

# INSURANCE

## LEGAL UPDATE

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## Insurer required to produce documents to receiver

*In the matter of **Southland Coal Pty Limited (rec and mgrs apptd) (In Liq)** [2006] NSWSC 184, Justice Austin of the NSW Supreme Court ordered an insurer to produce documents relating to the consideration of an insurance claim pursuant to an examination summons by a receiver of a company.*

### Key message

*An insurer recently failed in its bid to suppress documents relating to its decision to deny indemnity from an insured's receiver.*

Southland Coal Pty Limited (Southland) was a co-owner of a coal mine. QBE Insurance was the lead insurer of Southland. In December 2003 there was a 'spontaneous combustion incident' at the coal mine which resulted in the mine being sealed. Later that month, receivers' were appointed for Southland. Southland's principal asset was the proceeds of its insurance policies. In February 2005, QBE's solicitors wrote to Southland's solicitors denying indemnity in respect of the incident.

The receivers issued examination summonses (under section 596B of the *Corporations Act* (the Act)) to QBE's officers requiring the officers to be examined about QBE's 'examinable affairs'. The summonses also required production by the officers of specified books relating to QBE's examinable affairs in accordance with section 596D of the Act. The receivers sought production of documents relating to the denial of indemnity, the reasons for that decision, the considerations taken into account by QBE in making that decision, and the inquiries relied upon by QBE for that purpose.

QBE opposed the application for production of documents arguing that the Court should infer that the receivers' true purpose was to seek to obtain a forensic advantage not available from ordinary pre-trial procedures.

His Honour held that the receivers' purpose for requiring production of the documents

was to assist the receivers to determine whether or not proceedings should be instituted against QBE in respect of the insurance claims – and this was a proper and permissible purpose relating to Southland's 'examinable affairs'.

Notably, his Honour held that it was not improper for the receivers, in pursuing examinations, to investigate whether QBE had assessed Southland's claims with utmost good faith. His Honour stated:

*"In my opinion the proposed consideration by the Receivers of whether QBE has acted with the utmost good faith is part of the overall purpose of considering whether proceedings should be instituted against QBE in respect of the insurance claims. It is a ground upon which such proceedings could be initiated rather than some independent purpose for conducting examinations and seeking ancillary production of documents".*

Having said that, his Honour confirmed the position that an examination (and consequently, the production of documents) is not to be conducted as a dress rehearsal for cross-examination or to destroy the credibility of witnesses or otherwise for the predominant purpose of obtaining a forensic advantage not available in ordinary pre-trial procedures.

**Russell Stewart** | Senior Associate

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# Employment Practices Liability under WorkChoices – what will change?

The introduction of **WorkChoices** will shape the kind of litigation in which employers and their insurers are involved. Restrictions on unfair dismissal and prohibitions on unfair contract claims are likely to lead to an increase in unlawful termination, wrongful termination and discrimination claims.

## Key message

*WorkChoices has an impact on all business in Australia, for the insurance industry, aside from its own employment issues, it has changed the nature of possible workplace litigation.*

Employers and their insurers will have to refine their knowledge of the law and refocus their employment practices policies and risk management strategies.

### Unfair Dismissal

Certain employees remain unable to make unfair dismissal claims, including:

- » employees or trainees on probation, fixed term contracts or contracts for the performance of a specified task
- » employees engaged as casual employees for less than twelve months or on a seasonal basis
- » non-award employees whose annual salary exceeds \$94,900

In addition, the following employees are now also barred:

- » those whose employer (including related bodies corporate) employs 100 employees or fewer
- » those whose employment is terminated for 'genuine operational reasons', that is 'reasons of an economic, technological, structural or similar nature' (subject to limited exceptions).

### Unlawful Termination

Employees may still bring a claim for unlawful termination where termination is made on a discriminatory ground such as race, religion, sex, age, family responsibilities, disability or membership or non-membership of a trade union.

### Wrongful Termination

Employees may still bring an action for wrongful termination where the termination is a breach of the employment contract.

### Unfair Contracts

WorkChoices removes the right of employees to make claims under the Queensland and New South Wales unfair contracts legislation.

### Discrimination

Employees may still bring a claim under anti-discrimination law in the Human Rights and Equal Opportunity Commission or relevant State Commissions and Tribunals if they have received unfair or unequal treatment or less favourable treatment on the basis of a prohibited discriminatory ground. Remedies include compensation and reinstatement.

### Implications for employers and their insurers

WorkChoices is likely to cause an increase in unlawful termination claims, particularly by

those employees who can no longer make unfair dismissal claims. Unlawful termination claims are also attractive to employees because the burden of proof rests with the employer, who must demonstrate that the termination was not for a prohibited reason. WorkChoices also establishes a needs-based legal assistance scheme whereby employees making unlawful termination claims may be eligible after means testing to receive up to \$4,000 of independent legal advice on the merits of their claim.

There has been a marked increase in discrimination claims. The jurisdictions in which these are conducted are often more attractive to employees than the Courts, being less formal, more expeditious and less likely to award costs. Further, in such cases employers are increasingly being held liable, directly or vicariously, for discrimination occurring in the workplace.

Employers should therefore ensure that they are fully aware of and compliant with discrimination legislation. This will include taking 'all reasonable steps' to prevent discrimination in the workplace by establishing policies and procedures whereby it can be identified and addressed. Risk management in this area will become increasingly important for both employers and their insurers.

It appears that WorkChoices will not reduce so much as redirect Employment Practices litigation. Employers and their insurers are likely to find themselves defending claims in unfamiliar jurisdictions with a particular emphasis on discriminatory and prohibited grounds for termination.

**Peter Lupson** | Partner  
**Lucia Clarke** | Articled Clerk

## Civil and criminal penalties in place for unlawful document destruction

*New provisions have been added to Victoria's Crimes Act, 1958 and Evidence Act 1958 dealing specifically with the civil and criminal consequences of the destruction of documents relevant to current proceedings and proceedings which 'may be commenced' in the future.*

### Key message

*The Victorian government has changed laws regarding the destruction of documents relevant to proceedings that may be commenced.*

The new laws operate from 1 September 2006, and come off the back of the Victorian Court of Appeal's decision in *British American Tobacco Australia Services Limited v Cowell* [2002] VSCA 197 (the Rolah McCabe Case) and a subsequent review of the law by Crown Counsel.

In the Rolah McCabe Case, the Court held that the focus of the common law in cases of document destruction was on the crimes of attempting to pervert the course of justice and criminal contempt of court. The

Victorian government thought this did not impose adequate obligations on bodies corporate or adequately clarify the civil consequences of document destruction in civil proceedings affected by the destruction.

### **Criminal culpability**

Under the amended *Crimes Act*, it is an offence if a person, knowing that a document is or is likely to be required in evidence in a legal proceeding:

- » destroys or conceals the document or renders it illegible, undecipherable or incapable of identification
- » expressly, tacitly or impliedly authorises or permits another person to do so

with the intention of preventing the document from being used in evidence in a legal proceeding.

For the purposes of a successful prosecution of a body corporate:

- » there must have been destruction of a document by an 'associate' (eg, an officer, employee or agent) of the body corporate
- » the knowledge of the associate that the document is, or is likely to be, required in evidence in a legal proceeding, must be attributed to the body corporate.

Other key elements of the legislation include:

- » the Act applies to all documents, including emails, and other 'things' which can constitute evidence
- » companies can be criminally liable if a 'corporate culture' existed which encouraged or tolerated destruction of relevant documents. 'Corporate culture' is defined as an attitude, policy, rule, course of conduct or practice existing within the body corporate
- » it is a defence for a company that it exercised due diligence in attempting to prevent the contravention occurring, for example through the implementation of a compliance programme
- » individuals face up to 5 years' imprisonment and/or a fine of \$62,886, and companies face a fine of \$314,430.

The Act refers to documents relevant to proceedings that 'may be commenced'. A party might be considered on notice, for the purposes of the Act, if there is a possibility, as opposed to a probability, of proceedings being issued in the future, even where the identity of the plaintiff is not known.

### Civil Consequences

The amendments to the *Evidence Act* apply to all civil proceedings commenced after 1 September 2006 and apply where documents are 'unavailable', that is, they have been in the possession, custody or power of a party to the litigation and have subsequently been destroyed before or after 1 September 2006. The Act is not confined to destruction by or on behalf of a party.

If a document is unavailable and the court considers that the unavailability is likely to cause unfairness to a party to the proceeding, the court may, among other things, draw adverse inferences, declare that a fact in issue will be made out in the absence of evidence to the contrary or simply reverse the burden of proof, order that certain evidence not be permitted, or strike out part of a statement of claim or defence.

Prior to making such orders, the court must have regard to the circumstances in which the document became unavailable and the impact of the unavailability on the proceedings, including whether the unavailability will adversely affect the ability of a party to prove its case or make a full defence.

Insurers in all states should be aware of the Acts in deciding when to destroy documents such as proposals for insurance or assessors' reports which might be relevant in civil litigation in Victoria.

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### Further information

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