Piper Alderman

Federal Government Steps In To Overturn Sons of Gwalia Ruling

The High Court of Australia's Sons of Gwalia Ltd v Margaretic (Sons of Gwalia) decision recognised an aggrieved shareholder's claim for damages (in relation to the acquisition of shares) on equal footing with those of an insolvent company's other unsecured creditors. Dispute Resolution Associate, Justin Le Blond, examines the Government's response to the decision.

The Sons of Gwalia decision related to the question of whether a shareholder's claim against a company for a breach of the continuous disclosure laws or for misleading and deceptive conduct could rank alongside the claims of unsecured creditors in the event of a company's insolvency.

The High Court held that the shareholder's claim was not made by him in his capacity as a member of the company and therefore in liquidation, the shareholder could lodge a proof of debt alongside unsecured creditors.

Following the Sons of Gwalia decision, widespread debate ensued which was resolved when CAMAC (Corporations and Market Advisory Committee) recommended in its December 2008 report that "*claims by shareholders against insolvent companies: implications of the Sons of Gwalia decision, that there should be no change in the law in the response to the Sons of Gwalia decision*".

Regardless, on 19 January 2010, the Minister for Financial Services, Superannuation and Corporate Law, the Honourable Chris Bowen MP announced the Government's Corporate Insolvency Reform Package (the Insolvency Reforms) which includes the Government's intention to amend the *Corporations Act* 2001 (Cth) to reverse the effects of the Sons of Gwalia decision.

The Insolvency Reforms when enacted are intended to:

- increase availability and lower the cost of debt funding for Australian companies and by reversing the effect of the Sons of Gwalia decision should encourage lenders to provide unsecured debt finance to Australian companies without pricing in the risk of potential competing shareholder claims, and allow Australian companies and their shareholders to benefit from greater access to and lower cost of unsecured finance;
- support the growth of the secondary debt market in Australia, as a market which is, in relative terms, in its early stages of development in Australia. The secondary debt market will be helped along by the removal of a layer of risk and uncertainty in the trading of Australian corporate debt; and
- encourage informal workouts and distressed investments. Distressed investments are a growing market and there are opportunities around the world for potential investors. It is, by its nature, a market characterised by higher levels of risk, but the Sons of Gwalia decision has added to the risks of some such investments in Australia. The reforms, if implemented, may provide greater certainty and lower transaction costs associated with distressed investments.

Overturning the Sons of Gwalia decision should also lower the cost and complexity, and improve the efficiency of large insolvency administrations, particularly those involving listed companies. Whilst the decision has been widely applauded by financial and legal commentators alike, litigation funders are likely to suffer for obvious reasons.

Presumably the Insolvency Reforms will not impact the ability of shareholders to pursue companies for damages for misrepresentation(s) or for breaches of continuous disclosure laws in connection with the acquisition of securities issued by the companies, whether those companies are solvent or insolvent.

It appears the Insolvency Reforms will only have the effect of subordinating those claims to the claims of the company's unsecured creditors. Importantly, however, shareholders will not receive any return from an insolvent estate in respect of such claims unless all other unsecured creditors have been paid in full.

Horticulture Code of Conduct Update

The Agribusiness Practice Group at Piper Alderman has been following the progress of proposed amendments to the Horticulture Code of Conduct, a mandatory industry code for the purpose of the Trade Practices Act. Partner, Simon Venus, and Lawyer, Bianca Battistella, report on the latest developments.

Introduced in May 2007, the Horticulture Code regulates trade in horticultural produce between growers and traders and agents. Traders in this context are merchants who buy produce and on-sell it and agents are people who sell on behalf of growers. "Horticultural produce" includes unprocessed fruit and vegetables, nuts, herbs and other edible plants. The Code does not cover nursery products (trees, shrubs, seeds and bulbs and so on). Nor does it apply to produce which is bought to be processed (such as by juicing or preserving) or exported or sold by retail by the trader.

Late last year the Rudd Government released a report from the Horticulture Code of Conduct Committee, recommending a range of measures to encourage greater clarity and transparency between fruit and vegetable growers and traders and in particular, to address industry concerns that growers are not always receiving a fair share of the end price paid by Australian consumers.

As reported in the March and June editions of the e-Bulletin, the Committee was asked to assist the Government in responding to the ACCC's 13 recommendations to improve the Horticulture Code of Conduct, released as part of the ACCC's inquiry into the competitiveness of retail prices for standard groceries. The recommendations were as follows:

1. Introduce civil pecuniary penalties and infringement notices for a breach of mandatory codes under the *Trade Practices Act 1974* and give the ACCC powers to facilitate random record audits.
2. Extend the Code to first point of sale transactions of horticulture produce between a grower and a retailer, exporter or processor.
3. Extend the Code to transactions entered into under agreements made prior to 15 December 2006.
4. Require a merchant to provide a grower, before delivery, with either a price or a formula for calculating price with reference to the amount received from a third-party purchaser.
5. Require that if a merchant does not reject produce within 24 hours of physical delivery, the produce be deemed to be accepted.
6. Enable a merchant to deduct the cost of services supplied to prepare produce for resale as part of the price or method for calculating price.
7. Only permit an agent to recover commission for services as a deduction from amounts paid by a third-party purchaser.
8. Exclude an agent's competitor from inspecting that agent's records on a grower's behalf.
9. Exempt transactions between a grower and a cooperative/packing house, in which that grower has a significant interest, from the Code.
10. Permit agents and growers to engage in pooling and price averaging.
11. Exempt transactions entered into in a grower shed at the central markets from the Code, whilst enabling parties to these transactions to access the Code's dispute resolution procedure.
12. The costs incurred by parties to a dispute under the Code dispute resolution procedure be subsidised by the Australian Government.
13. The ACCC undertake further education in relation to the Code and its dispute resolution procedures.

In forming its views, the Committee consulted extensively with representatives across all industry sectors. The Committee's report to the Minister for Agriculture, Fisheries and Forestry, Tony Burke, entitled "Implications of the Australian Competition and Consumer Commission recommendations to amend the Horticulture Code of Conduct", outlines both the divergence of views encountered during industry consultation and the Committee's views in relation to the practical issues that are likely to arise in implementing the recommendations.

In short, the Committee found that "the entire industry will benefit in the long run from improved efficiencies and transparency", if the recommendations are implemented. The Committee grouped the recommendations to reflect the practical issues that are likely to arise in implementing them.

This article summarises the key recommendations and responses contained in the Committee's report, reflecting the groupings applied by the Committee.

Group 1 – Recommendations 4,10 and 9

Most notably, the Committee was in favour of recommendation 4 (that the Code be amended to require a merchant to provide a grower with a sale price for horticulture produce, or a formula for calculating the sale price, prior to delivery).

This would assist in eliminating the current practice whereby merchants suppress the price offered to growers at or before delivery, in order to manage the risk of a fluctuating market. Amongst other conditions, the Committee proposed that it be necessary for the point of ownership transfer of the produce to be included in the Horticultural Produce Agreement and that payment be linked to the sale price obtained from a third-party purchaser. As concerns the latter condition, the Committee recommended that a grower (or its representative) be entitled to inspect the records of a trader (including sales receipts) relating to produce sold at a price calculated in accordance with a method, so as to ensure the transparency of the process.

The Committee noted the benefits of such an amendment to the pricing regime under the Code, particularly if the Code is extended to other industry sectors including exporters (recommendation 2, discussed below). The Committee did however highlight the possible difficulties that may arise with the use of the formula method for calculating sales price, if for example, the Code is extended to apply to processors, where the value contributed by produce to a processor's final product may be undeterminable.

The Committee also saw some benefits in implementing recommendation 10 (permitting pooling and price averaging by agents and growers), provided that it is implemented in conjunction with recommendation 4. This would effectively enable merchants and packers to pool and price average, if expressly agreed in their Horticultural Produce Agreement and would constitute a beneficial risk management tool for the horticulture industry. The Committee proposed that recommendation 10 be accompanied by conditions requiring, amongst other matters, that the pooled produce be of the same quality and that both parties agree to such practice as part of their Horticultural Produce Agreement .

Finally, the Committee noted that if recommendations 4 and 10 were implemented, then recommendation 9 would be unnecessary. This is simply due to the motivation behind the recommendation being the ability of a grower and a cooperative/packing house, in which that grower has a significant interest, to pool and price average, which would be acceptable by virtue of such amendments.

Group 2 – Recommendations 2,11 and 3

Whilst the Committee was in favour of recommendation 2 (the extension of the Code to all first point of sale transactions involving growers and horticultural produce), it acknowledged that the associated increase in compliance costs may be disproportionate to the benefits of compliance, particularly in relation to face to face transactions of small value, with immediate settlement and a high degree of transparency. This would predominantly impact negatively upon restaurants, caterers, farmers' markets and farm-door sales.

The Committee therefore recommended that this proposed extension of the Code only be implemented if done so in conjunction with recommendations 11 and 3.

Specifically the Committee proposed that if the Code is extended to apply to all relevant first point of sale transactions, then transactions valued at under $1,000, conducted face-to-face with immediate settlement, be exempt from the Code (whilst maintaining access to the Code's dispute resolution procedures for parties to such transactions). This proposal would achieve the intent of the ACCC surrounding recommendation 11 (that transactions occurring in a central market grower shed be exempt), without creating a geographical loop-hole for Code avoidance, whilst also eliminating compliance costs for small transactions.

Moreover, the Committee supported recommendation 3 and suggested that parties to pre-Code agreements be given a period of time to amend their contracts to be Code compliant, so as to create a uniform system across all grower-buyer relationships. This is particularly important in ensuring the application of the Code to all industry participants that may become exposed to regulation under the Code as a result of the proposed expansion of its application.

Other recommendations

For practical reasons, the Committee did not support recommendation 7 (that agents only be permitted to recover their commission as a deduction from payments received form a third-party purchaser), nor recommendation 5 (that produce be deemed to be accepted if not rejected within 24 hours of physical delivery). The Committee concluded that the issues that these recommendations were intended to resolve will be more suitably addressed through parties' contractual arrangements. In relation to recommendation 5, the Committee believed that the deadline for acceptance or rejection of produce should be a matter that the parties be required to negotiate and include in their Horticultural Produce Agreement. This would allow parties to identify when the transfer of ownership of produce would occur and would also provide them with greater flexibility in negotiations to reflect the nature of the produce being traded.

The Committee supported the following recommendations without identifying any significant negative implications arising from their implementation:

- recommendation 8 (excluding a competitor from inspecting an agent's records on a grower's behalf)
- recommendation 12 (providing for Government subsidisation of disputes under the Code) and thereby decreasing cost barriers to the dispute resolution process, with a relatively small cost increase for the Government
- recommendation 13 (providing for further Code education initiatives), particularly if the operation of Code is expanded as per the recommendations.

The Committee was also generally in support of recommendation 6 (enabling the deduction of the cost of services to prepare produce for resale by merchants as part of the price), provided that the Code:

- must not dictate how to set the price for services, but require the charge to be set out in the Horticultural Produce Agreement
- require reports including itemised invoicing detailing the charge for each service rendered, rather than detail as to how the business costs in providing each service are accrued.

These safeguards will protect growers from illegitimate service charges, whilst protecting traders from having to report commercially sensitive information to growers.

Finally recommendation 1 (relating to enforcement and penalties) was referred to the Assistant Treasurer to consider rather than the Committee as it relates to the Trade Practices Act generally and will affect all mandatory codes under the TPA.

General implications

It is important to keep in mind that despite the proposed expansion of the Code to all relevant first point of sale transactions, the Code does not prima facie capture a large number of unincorporated bodies, most commonly found within the growers sector, until those bodies enter into a transaction with an incorporated body. This is due to the way in which the Code is given force of law, as a mandatory code under the *Trade Practices Act*, which is limited to the regulation of incorporated bodies.

The Government is now in the process of considering the Committee's report findings and the issues raised during consultation before implementing any amendments to the Code.

For those involved in the horticultural value chain, this will be an area to watch in 2010.

High Court Decisions re Personal Responsibility

The High Court recently handed down two separate decisions reaffirming the Court's reluctance to extend common law duty of care and re-enforcing the principle that individuals must bear personal responsibility for their own actions. Dispute Resolution Partner, Tom Griffith, examines the decisions.

The first case, *Adeels Palace v Moubarak,* involved a shooting at a Sydney function centre at a New Year Eve's party. At about 2.30am on the night in question, a brawl erupted on the dance floor initially between two groups of women but quickly spreading and turning more violent.

One of the party goers left the venue during the brawl and later returned with a gun and shot two other party goers. The two shooting victims suffered serious injuries and sued the function centre alleging that by not providing accredited security guards, the function centre breached its duty of care.

The High Court found that the function centre did indeed owe the patrons a duty of care but that the extent of the duty owed was limited to the exercise of reasonable care to prevent injury to patrons from "violent, quarrelsome or disorderly" conduct of fellow patrons. The duty was consistent with the function centre's obligations under the *Liquor Act* (NSW). The Court identified that one of the ways the function centre could discharge the duty by preventing entry to the premises of violent, quarrelsome or disorderly people and by alternatively removing such people from the premises.

The Court declined to re-consider the lower Courts' finding that the function centre was in breach of its duty of care but instead dealt with the matter by concluding that the plaintiffs' claim failed on an analysis of causation. The Court found that the plaintiffs' argument that their injuries were caused by the function centre failing to take steps that **might** have made the injuries less likely to occur, ought be rejected.

The Court found that the presence of licensed security guards at the entrance of the function centre would not necessarily have deterred an armed gunman intent on revenge, and who was, on the evidence, not acting rationally. The plaintiffs' claim failed.

The second case, *C.A.L. No. 14 Pty Ltd v Motor Accidents Board,* involved a Tasmanian man who died in a motor bike accident following a drinking session at a hotel. The man's wife sued the hotel's licensee (the publican) alleging that the publican owed the man a duty of care to prevent him from riding the motor bike home.

The case largely turned on its facts. The evidence revealed that earlier in the evening, because of a rumour that there was going to be a police breathalyser placed near the man's house, and pursuant to a policy the hotel apparently had adopted to prevent drink-driving, the man had deposited the keys to the motorbike in the hotel's petty cash tin and agreed to store the motor bike in the hotel's store room. The evidence before the Court was that the hotel had a system in place whereby patrons would place their keys in the tin and the publican would call the patron's wife or partner to pick them up later that night from the hotel. During his drinking session, the man's drinking partner was driven home by his wife, who also offered two or three times to drive the man home. However, the offers were refused and the man remained at the bar. The man later became upset and agitated. The publican refused to serve the man further drinks and offered to call the man's wife. The man refused the publican permission to call his wife and was abusive towards the publican in his refusal.

The man then demanded the return of his keys and the motor bike. The publican asked the man three times whether he was alright to ride. The man insisted he was not overly affected by alcohol and took the motor bike and keys and left. The evidence before the Court was that the man did not exhibit usual signs of drunkenness. On the way home, the man was involved in a fatal accident. His blood alcohol reading at the time of his death was later revealed to have been 0.253.

The man's wife alleged that because the publican had failed to insist on calling her, and by allowing the man access to the keys and motor bike, the publican breached his duty of care to her husband. The High Court rejected the wife's argument. The High Court concluded that, on the evidence, there was no duty of care owed, no breach and a lack of causation, all of which were fatal to the wife's claim.

The Court found that the only way that the publican could have telephoned the wife was by delaying and deceiving the man (who had earlier refused the publican permission to call his wife and demanded the return of the motor bike, and had become abusive) and by somehow obtaining the wife's telephone number. However, the Court noted that even if the publican had succeeded in obtaining the wife's phone number, the evidence showed that the wife was not at home at the time that any call would have been made.

Further, the Court noted that even if the wife had been contacted and had duly attended the hotel to pick up her husband, there was no guarantee that the man would have meekly accepted the offer, given his aggressive and abusive behaviour during the course of the evening.

Finally, the Court noted that if it were to impose on the publican a duty to deny the man access to his keys (to which the man was legally entitled) then the publican may be exposed to a risk of physical harm.

The High Court took the opportunity to repeat the current common law position on liquor licensee's duties:

"persons in the position of the Proprietor and the Licensee, while bound by important statutory duties in relation to the service of alcohol and the conduct of the premises in which it is served, owe no general duty of care at common law to customers which requires them to monitor and minimise the service of alcohol or to protect customers from the consequences of the alcohol they choose to consume."

The latter decision has been heralded as a victory for common sense by publicans, but has been decried by advocates of safer drinking in the community.

Right to Farm Legislation passes the SA Legislative Council

Corporate Partner and Agribusiness Practice Group head, Simon Venus, considers Environment Protection (Right To Farm) Amendment Bill 2009 SA.

Data from the Population Reference Bureau puts a figure of around 80 million new mouths to feed each year around the world. Coupled with that increase is a scarcity of rural land as urbanisation increases. For the first time, the world population is evenly divided between urban and rural areas. By 2050, urban residents are likely to make up 70 percent of the world's population (*UN Population Division, World Urbanization Prospects*).

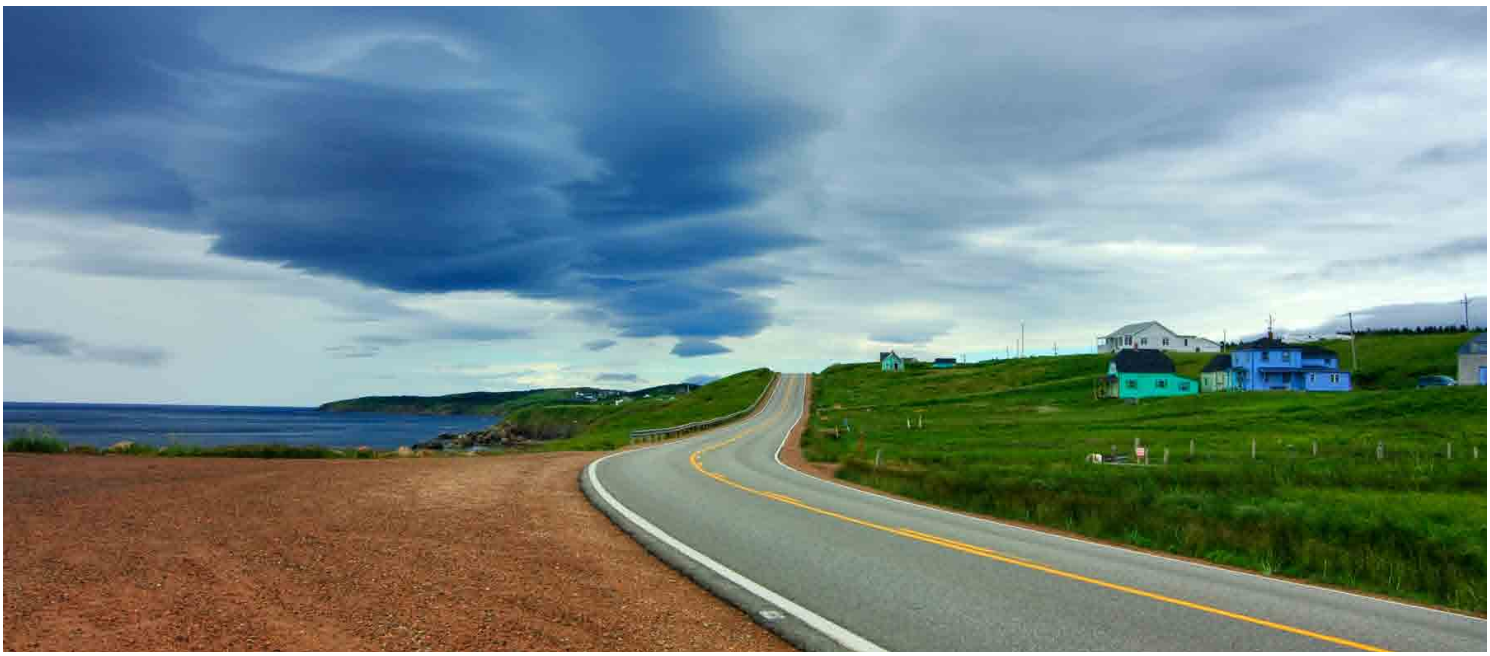
One of inevitable consequences of this macro trend in population development is that pressure is being exerted on arable farming land as expanding cities sees fertile soils being utilised for construction and housing.

While those statistics make agriculture a compelling investment proposition, the worldwide trend of urban sprawl has had other important implications when the interests of agriculture clash with the expectations of lifestyle and semi-rural property owners on the fringes of Australia's urban areas.

Complaints directed at long existing farming activity from those living on the urban fringes, lifestyle property owners and so-called tree-changers have been directed at some of the inevitable incidents of farming activities, including smell, noise, heavy vehicle and tractor traffic and so on.

In South Australia, the clash of interests has led to the Environment Protection (Right To Farm) Amendment Bill 2009, a private members bill which passed the South Australian Legislative Council on 18 November 2009 and was introduced to the House of Assembly a day later.

The Hon Robert Brokenshire, who moved the bill's introduction, based the draft legislation in part on models adopted in northern America. Those models generally exclude common law actions for nuisance, provided a farmer is compliant with public health and environmental laws.



The bill makes amendments to the *Environment Protection Act 1993* and the *Land and Business (Sale and Conveyancing) Act 1994*.

In relation to the former Act, it will be a defence to an EPA complaint if a farmer is conducting a "protected farming activity", namely, an activity condoned by a code of practice or by generally accepted standards and practices in the farming industry. The obligation will be on the EPA, not the farmer, to establish the defence. The relevant codes of practice will be prescribed by regulation.

A proposed amendment to section 130 of the *Environment Protection Act* provides that if the EPA is satisfied that an allegation relates to a "protected farming activity" then it should advise the complainant of that opinion and decline to take further action in relation to the allegation.

In relation to *Land and Business (Sale and Conveyancing) Act,* the draft legislation provides that a person who buys land in farming areas will be notified that there are farming enterprises operating in the area. The second reading speech states that *"this will serve as notice to purchasers to prevent nuisance complaints in the future should they decide they are unhappy with the noise, sight or smell of farming machinery rolling past their home."*

During debate on the bill, both the Greens and Labor expressed general sympathy for its objectives, namely that farmers have a right to conduct their farming activities, but fell short of supporting the drafting, saying that it was the wrong instrument for the job and would diminish the EPA's capacity to prosecute for non-complying activities. Criticism was also levelled at the broad scope of what might constitute "generally accepted standards and practices" in a given farming industry for the purposes of defining what is a protected farming activity.

This is not the first time right to farm legislation of this sort has found its way onto a parliamentary agenda in Australia. In New South Wales in 2004, the Protection of Agricultural Production (Right to Farm) Bill was introduced as a private members bill. However, that bill did not garner sufficient parliamentary support and was later negatived in the House of Assembly. Whether the South Australian legislation is destined for a similar fate remains to be seen, but its progress is likely to be followed closely by farmer advocate groups other jurisdictions.

Legal Professional Privilege and OHS

In the recent case of Nicholson v Waco Kwikform Limited (the Kwikform case) the NSW Industrial Relations Commission (NSWIRC) found that Kwikform's incident investigation report was protected by legal professional privilege and therefore was not admissible as evidence in Court. The decision provides some interesting consideration of what communications and documents would or would not qualify for legal professional privilege, as Employment Relations Partner, Mark Waters explains.

To claim legal professional privilege, communications must be:

- confidential between a client and its legal representative
- for the dominant purpose of giving or seeking legal advice, or the provision of legal services, including anticipated litigation and representation in court.

Legal professional privilege cannot be claimed as a blanket protection and does not extend to communications or documents prepared prior to seeking legal advice or before legal proceedings are anticipated.

In determining if a document/ communication is subject to legal professional privilege, the Court will generally consider the circumstances surrounding the production of the document (including any reasons other than privilege) and the intent of the person who requested, created or commissioned the document or communication.

Kwikform's solicitors were engaged to provide advice about an incident which resulted in the death of an employee earlier that day. Kwikform's solicitors subsequently requested that Kwikform produce several documents to "assist them in providing legal advice" in relation to the incident, including an incident investigation, the results of which would be provided to the solicitors.

WorkCover issued proceedings to determine whether the documents produced by Kwikform were subject to legal professional privilege. At the time of the hearing, no litigation had commenced.

WorkCover argued that the documents were not produced for the dominant purpose of seeking legal advice or for use in legal proceedings. Rather they were produced for multiple purposes including:

- conforming with Kwikform's internal procedures requiring that all accident and injuries be reported
- detecting if there were any faults in the system of work
- ascertaining if there had been any breaches of Kwikform's policies by employees or subcontractors.

No evidence was called by WorkCover to support its assertion of "other purposes." It submitted it "was a matter of common sense and logic."

The prosecution sought to rely on a various judgements which found that there may be a number of purposes for producing communications of this type, but where the sole or dominant purpose was not for seeking legal advice or the provision of legal services, it was not subject to legal professional privilege.

The NSWIRC determined that it was clear that litigation was anticipated in relation to the incident, as demonstrated by Kwikform's early engagement of solicitors to provide legal advice and as outlined in correspondence between Kwikform and it's solicitor. It is also clear that the solicitors purpose in commissioning the report was to enable them to provide advice as to the legal aspects of the matter.

The NSWIRC considered the argument that the documents were produced for multiple purposes, and found that it was unable to be sustained.

"The documents (or more relevantly the communications contained in the documents) were commissioned by solicitors. Matters of accident and injury reporting were therefore unlikely to be more than a peripheral concern. The dominant, if not only purpose set out in the letter, for the preparation of these documents was for the provision of legal advice."

This was also evidenced by the marking of each document as "privileged and confidential."

The appeal was allowed and the claim of legal professional privilege was upheld.

Implications for Employers

The Kwikform case reinforces that in determining if a document is subject to legal professional privilege, the dominant or most important purpose for bringing the document into existence should be obtaining legal advice, but it need not be the only purpose.

When seeking to rely on documents and communications as being subject to legal privilege, employers should:

- Consider which incidents are likely to require urgent legal advice, or have the potential for legal proceedings (eg. when a regulator commences an investigation into a workplace incident).
- Notify their solicitors immediately upon the occurrence of such an incident and instruct them to lead the investigation.
- Carefully consider the content and purpose of communications between the employer and their solicitors.

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