Standing Committee on Law and Justice

2020 review of the workers compensation scheme

Response from Australian Lawyers Alliance to Question on Notice – Hearing 3 August 2020

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The Hon. ANTHONY D'ADAM: We heard evidence in our earlier hearing from Unions NSW about the operation of section 248, the section around the protection of injured workers from a dismissal. I am happy to open it up to any member of the panel to offer some views about whether that section is operating as it was originally intended?

Mr CONCANNON: I must say from my perspective as a private lawyer practising in workers compensation, it is rare that I have seen that actually being used to benefit workers in my experience. It seems to be honoured perhaps more in the breach than in terms of compliance.

The CHAIR: Does any other member wish to make a contribution to that?

Mr BUTCHER: I think that is a fair comment that Mr Colcannon has made. Personally I did not come across it very often in my in my practice dealing mostly with statutory benefits. I think if you speak to injured workers they will tell you that they do not feel very protected from employer's actions, at least the clients I speak to anyway.

The Hon. ANTHONY D'ADAM: Does anyone on the panel have any recommendations about how the provision might be strengthened to provide greater protection for workers?

Mr CONCANNON: I think we would have to take that question on notice.

The experience of our members is that section 248 not widely utilised. The section contains a penalty provision that would usually be enforced by the regulator. I am unsure how often this is actually enforced but suspect the figure would be quite low. To enable the regulator to take action it would first require someone (either the injured worker or the insurer) to notify the regulator of a potential breach.

An employee whose employment is terminated within six months of injury is usually looking to enforce rights that might provide a financial benefit to themselves. As such I suspect that very few employees make a complaint to the regulator.

On the other hand insurers are intimately involved the rehabilitation of the injured workers and would or should know exactly when workers have had their employment terminated in breach of section 248.

Consideration could therefore be given to require the insurers to either:

- Report all potential breaches to the regulator to allow the regulator to take action if it chose to do so; and/or
- Include a requirement to report ‘dates of termination of employment from pre-injury employment’ in any data currently being provided to the regulator that would enable the regulator to determine which matters they should make enquires about for the purposes of examining any possible breaches.

By giving the regulator the tools it needs to use section 248 to prosecute employers in breach, and assuming the regulator uses those tools, then the message will quickly spread through amongst employers to be wary of any consequences that might flow from a breach. Hopefully this leads to a change in behaviour of some employers who would otherwise ‘take the risk’.

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Mr BUTCHER: We anticipated we might be asked some questions on his case. He currently has proceedings before the court and a hearing date has been set for early next year. There are negotiations going on between our office and the solicitor's for the insurer. Further than that, I do not want to say where those negotiations are up to but we have not yet reached any resolution. I understand Mr Fitzpatrick feels that SIRA has been quite supportive of his position and I think that is all I can say at the moment.

The Hon. TREVOR KHAN: Perhaps Mr Butcher can take it on notice and provide a response in writing.

The Hon. DANIEL MOOKHEY: Yes, maybe you could. Can I just ask one other question and see whether you are in a position to answer it?

Mr BUTCHER: Yes.

The Hon. DANIEL MOOKHEY: And if you are not, of course, you are not. In the course of those negotiations, has any lawyer from icare put to you or Mr Fitzpatrick that they will not be pursuing any dialogue with him now that he has raised the matter in the media?

Mr BUTCHER: I will take that one on notice.

Answer

I am pleased to be able to report that the Mr Fitzpatrick has now resolved his claim for work injury damages.

With respect to any dialogue that occurred between the parties during the negotiations, all communication was done on a without prejudice basis.

In addition to that, I also consider the discussions privileged and accordingly I feel that I am bound not to disclose.

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Mr DAVID SHOEBRIDGE: Either an industrial relations claim, or there may be a disability discrimination claim, or there may be an harassment claim and there can be similar factual underpinnings. Is that when 151A becomes a problem?

Mr CONCANNON: Correct.

Mr DAVID SHOEBRIDGE: Do you see a rationale for 151A to work in that way, to terminate compensation benefits in those circumstances?

Mr CONCANNON: I think the decision of the president in the name of the case that unfortunately escapes me does create real practical difficulties, even if the settlement of that claim specifically excluded workers compensation or common law work injury damages rights. I think some rewording of that provision needs to be seriously looked at in light of it.

Mr DAVID SHOEBRIDGE: If either of you wanted to give some further detail on that on notice, that would be useful.

Mr CONCANNON: Yes.

Mr BUTCHER: I am happy to as well.

ANSWER

On 23 July 2020 the New South Wales Court of appeal handed down it decision in *Gardiner v Laing O'Rourke Australia Construction Pty Ltd* [2020] NSWCA 151.

This decision has now clarified the law in this area. In summary the case can be seen as authority for the proposition that resolution of claims or disputes outside the workers compensation system do not, in and of itself, trigger operation section 151A of the Workers Compensation Act 1987.

Accordingly the Australian Lawyers Alliance recommends that amendment of 151A is no longer necessary.