

September 2010

At Coleman Greig, our experienced Commercial Litigation & Dispute Resolution Team understands that the most successful way to deal with a legal dispute is to avoid it arising in the first place!

In addition to the skills and expertise required to successfully represent clients in Court, our team is also available to provide advice and guidance on some of the ways in which you can “risk-proof” your business, or reduce the potential impact of a dispute. This latest legal update from the team will focus attention on a few issues that, if addressed early, could save your business considerable time and money in the future!

## Workers Compensation Claims 20 Years On - Surely Not!

Lessons your business can learn from a recent client issue

**By Caroline Hutchinson, Associate  
Team Leader, Litigation & Dispute Resolution**

It is a common misconception that workers must make a claim within three years of their injury and that present insurance will provide cover for the claim. Whilst this is the case for many claims, there are exceptions of which you should be aware - this can apply to any workplace.

A client recently contacted Coleman Greig regarding this issue. They were being sued by an old employee who left their business in around 1990. They were baffled - how could this be the case? Wasn't there some sort of limitation period that applied?

To make matters worse, the claimant was suffering from a terminal disease and action was immediately required. Who was their workers' compensation insurer back in 1990 or before? The concern was that they might have to foot the bill for the claim.

### Dust Diseases

For many years, I have acted in the Dust Diseases Tribunal (DDT). It is a unique jurisdiction, one which has its own rules, can require urgent attention and can be confusing. It is not uncommon for a business to be served with papers one day and for a claimant's evidence to be taken one or two days later. The DDT specifically deals with people suffering from “dust related conditions” including asbestos diseases such as the terminal cancer known as mesothelioma. It is a horrible disease and one which is generally well compensated.

Many of you would be aware of the names James Hardie and the campaigner, Bernie Banton, which are now synonymous with asbestos-related disease. Mr Banton himself died of mesothelioma. Unfortunately, it is a disease that has what is called a “latency period”, which means it can take up to 40 years for the symptoms to display themselves after exposure. Therefore, in the DDT, there is no limitation period on a claim - a person employed in the 1950's can make a claim now.

I can hear many of you thinking, ‘this couldn't involve us, our business didn't make asbestos products or supply them. We'll be right...’ well, unfortunately you could be wrong.

Many claims involve contractors who worked on different

sites over many years and your business can potentially be pulled into the litigation. It is possible that you could have had as little as an asbestos roof or shed or a boiler on site. So what do you do about it? How can you be prepared for such a claim?

Getting back to my client... Given the 20 years since the claimant was employed, managers had changed, many of the personnel had moved on or retired and documents had been destroyed. The company had only basic evidence of insurance and no paperwork to establish whether or not there was any asbestos on site. Without these documents or help from people "in the know" it became a very stressful period. Work had to be done to track down former employees, to work out insurance and determine the possibility of asbestos on site.

### **What should you do?**

So what lessons can you learn from such a situation?

1. Realise that claims can be made by persons employed or working on your site 20, 30 or 40 years ago, and that your business will be held financially responsible if you can't find insurance.
2. Realise that even if your business or company has changed names or hands, it still might be found liable.
3. Arrange for an employee list to be maintained with names, addresses, phone numbers and their position held.
4. Talk to your current employees and find out as much information from them as possible.

5. Keep records of insurance (old and new) and retain copies of policies.
6. Maintain a register of workers' compensation, contractors' liability and public liability insurers. Don't rely on your broker - the broker may no longer be in existence.
7. If you don't know who your insurer was in the past, start making enquiries now with your present insurer. They sometimes have details of previous policies.
8. Most importantly - don't destroy documents. Retain them - scan them - put them on your database - and let others in management know where they are.

### **And what was the result for my client?**

Without documents, they very prudently asked me to undertake searches and enquiries to ascertain the identity of their past insurers. Just as well, because as we embarked on this exercise another claim was received, this time from the 1970's. This tends to happen in the DDT.

Certainly on the next occasion, my client will be prepared and have the necessary information for insurance purposes.

If you have any concerns regarding the possibility of a claim being made against your business, contact Coleman Greig now for advice on how you can "risk-proof" your business and avoid lengthy litigation disputes - Phone 02 9635 6422 or email [chutchinson@colemangreig.com.au](mailto:chutchinson@colemangreig.com.au)