</u>

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[12] At paragraph [50].

50. So, for example, in the ubiquitous situation mentioned above where there is an injury for which compensation is payable under the WCRA, but also involving non-employer Defendants, the CLA is displaced, the CLA ISV does not apply but also the Plaintiff has no capacity then to obtain the statutory *CSR v. Eddy* damages. This will impact on claims where a worker dies in particular.

51. I can find no introduction of the statutory *CSR v. Eddy* damages in the WCRA 2010 amendments.

Commencement

52. Section 85 provides that, apart from dust related claims which have a retrospective effect, the section 59A damages apply to any "breach of duty" that happens on or after 1 July 2010.

Amendment to section 60 of the CLA

53. In passing, the other amendment worth noting is that subsection 60(1) of the CLA has been amended to provide that a Court cannot order the payment of interest on awards of damages for gratuitous services.

54. However, I infer from this that interest can be awarded on section 59, or at least arguably so!

55. If that is correct then, given that there is no double dipping between the two, a Plaintiff may well endeavour to characterise the claim as one as section 59A damages rather than gratuitous care, inter alia, to claim the interest.

Law Reform Act 1995 amendment

56. This otherwise innocuous looking amendment relating to a spouse's remedy for loss of impairment of consortium in fact is important. It introduces the concept of "spouse" to the loss of impairment of consortium. Previously that section only ameliorated the common law position by providing a corresponding right for a wife to sue for loss of consortium and servitium for her husband's injuries. At common law the wife had no such right.

57. This amendment, by introducing the concept of "spouse", which has a definition in the *Acts Interpretation Act 1954,* extends the right of action to de facto husband and wives. Expect to see such claims therefore increase in number.

Amendment of *Limitation of Actions Act 1974*

58. As has been well publicised, there is now an abolition of any limitation periods that related to a dust related condition. That abolition has a mostly retrospective effect[13].

59. The only reason I mention this in passing is that it will have a more general effect on Defendants.

60. It will be recalled that section 40 of the *Limitation of Actions Act 1974* provides for a limitation period for contribution proceedings. Generally speaking, that is two years from verdict or settlement or four years from the expiration of the primary limitation period, whichever is the earlier. So, for example, if there has not been a settlement or verdict then it will be a maximum of seven years.

61. In *Workers Compensation Board of Queensland v. Seltsam*[14], the Queensland Court of Appeal held that where the primary limitation period of three years had been extended, the additional four years begins to run from the end of that extended period.

62. I observe that section 40 of the *Limitation of Actions Act 1974* does not appear to have been the subject of an amendment in this batch of amendments.

63. Consequently, in the absence of a verdict or settlement, there appears to be no relevant limitation period for contribution proceedings. Therefore it may be possible for an occupier, supplier or, for that matter, an employer to be joined for contribution to a dust related claim many years after even the action had started.

64. There is some evident policy reason why this might be so. The Plaintiff of course could sue any one of those people directly, which is the underpinning premise of a

[13] See section 47 of the *Limitation of Actions Act 1974* which has some limited exceptions such as where there has been a judgment or the action has settled or there has been an application for an extension of the limitation period which was refused prior to commencement of the section.
[14] [1999] 2 Qd R 679.

contribution proceedings based on subsection 6(c) of the *Law Reform Act 1995*, and, therefore, there should, likewise, be no limitation period for contribution proceedings.

65. However section 40 of the LAA should be tidied up so that its intention is now clear. There is still the possibility of a limitation period from two years from settlement or verdict but otherwise no limitation period. If that is so then perhaps, it should expressly say so now that one of the limbs for the operation of the section has been removed.

PIPA amendments

66. Section 44 has been introduced into the PIPA. This new section provides a mechanism for urgent proceedings to be started by agreement. Pursuant to subsection 43A(8), urgent proceedings started by agreement will be stayed until such time as the Claimant complies with the pre-Court procedures or the proceeding is discontinued or otherwise ends. This is a familiar mechanism found in the WCRA.

67. Also of interest is section 42 which amended section 40 of the PIPA. This introduces a concept of an “upper offer limit” and a “lower offer limit” for mandatory final offers. The dictionary has been amended to provide for definitions of these but they are entirely unhelpful as they simply mean the amounts prescribed under a regulation.

68. The PIPA regulations were amended from 1 July 2010 to provide for an upper offer limit of $58,900.00, a lower offer limit of $35,240.00 and a declared costs limit of $2,950.00.

69. The explanatory notes are unhelpful and better assistance is gained by looking at the mirror provisions found in the amendments made to the MAIA. The idea appears to be that if the MFO is equal to or less than the upper offer limit, the offer must be exclusive of all costs. If the mandatory final offer is more than the lower offer limit but not more than the upper offer limit, there is a declared cost limit. There are limits on what costs are recoverable when a matter proceed to trial and the Court awards damages equal to or less than the upper offer limit.

THE WCRA 2010 AMENDMENTS

70. The intracies of all of the amendments to this Act might more properly be considered in a paper dedicated to that purpose rather than at a paper whose audience has more general interest.

71. But there are some aspects which have a more general importance.

72. There are also a number of "curiosities" throughout these amendments also[15].

73. For the purposes of this paper I wish to focus on two issues which are at the "interface" of the various schemes.

The abolition of *Bourk*

74. As is well known, these amendments abolish the operation of the decision in *Bourk v. Powerserve.* Although the intention is clear enough, it has, with respect, been clumsily worded.

75. New section 37A in the *Workplace Health and Safety Act 1995* ("WPHSA") abolishes the effect of *Bourk v. Powerserve* provides that no provision of the Act "creates a civil cause of action based on a contravention of the provision".

76. This, of course, is a misunderstanding of the action of breach of statutory duty. It is not a statutory cause of action. It is a creature of the common law (tort) which operates on the legislation if the requisite intent can be discerned.

77. Recourse to the explanatory notes makes it clear that the intention of section 37A is to remove the effect of *Bourk*. Further, section 197 of the WPHSA, which provides for the retrospective extinguishment of the right of action, despite its misleading heading referring to a "statutory cause of action", (again compounding the error), in its text correctly refers to the extinguishment without compensation of "any right to take action based on a civil cause of action arising from a contravention of the provision of the Act". Therefore I suggest whilst the wording is in place misconceived it should be sufficient. It would be better if section 37A was recast though.

[15] For example, why is section 306M present in the legislation having regard to subsection 10(3) of the WCRA? It may mean that the damages can be awarded but the policy of insurance does not extend to cover the employer for those awards but, if that was the case, then there is no need for the provision as it would be dealt with under the CLA in any event. In the absence of any other answer, it may be that this was simply an unnecessary transposition from the CLA to the WCRA.

78. The retrospective operation is itself unusual because it applies to any contravention of the WPHSA that happened before the commencement if proceedings for the action had not started before the commencement or proceedings for the action started after 8 August but trial had not been reached.

79. It would appear that if a party has been slow to progress their action they will be rewarded.

80. However, it has been suggested by another commentator[16] that the reason is probably that the legislature took the view that a person who commenced an action based on breach of statutory duty prior to the 8th of August 2008, the date when the Court of Appeal decision in *Bourk* was handed down, was not seeking to take advantage of the Court's decision. That appears to be the most sensible policy reason that can be offered for that protected class of proceeding.

81. The abolition of *Bourk* will have a significant effect, not only for WorkCover Defendants, but for Defendants in personal injuries claims generally. No longer will the employer simply be the "soft target" and, indeed, non-employer Defendants may be equally or more susceptible to being targeted now, especially in circumstances where, for example, there was an unknown defect in a product which was purchased from a reputable supplier by the employer. Those facts approximate the facts of *Bourk* itself. Generally speaking, an employer would then have a good defence. Indeed, in *Bourk* itself, the Plaintiff failed on all other grounds except for breach of statutory duty which it succeeded on on appeal. In such circumstances, Plaintiffs will no doubt sue the non-employer alone and will also get the benefits of no CLA ISV, care and costs!

MFOs

82. Sections 292 and 292A of the WCRA have been replaced by a new section 292.

83. This is one of the most important procedural reforms within the WCRA and it will have an effect in respect of all non-employer parties who are joined as a contributor to a WCRA claim.

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[16] Julie Cameron of Corrs in a paper delivered to the ALA this year.

84. The idea is, no doubt, on behalf of WorkCover, to put some "sting" into contribution proceedings to ensure that the compulsory conference and MFOs are not stifled, from WorkCover's perspective, by contributors not offering any money or, in WorkCover's view, offering a pittance compared to their exposure. There was no reason why contributor's could not take that tact under previous incarnation of the legislation as there was no, or no real, penalty in costs or otherwise for doing so. Indeed, there was no obligation by a contributor to make an MFO.

85. The new section 292 has some retrospective effect by reason of section 668 of the WCRA. It will apply in relation to a claim made by a Claimant and in existence immediately before the commencement of the section which commenced on 1 July 2010. It will apply if before the commencement of the relevant amending section, the Claimant has not started proceedings "in a Court" for the claim and the compulsory conference had not been held.

86. By the operation of section 668, this will pick up the vast majority of those claims that were in existence immediately before the commencement of the new section 292 on 1 July 2010.

87. The basic outline of section 292 is that the obligation to make an MFO now applies to a claim made by the Claimant against another party and also the contribution claim relating to the claim made by the Claimant. Each is termed "a claim".

88. Subsection 292(2) provides that if a claim is not settled at the compulsory conference, each party must ensure that it makes a written final offer at the conference:-

> "to another or other parties at the conference that would dispose of the claim if the offer or offers were accepted."[17]

89. The first question is whether this means that a contributory must make an offer to the injured person. The answer I suggest, by reference to the definite article – "the" - is in the negative. "The" claim can only be a claim which would be settled if the offer was accepted and that can only be a claim to which the person making the offer was a party. The Plaintiff accepting an offer from a contributor would not dispose, by reason of that acceptance alone, of the contribution claim. It may have that practical effect but that is

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[17] Underlining added.

not its legal effect. However, unfortunately this section is, again, infelicitously worded. It uses the expression “dispose” rather than “compromise”, for example. That may lead to arguments that a contributor should make an offer to a Claimant which may “dispose” of the contribution claim because the Claimant would discontinue the claim against, for example, the employer, if the offer were accepted.

90. That hardly seems to be a sensible interpretation of the section but disputes may arise.

91. These disputes are also made possible by a reference in subsection 292(1)(a) to the claim by the Claimant against “another party”. When read with subsection 292(2), this may suggest that the claim by a worker, not only against the employer but against a non-employer, is regulated by section 292 and the non-employer, captured by section 292, must make an MFO under section 292. That would also then align with what was just suggested is a possible meaning of the “disposal” of the claim if the offer or offers were accepted.

92. As already submitted, that appears to be an unlikely and unappealing construction given that the other claims have their own extensive set of regulation under, inter alia, the PIPA.

93. Subsection 292(1)(a) will have to be read down so that the “other party” can only be an employer or other special insured under the WCRA.

94. The idea of section 292 is clear enough. It is to provide for a penalty or potential penalty for costs should a contributor make a proportionate claim of sufficient order as subsection 292(13) reveals. Subsection 292(13) however does not actually provide for any mandatory outcome if an offer is “beaten”. It simply is a factor taken into account in the Court’s discretion. It would have been better, for all concerned, and lessen the arguments, if section 292 had, in that regard, been given more “teeth”, subject to the Court’s discretion not to award costs in a particular way if the circumstances and justice require otherwise.

95. Subsection 292(3) appears to legitimise a joint offer by WorkCover and a contributor to the Claimant. It does not appear to contemplate joint and several offers however. This means, perhaps, that only a single offer can be put to the Claimant in a lump sum and WorkCover and the contributor would have to do a side deal as to the apportionment,

should the offer be accepted. Each of WorkCover and the contributor would be exposed to the extent of 100% to the Claimant, should the offer be accepted.

96. Subsection 292(5) also now appears to allow the Claimant and WorkCover to make a single final offer when there is a series of claims being dealt with together. For example, where a Claimant has served more than one NOC and seeks damages for injuries arising out of all the claimed circumstances. For example, multiple injuries over various events and times.

97. There are however some practical matters which are not addressed and will have to be worked out.

98. In the usual situation where there is a joint conference under the PIPA, for example, and the WCRA, problems emerge. The PIPA Respondent will have to make an offer to the Claimant under the PIPA by way of an MFO. If that same PIPA Respondent is a contributor under the WCRA, he will have to make an offer to the employer. It is then on the horns of a dilemma. It will want to make an offer to protect itself against the Claimant but it does not want to pay twice if the Claimant does not accept the WorkCover offer. Making a joint offer under WCRA will not solve the problem of having to make an offer under the PIPA because even if that offer is nil, no protection under the PIPA has then been afforded, but only under the WCRA.

99. In such a circumstance, the PIPA party may have to be creative and provide for an offer to the Claimant under the PIPA in a certain amount and then in the WCRA offer to the employer, provide that that same amount is offered as contribution and it will be satisfied by the Plaintiff accepting the amount of the PIPA offer or, in the event that the Plaintiff does not accept that amount, but the employer accepts the amount (whichever occurs first), WorkCover accepts that amount and agrees to indemnify the PIPA Respondent thereafter in relation to the PIPA proceedings and any litigation which may ensue directly by the Claimant against the PIPA Respondent.

100. This is only a suggestion on my behalf, which I have not had the opportunity to work through. Please treat it only as such!

101. I am open to creative suggestions as to how this practical problem may be overcome.

102. It is of course then doubtful, also, whether such an offer may comply with either Act as it is conditional, but it is at least arguable that it does.

103. The new section does not deal with the age old problem of a low contribution offer being made to the employer by the PIPA Respondent. The employer is still in the difficult position then, if it is dissatisfied with the contribution offer, and assuming the Claimant has not pursued the contributory directly, of whether to accept the Claimant's offer, which may be a genuinely good or low offer, and pursue the contributor later, or not to. Often the subsequent pursuit, after a settlement, of a contributor is fraught with logistic difficulty. Unless there has been a concession that the settlement was reasonable in terms of quantum and liability, the whole of the Claimant's case has to be proved as well as the amount of the contributor's responsibility. This is usually done with a Claimant who is then disinterested, as well as other forensic disadvantages which arise.

104. The amendments do not seem to have addressed this problem which is a real and continuing issue and, again, may hamper a negotiated outcome, if that is what is deserved. The same applies to contributors brought in by a PIPA Respondent under the PIPA.

Conclusion

105. Many of the amendments are welcome. However there are a number of problems which need to be addressed by clarifying amendment, or worked out by the Courts.