ANDERSON RICE *Lawyers*

Anderson Rice News
Summer 2007 Edition

In this Edition:

Article: Sports Law - Conflicting Approaches to Drugs in AFL
Jacqueline Guthridge - Lawyer, Commercial Law & Intellectual Property

Case Note: *Alcoa Portland Aluminium Pty Ltd v Victorian WorkCover Authority* [2007] VSCA 210 (11 October 2007)
Terry O'Connor- Senior Associate, Insurance Law & Commercial Litigation
Caitlin Tierney- Articled Clerk, Insurance Law & Commercial Litigation

Case Note: *Black v Garnock* [2007] HCA 31 (1 August 2007)
Melva Cameron - Senior Associate, Property Law, Wills & Estates

Case Note: *CFMEU v The Master Builders' Group Training Scheme Inc* [2007] FCAFC 165 (26 October 2007)
Tim Donaghey - Employment & Industrial Law Barrister

Top

Tel (03) 9672 2666 Level 10, 555 Lonsdale Street
Fax (03) 9642 0271 Melbourne Vic 3000 Australia
Email lawyers@andrice.com.au

www.andrice.com.au PO Box 14099
Melbourne Mail Centre 8001

AUSDOC DX 177 Melbourne

Conflicting Approaches to Drugs in AFL

The drugs policy of the AFL has been under intense media scrutiny since Ben Cousins was suspended indefinitely in March this year and amidst widespread allegations of recreational drug use by AFL players.

The AFL has had an Anti-Doping Code for 16 years which has severely penalised players using performing enhancing substances and under which players are tested both in and out of season.

In January 2005, the AFL also introduced its Illicit Drugs Policy (IDP) to also discourage the use of non-performance enhancing drugs such as ecstasy, amphetamines, cocaine, heroin and cannabis. The focus of the IDP was to provide rehabilitation, counselling and education for players that tested positive to illicit non-performance enhancing drugs. Under the IDP, players are tested confidentially. For a first positive test, the player must attend before the AFL medical officer for education, counselling and treatment and the medical officer of his club is notified. The same requirements apply to a second positive test. It is only after a third positive test that the player is deemed to have engaged in conduct which was "unbecoming or likely to prejudice the reputation or interests of the AFL or to bring the game of football into disrepute" and faces the maximum penalty of 12 weeks suspension. With these two policies, the AFL distinguishes between performance and non-performance enhancing drugs, providing proportionate responses to the drug in question, whilst sending a clear message that drug use is not be tolerated in AFL players, even out of season.

However, in late 2005, the AFL (and all other Australian sports) was required to adopt the World Anti-Doping Agency (WADA) Code in order to retain government financial support. In stark contrast to the IDP approach, the approach under WADA does not distinguish between performance enhancing drugs and non-performance enhancing drugs and responds to drug use with severe penalties and public shaming. Typically, a player that tests positive will not be given a second chance, the result will be publicised, they will be suspended for 1 - 2 years without salary and will be required to return prizes and scholarship money. A particularly harsh aspect is that the WADA approach is applied in a strict liability manner, so the defence of honest and reasonable mistake is not available to players and the offence is complete upon a positive test. The only manner in which the suspension period may be reduced is if "exceptional circumstances" are shown. However, unlike the IDP, WADA does not require players to be subject to its penalties out of season. The WADA is zero-tolerance for any drug during the football season.

When it comes to non-performance enhancing drugs taken recreationally by players outside the course of their employment, the inflexible approach of WADA, combined with limited and harsh penalties appears to punish players disproportionately. Such a response is inconsistent with the treatment by Victorian courts of first-time drug users that are normally given a warning and counselling before a finding of guilt against their names.

The WADA justifies its equivalent treatment of performance and non-performance enhancing drugs with the objective of protecting the health of athletes, regardless of the effect of the drug on the athlete's performance. However, this is not consistent with its practice of not testing athletes out of season and the fact that counselling and rehabilitation are not offered to get to the root of the problem.

Tel (03) 9672 2666
Fax (03) 9642 0271
Email lawyers@andrice.com.au
www.andrice.com.au

Level 10, 555 Lonsdale Street
Melbourne Vic 3000 Australia

PO Box 14099
Melbourne Mail Centre 8001

AUSDOC DX 177 Melbourne

The WADA sends a clear message that because AFL players are in the public eye and are regarded as role models (whether or not they hold themselves out to be) they must be more answerable for their conduct than ordinary Victorian citizens.

The IDP arguably deals with recreational drug use in a more constructive manner, with more rigorous testing of players in and out of season and its focus on rehabilitation. Justice Murray Kellam said in a Supreme Court judgement concerning the Illicit Drug Policy last year that:

"It is argued before me that bearing in mind that the IDP (Illicit Drug Policy) imposes a regime upon players over and above the World Anti-Doping Association compliant Anti-Doping Code, the IDP reflected 'a ground-breaking, innovative and co-operative initiative' between a major sporting administration body and a player representative body directed at proactively addressing illicit drug use in a manner designed to protect the health and welfare of players and others whilst simultaneously condemning and recognising, the potential harm involved with the use or possession of illicit drugs. I accept that argument."

Unfortunately, the benefits associated with the IDP will now be confined to outside the football season when the WAPA does not apply. During the football season however, the AFL must reconcile the differing approaches of WAPA and its IDP to non-performance enhancing drugs.

For further information contact:

Jacqui Guthridge
Lawyer
jxg@andrice.com.au

Top

Tel (03) 9672 2666 Level 10, 555 Lonsdale Street
Fax (03) 9642 0271 Melbourne Vic 3000 Australia
Email lawyers@andrice.com.au

www.andrice.com.au PO Box 14099
Melbourne Mail Centre 8001

AUSDOC DX 177 Melbourne

CASE NOTE

Terry O'Connor & Caitlin Tierney

***Alcoa Portland Aluminium Pty Ltd v Victorian WorkCover Authority* [2007] VSCA 210 (11 October 2007):**

QUANTUM ISSUES IN VWA RECOVERY ACTIONS

Those involved in recovery proceedings by the VWA pursuant to Section 138 of the Accident Compensation Act will be heartened by a recent decision of the Full Court of the Victorian Supreme Court of Appeal in ***Alcoa Portland Aluminium Pty Ltd v Victorian WorkCover Authority* [2007] VSCA 210.**

This appeal related to the VWA component of a common law claim and a VWA recovery action that were heard together. In the VWA recovery action, the trial judge found that:

1 Part VB of the Wrongs Act applies when determining notional damages for the purpose of quantifying Factor A in the Section 138(b) indemnity formula; and

2 the cost of medical reports obtained by the VWA is not "compensation paid or payable under this Act in respect of an injury" and is therefore not recoverable pursuant to the Section 138 (3) indemnity.

The VWA appealed these findings. In a unanimous judgement the Court of Appeal rejected the appeal and upheld the findings of the trial judge.

Application of Part VB of the *Wrongs Act* 1958

Under Section 138 (3) of the Accident Compensation Accident the amount recoverable by VWA by way of indemnity from a party contributing to an injury or death is the lesser of:

(a) the amount of compensation paid or payable by the VWA under the Act in respect of an injury or death; and

(b) the third party's proportionate liability for the notional damages which would be payable but for the operation of the Accident Compensation Act and the Transport Accident Act, calculated pursuant to a formula for the purposes of which the amount of the notional damages is referred to as "Factor A".

The effect of the formula is that the greater the value of Factor A, the more likely it is that its application will result in a value greater than the amounts actually paid or payable by VWA. This results in VWA recovering the full amount of the payments, regardless of any contribution to the cause to an injury or death by the employer.

Part VB of the Wrongs Act applies to awards of damages for personal injury, imposing a cap on general damages and regulating damages for economic loss. Its application to the calculation of Factor A could produce a value less than the compensation paid or payable, with the result that the proportional liability element of the Section 138 (3) (b) formula would apply to reduce the amount of the indemnity.

VWA argued that Part VB is to be ignored in determining Factor A because a claim under S138 is a claim for a statutory indemnity, not a claim for an award of damages for personal injury. In the alternative it in effect argued the opposite - that the application of Part VB was excluded by S28C of the Wrongs Act, which provides that Part VB does not apply in respect

Tel (03) 9672 2666 Level 10, 555 Lonsdale Street
Fax (03) 9642 0271 Melbourne Vic 3000 Australia
Email lawyers@andrice.com.au

www.andrice.com.au PO Box 14099 Melbourne Mail Centre 8001

AUSDOC DX 177 Melbourne

of awards of damages under Part 4 of the Accident Compensation Act. The Court rejected both of these arguments.

It found that Section 138 (3) (b) requires an assessment of the damages for personal injury payable outside the operation of the Accident Compensation Act. As the determination of such damages is subject to the operation of Part VB of the Wrongs Act, the Factor A assessment is also subject to those provisions.

Regarding Section 28C, the Court found that as claims under S138 are claims for indemnity, they are not awards of damages for the purposes of S28C, with the result that the exclusion did not apply.

Indemnity for medical reports obtained by VWA.

VWA claims the cost of medical reports in its recovery actions because they fall within the definition of "medical services" for the purposes of the Accident Compensation Act and thus form part of the "compensation" recoverable under S138.

The Court found that 'compensation' should be given its ordinary meaning of something that is to be paid to make up for a loss that has been suffered. It found that the medical report costs were costs incurred by VWA in the course of administering the Accident Compensation Act and not "compensation". As a result it confirmed the medical report costs were not recoverable.

Conclusion

The outcome of this decision is that there will be more certainty in calculating the value of Factor A for the purposes of the S138 (3) (b) formula. This should place contributing parties in a stronger position when negotiating with VWA.

For further information contact:

Terry O'Connor
Senior Associate
toc@andrice.com.au

Caitlin Tierney
Articled Clerk
cat@andrice.com.au

Top

Tel (03) 9672 2666
Fax (03) 9642 0271
Email lawyers@andrice.com.au
www.andrice.com.au

Level 10, 555 Lonsdale Street
Melbourne Vic 3000 Australia

PO Box 14099
Melbourne Mail Centre 8001

AUSDOC DX 177 Melbourne

ANDERSON RICE *Lawyers*

CASE NOTE

Melva Cameron

Black v Garnock **[2007] HCA 31 (1 August 2007)**

PRUDENT CONVEYANCING: PROTECTION BY CAVEAT UPON CONTRACTUAL EXCHANGE

The recent High Court Case of *Black vs. Garnock* raises important legal issues regarding writs and caveats. It also raises significant practical issues in relation to the lodging of caveats, the protection of purchasers between exchange of contracts and registration, the timing of final searches before settlement, and the benefit of prompt registrations after settlement.

The case involved a couple, Mr & Ms Smith, whom owned a 1600-acre property near Bombala named "Wanaka". Judgment creditors obtained judgment against the Smiths in the amount of $228,000 in the NSW District Court in September 2004.

The following year purchasers, on 15 July 2005, negotiated to buy the property from the Smiths for $1 million, with a deposit of $100,000. Whilst settlement for this sale was set to occur at 2pm on 24 August 2005, the judgment creditors had in fact obtained a writ of execution from the District Court the previous day on 23 August 2005. Given that this was then recorded on the NSW Land Register at 11:53am on 24 August 2005, just prior to the proposed settlement at 2pm, the question became whether the purchaser's transfer would be barred from registration, with rather the judgment creditor's writ giving priority registration to the sheriff, enabling him to sell the property to pay the judgment debt.

The case went to three courts and eventually to the High Court, where it was found by 3-2 majority that the sale of the property was blocked by the registration of a judgment debt just two hours prior to settlement. Reasoning for this finding included the fact that the formerly granted injunction was in conflict with the statutory scheme in the NSW Real Property Act, and system of recording writs as a means of title registration. The determining factor as to the priority of the writ, was that the registration of sale to the purchasers itself (as opposed to the preceding dates on which contractual agreement was met with the purchasers), took place after the recording of the writ, albeit by two hours.

The practical effect of the High Court's decision is that purchasers and mortgagees are exposed to being defeated by a writ between contract and registration of their interest and the only means by which they can protect themselves is to lodge a caveat immediately after entering into a contract.

For further information contact:

Melva Cameron
Senior Associate
mkc@andrice.com.au

Top

Tel (03) 9672 2666 Level 10, 555 Lonsdale Street
Fax (03) 9642 0271 Melbourne Vic 3000 Australia
Email lawyers@andrice.com.au

www.andrice.com.au PO Box 14099
Melbourne Mail Centre 8001

AUSDOC DX 177 Melbourne

CASE NOTE Tim Donaghey

***CFMEU v The Master Builders' Group Training Scheme Inc* [2007] FCAFC 165 (26 October 2007)**

Background
The Construction Forestry Mining and Energy Union ('**union**') contended that an interpretation of cl 38 of the National Building and Construction Industry Award 2000 ('**award**') and other provisions had the effect of:

- making available travel patterns allowances to apprentices, for travel to trade school; and
- that Master Builders' group training entity ('the respondent') had breached the award by not paying an allowance to apprentices attending trade school.

The relevant provisions of the award were cll 38.1 and 38.1.2. They provided:

38.1 Metropolitan radial areas
... the following fares and travel patterns allowance shall be paid to employees for travel patterns and *__costs peculiar to the industry__* *which include mobility requirements on employees and the nature of employment on construction work.*

38.1.2 South Australia
When *__employed on work__* *located within a radius of 30 kilometres from the GPO Adelaide - $14.20 per day.'*
*[underlining my emphasis]

Few facts about the apprentices were in dispute. For example, it was common between the parties that apprentices would attend trade school, generally in one-week blocks. The apprentices were paid for a 40-hour week when they attended trade school. Also, the apprentices often took their own tools to trade school and occasionally answered telephone calls whilst at trade school, about work issues.

The respondent disputed the union's interpretation of these clauses. In 2006, the union applied to the Federal Court of Australia under the Workplace Relations Act 1996 (Cth) ('**WR Act**'). In its application, the union sought an interpretation of the award, and a finding that the Respondent had breached the award by failing to pay apprentices in South Australia the fares and travel patterns allowance in cl 38 for each day when the apprentices attended trade school. Consequent upon the finding of a breach, the union also sought the imposition of a penalty under the WR Act for breach of the award.

First instance decision
On 31 August 2006, Besanko J heard the first-instance application, and found:

- that, properly construed, the terms of the award support an interpretation advanced by the respondent, that the apprentices are not entitled to the travel patterns allowance;
- his Honour Besanko J based this conclusion upon two reasons:
  - first, consideration of the purpose of the travel patterns allowance. The payment of the allowance to a worker who attends trade school does not seem to be within that purpose;
  - second, the use of the word 'work' as it is used in the award will vary, depending upon context, his Honour did not consider that attending trade school fit the description of 'work' required by the award.

See [2007] FCA 435, at para [39].

The Court therefore found against the union's submission, dismissing the application.

Tel (03) 9672 2666 Level 10, 555 Lonsdale Street
Fax (03) 9642 0271 Melbourne Vic 3000 Australia
Email lawyers@andrice.com.au

www.andrice.com.au PO Box 14099 Melbourne Mail Centre 8001

AUSDOC DX 177 Melbourne

APPEAL DECISION

The union appealed to the Full Court of the Federal Court of Australia. The appeal centred upon the issue as to whether the apprentices were 'employed on work' within the meaning of cl 38.1.2 of the award, whilst at trade school.

The union/ appellant submitted that an apprentice at trade school is 'employed on work', because the respondent and the 'host employer' conducting training are each obliged by contract and statute to have the apprentice attend. The Full Court found against this submission, whilst finding it factually correct: their Honours Branson, Finn and Gyles JJ held that the purpose of cl 38 of the award was to compensate for travel 'peculiar' to the construction industry. Their Honours found that attending trade school did not fit that purpose, upheld the decision at first instance and dismissed the union's appeal.

NATURE & EFFECT OF DECISION

Decisions in superior courts concerning the meaning of expressions in awards, agreements or common law contracts are rarer today than ever before. In most instances the issue would not be of wide enough application to be worthwhile pursuing in an appeal.

In this case, the wide application (and possibly Australia-wide impact) of the decision makes this decision of some great practical significance. Not only was the case likely to alter the pay arrangements for apprentices in South Australia, it was likely to do so in other states, with similar trade school arrangements.

This case also demonstrates one of the main down-sides to the current penalties regime of the WR Act: what amounts to an inadvertent underpayment could have an impact not only in the financial viability of many employers, but given the substantial penalties regime, this creates both a significant jeopardy for an employer (in interest levied upon the underpayment), and amounts to an incentive for unions to test the meaning of award terms in a costs-free environment.

For further information contact:

This article is brought to you by Tim Donaghey, Employment & Industrial Law barrister. Tim regularly contributes to the Anderson Rice newsletter by providing updates on recent case law and legislation. Tim can be contacted on tim.donaghey@vicbar.com.au.

Top

**This bulletin is for general information purposes only and should not be used or relied upon as an alternative to obtaining detailed legal advice. Anderson Rice disclaims liability of any kind whatsoever to any reader of this bulletin who acts in reliance wholly or partly upon these contents.*

Editor
Caitlin Tierney
Articled Clerk, Commercial Litigation & Insurance
ANDERSON RICE | Newsletter