

Filing of Certificates of Common Law Registration: Amendments to the Workers' Compensation and Rehabilitation Act 1981



VICKY PRISKICH[†]

Important amendments to the workers' compensation scheme came into effect in December 1993. This article considers one of the difficulties to which the transitional provisions of the new scheme give rise.

The law governing a person's right to bring proceedings for general damages arising from a work related injury was amended in December 1993 by the Workers' Compensation and Rehabilitation Amendment Act 1993 ('the Amendment Act'). Where a work related injury is sustained *after* 1 July 1993 leave of the court is required to bring proceedings. Leave will only be given where the disability is assessed at 30 per cent or more, or the pecuniary loss is greater than the prescribed amount.¹ For injuries sustained wholly *before* 1 July 1993 the transitional provisions of the Amendment Act apply.

The transitional provisions provide for the establishment of a register of notifiable claims at the Workers' Compensation and Rehabilitation Commission.² Such claims had to be registered at the Commission before 5 pm, 29 July 1993.³ The claimant was issued with a certificate of common law registration bearing a date of issue. The employer or insurer was given a separate notice including the name of the claimant, the accident date, workers' compensation claim number and employer details.⁴ The claimant

[†] Solicitor, Perth.

1. Currently \$102 041.

2. S 6.

3. In practice an extension was given under s 6(3) of the Amendment Act if an adequate explanation was given for the delay.

4. S 8.

was then in a position to commence proceedings for common law damages if settlement could not be reached.⁵

The Amendment Act provides that where such proceedings are commenced, and where a certificate is filed in the proceedings and a copy of the certificate given to the parties to the proceedings within 90 days, the relevant employer or insurer may apply to the court within 60 days thereafter for a declaration as to whether it is liable and whether damages are 'significant damages'.⁶ If the court declares that the employer or insurer is likely to be liable and that the damages would be significant, the claimant has the option of continuing with the common law proceedings or opting for the new benefits.⁷

FAILURE TO FILE THE CERTIFICATE IN THE PROCEEDINGS WITHIN 90 DAYS

1. Inherent power of the court

One aspect of the foregoing statutory procedure that has raised difficulties in practice has been the filing of the certificate in the proceedings within 90 days, as required by section 11(1) of the Amendment Act.⁸ The terms of section 11(1) do not expressly state that the certificate *must* be filed within 90 days.⁹ Rather, section 11(1) sets out a series of events where the doing by the claimant of specified acts sets other options in play. The necessity to follow strictly the procedure set out in section 11(1) is said to arise by virtue of section 13(1).¹⁰ By reason of this section the court has

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5. S 9(1).
 6. S 11(4). 'Significant damages' means pecuniary damages equal to or greater than \$25 000: s 5(1).
 7. S 11(2).
 8. 11(1). If an affected person —
 - (a) has commenced court proceedings in respect of a registered cause (whether the cause was registered before or after the proceedings were commenced); and
 - (b) has, within 90 days after the day on which the certificate was given, filed the certificate of registration in the proceedings and given a copy of the certificate to each other party to the proceedings,
 - the relevant employer or insurer may within 60 days after the day on which the certificate is filed, apply to a District Court Judge for a declaration as to the preliminary questions or either of those questions that is in dispute.
 9. By contrast the terms of s 459G(2) of the Corporations Law relating to the setting aside of statutory demands have been interpreted strictly by the High Court in *David Grant & Co v Westpac Bank* (1995) 13 ACLC 1572 so that no extension will be granted. The case can be distinguished as it turns upon the phrase 'may only', which qualifies the jurisdiction of the court.
 10. *Mulligan v Diamond Sky Pty Ltd* (unreported) District Court 1995 no 4447; affirmed in *WA Petroleum Pty Ltd v Scott* (unreported) District Court 1995 no 4607.

decided that there is no inherent judicial power to extend time for the filing of the certificate in the proceedings beyond 90 days — inherent power being impliedly excluded where it would contravene a statutory provision.¹¹ However, the onus lies upon those asserting contravention.¹²

Section 13(1) states that where the common law proceedings are continued (ie, the claimant opts to continue with the proceedings after the court has made a declaration, or where the employer or insurer has not sought a declaration) section 93D(4), relating to the threshold, does not apply. Section 13(1) does not expressly require compliance with section 11(1); it merely reinforces the immunity given to a claimant who has decided to continue with the proceedings. However, the view of the court appears to be that the claimant must have complied strictly with the provisions of section 11(1) in order to arrive at that position. It is quite a logical leap, in the absence of any other considerations, to suggest that a statute which impliedly requires a timetable to be complied with goes further, so that the timetable is a mandatory one leaving no scope for an inherent power to extend deadlines. The court does in fact rely on another consideration. In *Mulligan v Diamond Sky Pty Ltd*,¹³ Williams J held that if the legislature intended the court to have power to extend the time for filing of the certificate beyond 90 days it would have provided an express power to do so (as was done in the Crown Suits Act 1947, the Local Government Act 1960 and the Limitations Act 1935).¹⁴ In the absence of such express power, Williams J reasoned, parliament must be taken to have intended that the court would have no inherent power to extend time for the filing of certificates.

However, it is submitted that, contrary to Williams J's view, the aforementioned Acts may be distinguished on the basis that the extension sought relates to the bringing of proceedings in circumstances where the court would otherwise be *functus officio*. Under the Amendment Act the relevant extension relates to the filing of the certificate which is a *procedural* matter ancillary to the substantive part of the Act. The court ordinarily has power to regulate procedural matters as distinct from matters of substance.¹⁵ In matters relating to procedure, the court invariably strives to prevent injustice by exercising its discretion.¹⁶

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11. IH Jacob 'The Inherent Jurisdiction of the Court' (1970) *Current Legal Problems* 23, 24.
 12. K Mason 'The Inherent Jurisdiction of the Court' (1983) 57 *Aust Law Journ* 449, 457.
 13. *Supra* n 10.
 14. *Mulligan v Diamond Sky* *supra* n 10, 7.
 15. *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 *CLR* 268; *Biala Pty Ltd & TS Holdings Pty Ltd v Mallina Holdings Limited* (1989) 2 *WAR* 381, 393, 398.
 16. See *Biala v Mallina Holdings* *supra* n 13; *Brown v Cocco* (1993) 10 *WAR* 391, 395; *Union Bank of Aust v Harrison, Jones & Devlin Ltd* (1910) 11 *CLR* 492, 504.

2. Mandatory and directory statutory procedures

More fundamental than the question of whether the court has an inherent power to extend time for the filing of certificates is the question of whether section 11(1) must be strictly adhered to in any event.

Many statutory procedures are capable of a 'directory interpretation' such that some degree of non-compliance with the statutory requirement is not seen as prejudicing the substantial carrying into effect of the Act's general object.¹⁷ In relation to the option of the employer or insurer to apply within 60 days for a declaration, there is authority on the one hand to say that the time limit is mandatory¹⁸ and on the other directory.¹⁹ Presently, there is no pronouncement from the District Court as to whether the requirement to file the certificate within 90 days is mandatory or directory, although arguably it is implicit in certain passages in the decision of Williams J in *Mulligan v Diamond Sky Pty Ltd*²⁰ that the requirement is mandatory. Further, Gunning J in *Da Silva v United Construction Pty Ltd*²¹ has decided that certificates must be served on every other party to the proceedings and has endorsed the views expressed by Williams J in *Mulligan v Diamond Sky Pty Ltd* regarding the interpretation of section 11 in light of section 17.²² The task is one of statutory interpretation to determine whether the legislature intended that a failure to comply with the stipulated requirement would necessarily invalidate the act done or whether the validity of the act might be preserved notwithstanding noncompliance.²³ Relevant to the inquiry is the language of the statutory provision, the scope and object of the whole statute and the effect of the failure to observe the statutory requirement²⁴ 'to determine whether what has *in fact occurred* nevertheless gives effect to the general object of the statute'.²⁵

The broad purpose of the Amendment Act 'is to allow some relief in relation to some causes of action, namely those defined as notifiable causes'.²⁶ The relief, in the context of an exception to the operation of section 93D(4), is tempered by the requirement to settle or to bring proceedings expeditiously, that is, within 90 days. The purpose of the certificate is evident from section 8: it is to give notice to the claimant 'to the effect that the cause is registered'. A copy of the certificate is not provided to the employer or insurer. Instead,

17. See *Victoria v Cth and Connor* (1975) 134 CLR 81, 179.

18. *WA Petroleum v Scott* supra n 10, 5.

19. *McGauley v Tiwest Pty Ltd* (unreported) District Court 1995 no 4281, 10.

20. Supra n 10.

21. (Unreported) District Court 1995 no 4496.

22. *Id.*, 5.

23. *Tasker v Fullwood* [1978] NSWLR 20, 23-24.

24. *Ibid.*

25. Supra n 17 (emphasis added).

26. *Purton v Qantas Airways Ltd* (unreported) District Court 1994 no 4264, 7.

the employer or insurer receives more detailed information.²⁷ In any event, the employer or insurer may obtain a copy of the certificate from the claimant in any informal negotiations or in negotiations made pursuant to section 9(1). Given the system of registration and notification from the Commission and the probable approach by the claimant for settlement, it seems unlikely that by the time proceedings are commenced by the claimant, the employer or insurer would be unaware that the proceedings are governed by the transitional provisions of the Amendment Act. It is therefore difficult to see the relevance, if any, of filing the certificate in the proceedings, as it is not the court which is required to do something under the transitional provisions, but the parties if they so choose. The failure to file the certificate would not appear to frustrate the object of the Amendment Act in facilitating the resolution of the claim by settlement or the expeditious commencement of proceedings.

A possible answer to this presumed intention of parliament is to be found in section 17. This section is headed 'Leave not required if certificate filed' and provides that section 93D(4) of the principal Act does not apply if the proceedings are commenced more than 90 days after the date of the certificate and 'when the proceedings are commenced the certificate is filed' (emphasis added). Section 17 has been interpreted in a relative and conjunctive setting to mean that, at the time the proceedings are commenced, the certificate must be filed.²⁸ However, that interpretation seems inconsistent with section 11(1)(b) which provides that a certificate may be filed in the proceedings at any time prior to the expiration of 90 days from the date of the certificate. The provisions of section 17 are also ambiguous in the sense that, while they refer to the certificate being filed, they are silent on the question of providing a copy of the certificate to every other party to the proceedings.²⁹ Given the difficulties with the section, the only sure purpose to be inferred from section 17 is 'an abundance of caution on the part of the draftsman. The draftsman may well have considered that without section 17 of the Amendment Act an affected person proceeding under section 11 of the Amendment Act would need leave under section 93D(4) to commence proceedings if there were no section 17'.³⁰

Section 17 operates to limit the effect of section 93D(4). The section is not clearly drafted so as to refer to section 11 or to require any compliance with it; however, without reference to both section 11 and those provisions relating to the issuing of the certificate, it is difficult to make any sense of it. In light of those provisions, there seems to be no compelling reason to insist

27. *Supra*, p 329.

28. *Mulligan v Diamond Sky* *supra* n 10, 8.

29. S 11(1)(b).

30. *Mulligan v Diamond Sky* *supra* n 10, 8.

that in all cases the certificate must be filed in the proceedings within 90 days — or filed at all.

CONCLUSION

The Minister for Health is reported to have been considering amendments to the Amendment Act earlier in 1995. However, an announcement has been issued that no such amendments will be made to the Amendment Act. Reasons cited for the decision were that the vast majority of claims would be resolved or were being resolved. It therefore appears that the meaning to be given to the Amendment Act will be clarified by the courts rather than by parliament. It seems unlikely in light of recent decisions that the District Court will find that the provisions of section 11(1) are directory. It remains to be seen whether the Supreme Court will share this view.
