CITATION:	*Allianz Australia Insurance Limited (Nayda) v TIO* [2007] NTMC 058
PARTIES:	ALLIANZ AUSTRALIA INSURANCE LIMITED (re Shane Nayda) v TERRITORY INSURANCE OFFICE
TITLE OF COURT:	Work Health Court Darwin
JURISDICTION:	Work Health
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JUDGMENT OF:	Mr R J Wallace SM

CATCHWORDS:

Workers Compensation – *Work Health Act NT* s 126A – Contribution between approved insurers

Limitations of Action – *Work Health Act* s 126A – "the insurer's potential liability"

REPRESENTATION:

Counsel:

Applicant:	Mr Stephen Walsh QC
Respondent:	BG McManamey

Solicitors:

Applicant:	Cridlands
Respondent:	Morgan Buckley

Judgment category classification:	A
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IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20622570 *[2007] NTMC 058*

BETWEEN:

ALLIANZ AUSTRALIA INSURANCE LIMITED (Re Shane Nayda)

Applicant

AND:

TERRITORY INSURANCE OFFICE

Respondent

REASONS FOR DECISION

(Delivered 30 August 2007)

MR R J WALLACE SM:

I**ntroduction**

1. This action has grown out of another, *Shane Nayda v Newmont Diving Services Pty Ltd* (No 20529197), an action for compensation pursuant to the *Work Health Act* ("the Act"). Mr Nayda suffered a succession of injuries to his back while in the employ of Newmont, working as a diesel fitter in the mining industry. Mr Nayda is still relatively young: he was born on 9 June 1974. The cost of his worker's compensation is potentially large.

2. This action is brought by Allianz Australia Insurance Limited ("Allianz"), pursuant to s 126A(2) of the Act, against Territory Insurance Office ("TIO") and by it, Allianz, which was the approved insurer under the Act of Newmont from 1 July 1995 (after which date at least two of Mr Nayda's injuries occurred), claims to recover a contribution from TIO, which was

Newmont's approved insurer from March 1993 to 30 June 1995. One of Mr Nayda's injuries – the first, as far as I can tell - occurred during that period, on 3 October 1993.

3. TIO makes two answers to this claim. First, it says that as a matter of law, s 126A(2) provides no basis from which recovery of a contribution may be claimed by one insurer from another. The argument is that s 126A(2) permits only a claim for an indemnity. Secondly, TIO argues that Allianz failed to commence proceedings against TIO within the six month period prescribed in s 126A(2)(b) and that it ought not to be granted an extension of time.

Mr Nayda's Injuries

4. I believe that it may render more intelligible the following discussion of matters legal if I set out in a little more detail the salient features of the history of Mr Nayda's back troubles. I extract all this from the bundle of material admitted as Exhibit 1, which included some medical reports:

(i) "The 1993 injury" – Mr Nayda felt sudden back pain when lifting a heavy tub of dirt. He was off work completely for about one week as a result and on light duties for the fortnight after that, before resuming the full duties of his employment. Thereafter, he suffered intermittent back pain, controlled by non-prescription analgesics.

It is now a matter of controversy whether the 1993 injury was in truth only a soft tissue injury (as it was then diagnosed) or whether it involved more lasting damage to spinal structures.

(ii) "The 2000 injury" – Mr Nayda felt sudden low back pain while lifting packets of steel at work at the Granites Gold Mine on 25 May 2000. He went on to light duties for a few days until he got the chance to see Dr Pannell in Alice Springs on 2 June 2000. He was then off work

until 13 June 2000, when he was certified fit to return to his normal duties.

Again, the pain was, at the time, attributed to soft tissue "ligamentous/muscular injury of the lumbar spine" in Dr Pannell's report dated 6 August 2000 and no long term sequela was expected.

(iii) "The 2001 injury" – Mr Nayda felt a sharp pain in his lower back as he was lifting a spare wheel and tyre at work on 14 August 2001. As a result, he was either totally or if not totally, partially incapacitated for his normal duties until about July 2002. Thereafter, he was certified fit for restricted duties and returned to work.

5. He went on working at restricted duties until his employment was terminated on 31 August 2005.

6. Earlier in August 2005, the employer cancelled payments pursuant to the Act, which cancellation caused Mr Nayda to commence action number 20529197. That was set to be heard, together with this matter, but was resolved between the parties on terms acceptable both to Allianz and TIO.

Indemnity Or Contribution?

7. Section 126A of the Act reads:

> 126A. Liability as between approved insurers
>
> (1) Subject to subsection (2), where an employer is liable under this Act to pay compensation to a worker, the approved insurer of the employer at the time the claim is made shall indemnify the employer for the full amount of the employer's liability to the worker notwithstanding that the approved insurer may allege that, at the time the injury was sustained or the disease was caused, the liability to indemnify the employer (whether in whole or in part) was that of another approved insurer.
>
> (2) Where an approved insurer who has indemnified an employer for the employer's liability to pay compensation to a worker under this Act is aware that another approved insurer may be liable to indemnify the employer for all or a part of the compensation paid, the first-mentioned insurer –

(a) shall notify the other insurer as soon as practicable after becoming aware of the insurer's potential liability; and

(b) may, within 6 months after becoming aware of the other insurer's potential liability or such longer period as the Court may allow –

(i) commence proceedings under Division 4 of Part VI to recover from the other insurer all or a part of the compensation paid; or

(ii) where other proceedings in respect of the claim for compensation have been commenced under that Division, join the other insurer as a party to those proceedings.

(3) Where an approved insurer has indemnified an employer for the employer's liability to pay compensation to a worker under this Act and it is subsequently established that another approved insurer was liable to indemnify that employer in whole or in part, that other insurer shall reimburse the first-mentioned insurer such amount or amounts –

(a) as agreed between the 2 insurers; or

(b) in the absence of such agreement, as the Court determines.

(4) In this section, "approved insurer" includes –

(a) a self-insurer; and

(b) the Territory.

8. It was inserted into the Act as s 22 of Act No 78 of 1993, the *Work Health Amendment Act (No 2) 1993* and came into force on 1 January 1994. Until s 126A was brought into existence, the Act appears to have been silent as to the question of liability of successive approved insurers of an unlucky worker, like Mr Nayda, off work on more than one occasion as the result of a series of injuries at work, injuries which may be casually related to one another.

The Common Law Position

9. Workers compensation law has always been based upon statute, so it is something of a misnomer to refer to old case law as “common law”, even when the time of case law so described goes back almost to the time of the first statutes. For a party hoping to rely on such a line of case law “common law” has a more attractive ring than “old”, not to say “antiquated”.

10. Mr Walsh, counsel for TIO, traces his line of authority to *Noden v Galloways Limited* [1912] 1 KB 46 in which Cozens-Hardy MR (at p 49) and Fletcher Moulton LJ (at p 52) held, to quote the former, that:

> "once it is shown that the man having the disability occasioned by the 1902 accident met with another accident in 1910, it is the second employer who is liable and who alone is liable and it is not relevant to say that the 1902 accident was a contributing cause".

11. The third member of the Court of Appeal, Farwell LJ, agreed with both. The weight of their judgements seems not to have been diminished by their being, on this point, obiter dicta (in that their Lordships were of the view on the fact that there was no casual link between the 1902 accident and the 1910 injury).

12. The Master of the Rolls came to the conclusion above after observing (at p 49):

> "'The accident is laid [ie, the cause of action pleaded] as arising in 1902. The question is whether that accident is a contributing cause to the incapacity which has come on at different times'. Now the learned deputy county court judge lays that down as the proposition of law with which he has to deal. It seems to me to be a proposition most dangerous and I think inaccurate. Suppose there had been not the same employer in 1910 as there was in 1902 and suppose there was an admitted accident occurring in 1910 in circumstances which rendered that accident much more probable because the new employer knew that the man was, to some extent, disabled by the accident of 1902, can it reasonably be suggested that the workman would have been entitled to say that the 1902 accident was contributory to the incapacity resulting from the 1910 accident and that he could proceed against the 1902 employer and leave the 1910 employer untouched? Or could he proceed against both?"

13. What would be "dangerous", is, I think, that such a course could subvert the policy consideration, that the legislative requirement for the payment by employers of workers compensation ought to lead employers to provide safer work places generally and to guard against putting into particular employments, workers particularly likely to be injured in the course of such

employment by reason of a pre-existing incapacity or handicap. That policy argument remains valid today, despite huge changes to the legal landscape bearing on such matters; changes, ranging from the introduction of anti discrimination law (which is of no relevance to the present case), to the emergence into the light of day - indeed, into statutory recognition - of insurers against employers' liability, which change is obviously central to the present case, the existence of and liability of insurers being the subject matter of s 126A.

14. The Master of the Rolls may equally have thought it "dangerous" to expose a former employer to a share of the liability created by the negligence or complacency of a later employer, although "dangerous" is not the obvious word to apply to this outcome. It would be more natural to describe it as "unjust" or "unfair" and when put in those terms, it seems to me that the later employer may equally argue it to the unjust and unfair that it be lumbered with the entire cost of compensating a worker for an incapacity only part of which has arisen in consequence of the injury sustained when in the employ of that later employer.

15. Thoughts about the equities of the situation are more complicated when the parties left to pay the bills are not employers but approved insurers. Approved insurers are integral to the scheme of the Act. The terms of policies of insurance are part of the Act (in Schedule 2) and the Act permits virtually no departure from those terms (see s 126 (4)). The parties to the policy are free to negotiate only the premium and the period of cover. The insurer is certainly on risk in respect of injuries incurred in that period, but in the absence of clear legislative provision or well established case law, may think its liability is limited to the period specified in the policy.

16. As the law now stands it is in any event not clear what these dicta in *Noden v Galloways Limited* still possess in the way of authority. In *Accident Compensation Commission and Others v CE Heath Underwriting &*

Insurance (Australia) Pty Ltd and Others (1994) 121 ALR 417, Brennan J (with whom the other four judges of the High Court agreed) said at p421:

> "Liability to make weekly payments or to pay a lump sum is imposed on any employer liable in respect of any injury which caused or materially contributed to the incapacity. In *Bushby v Morris* the Privy Council said in reference to the New South Wales Workers' Compensation Act 1926:
>
> 'It is well established in common law contexts that an injury or incapacity may be attributable to more than one cause, in the legal sense, operating concurrently … There is no room for an artificial rule of law that, in such a situation, one or other accident must necessarily be selected as the cause of the incapacity, apparently on an entirely arbitrary or capricious basis.'.
>
> And in *Australian Eagle Insurance Co Ltd v Federation Insurance Ltd*, King J said in reference to the South Australian Workmen's Compensation Act 1971:
>
> 'If the incapacity results in a true sense from more than one accident, a workman must be entitled to claim compensation in respect of all or any of the relevant accidents. If the accidents occur in the employment of different employers, he must be entitled to claim compensation against each employer. If the accidents occur in the employment of the same employer, he is nevertheless entitled to base his claim upon all or any of the accidents.'
>
> Similarly, liability under the Act to make weekly payments during incapacity or to pay a lump sum in redemption of that liability arises from each of the injuries which caused or materially contributed to the incapacity. Any employment in the course of which the worker sustained an injury causing or materially contributing to his incapacity attracts liability to the employer and to the insurer on risk at the time of the injury, whether the employment be the last in the course of which an injury was sustained or some earlier employment".

17. In a footnote on that page, dependent from "at the time of the injury" in the paragraph last quoted, His Honour noted with apparent want of approval:

> *"Manufacturers Mutual Insurance Ltd v National Employers' Mutual General Insurance Association Ltd* (1991) 6 ANZ Ins Cas at 76,965 per Priestley JA. Samuels JA seems to take a different view which is

inconsistent with *Bushby v Morris* and *Australian Eagle Insurance Co Ltd v Federation Insurance Ltd"*

18. And in *Bushby v Morris* [1980] 1 NSW LR 81, Lord Keith of Kinkell delivering the opinion of the Privy Council, said, at p 86:

> "*Noden v Galloways Ltd* (8) was considered in a number of subsequent cases in the Court of Appeal. There are *Roberts v Broughton & Plas Power Collliery Co Ltd* (9); *Hutchinson v Kiveton Park Colliery Co Ltd* (6) and *Hutchings v Devon County Council* (5). These were all two-accident cases. Each of them was decided on the basis that there was evidence to support the finding made by the trial judge, viz, in the first and second cases that the incapacity relied on had not resulted from the first accident and in the third case that it had so resulted. In none of them was it necessary either to approve or disapprove of the statements of law contained in *Noden*'s case (8), but it does not appear to their Lordships that in any of them were these statements treated with particular enthusiasm".

And at p 87:

> "Their Lordships are of opinion that *Noden v Galloways Ltd* (8) is not properly to be understood as laying down any rule of law such as is contended for by the appellants. They consider that by their use of the expression "contribution cause" in that case Cozens-Hardy MR (8a) and Fletcher Moulton LJ (8b) were referring to the concept which is commonly described as "causa sine qua non", such as is referred to in the concluding sentence of the judgment of Taylor J (2b) quoted above. It is only upon this view that these two able and experienced judges can reasonably be regarded as having been able to perceive any question of law at all arising upon the facts of the case. The deputy county court judge was seen as having directed himself that a mere predisposing cause of the incapacity was sufficient in law to found a claim to compensation. The Court of Appeal were concerned to make clear that this was erroneous, but they went on to observe that the 1902 accident could not, on the evidence, properly be held to have any causal connection whatever with the incapacity. If, contrary to their Lordships' understanding of the judgments in the case, the Court of Appeal intended to lay down any wider rule, they fell into error, and the judgments should not be followed".

19. There are lines of authority based originally on, among other things, a view of *Noden v Galloways Limited* that differs from the view of the Privy

Council and the High Court of Australia. The at least partial eclipse of *Noden v Galloways Limited* by those binding authorities need not, as a matter of logic, bring to an end those lines of authority, which, having taken on a life of their own, may survive the culling of a parent. Such, perhaps is the situation of the cases from New South Wales which I will touch on briefly below.

20. As to local case law, I am aware of only one Supreme Court decision touching on s 126A, the judgement of Kearney J in *HIH Casualty and General Insurance Limited v TIO* (1998) 120 NTR 24. That case, like this one, was between two approved insurers. It went on appeal to Kearney J after the Work Health Court refused to extend the time to commence proceedings pursuant to s 126A(2)(b) [which question also has its parallel in this matter]. The question whether s 126A created rights to apportionment and contribution between insurers was touched on incidentally, in that the appellant, HIH, needed to persuade the Court that it had an arguable case to warrant the grant of an extension of time.

21. As I read that decision, Kearney J did not in any considered way express an opinion on the question whether the Act permitted apportionment between insurers. Rather, His Honour was persuaded that Mr Southwood, counsel for the Appellant, HIH, had successfully argued that there was an arguable case according to the most difficult of the standards set by Mr Southwood himself, on the assumption that s 126A of the Act established essentially the same requirements and outcomes as the New South Wales legislation did at the time of the decision of *Manufacturers' Mutual Insurance Ltd and Others v National Employers' Mutual General Insurance Association Ltd and Others* (1990) 6 AN2 Ins Cases 61-038 ("the *MMI case*").

Thus, at p 46 of the report, Kearney J writes:

> …there was a sound basis for the appellant's claim for contribution: that is, that the worker's incapacity in 1993 was arguably wholly

attributable to the injury of 1989. I accept Mr Southwood's submission to that effect".

22. Obviously, Mr Lindsay, counsel for the respondent in that case (TIO), had no interest in arguing that the standard was any lower than the high, *MMI case* standard that Mr Southwood had set himself to meet and Kearney J, being satisfied that there was an arguable case by that standard, had no need to consider whether a lower standard would suffice.

23. I therefore do not regard the HIH case as deciding the question. If I am right about that, there is no case law regarding the effect of s 126A of the Act.

24. It appears to me that there are arguments of policy and equity which cut both ways and which accordingly, provide no sound basis to decide what the legislature may have had in mind. In favour of the total liability remaining with the later insurer is the idea that it would be unfair that an earlier insurer have its liability as it were revived in relation to an injury (the second injury) which occurred at a time when that insurer was not on risk and had receive no recompense by way of premium paid. See, for example, the remarks of Samuels and Priestley JJA in the *MMI case*. The apparent unfairness is perhaps not all that gross. After all, in the case of a relapse by an injured worker (as apposed to a re-injury) outside the period when the insurer is on risk, I don't think there is any doubt the insurer will have to foot the bill. In favour of splitting the liability in proportion to the causation of the incapacity, are the arguments advanced by King CJ in *Australian Eagle Insurance Company Limited v Federation Insurance Limited* (1976) 15 SASR 282, a case in which the contrary principle would have left the second insurer wholly responsible for an incapacity only 10 per cent of which resulted from the injury that occurred while that insurer was on risk, while the first insurer, during the course of the coverage of which an injury occurred causing 90 percent of the eventual incapacity, would escape without any contribution at all. Such an outcome could cause

insurers to penalise employers who take on workers known to be more fragile than others, on account of the after effects of injuries from which they have received, but to the recurrence to which they are vulnerable – an outcome quite contrary to the overall purpose and direction of the Act which was to erect a scheme directed at returning workers to work.

25. In his Second Reading Speech introducing the Bill which contained the clause that was to become s 126A, Mr Manzie, the responsible Minister, said (Hansard 18/8/93 at p 8984):

> "There are 2 other significant changes to the court's powers. The first is giving the Work Health Court power to handle disputes between insurers where an attempt may have been made to transfer liability to a previous insurer. The bill makes it clear also that liability will rest with the current insurer until such time as the matter is resolved either between the insurers or by the court …"

26. It is clear that the Minister there was contemplating that the provision he was introducing would entail the Work Health Court having to decide disputes between successive insurers. However, when Mr Manzie spoke of " … an attempt … to transfer liability …" it is, in my opinion, entirely unclear whether he was speaking of the whole of, or a share of, that liability. (Nor, for that matter, is the point any clearer in the remarks of the Opposition spokesman, Mr Parish on p 10, 200 21/10/93, quoted in Mr Walsh's written submissions for the TIO in this case, even if it were proper to draw on those remarks for the purpose of aiding interpretation , which I doubt). Accordingly, as is often the case, the Second Reading speech does not assist me in the task of interpretation.

27. For different reasons, the case law from other jurisdictions is not very helpful either. Far and away the most elaborated is that of New South Wales. The rather woeful history of legislative amendment and judicial interpretation is sketched in the judgments of Kirby P (as he then was), (dissenting) and of Handley JA in *Insurers Guarantee Fund v GIO* (1993) 33 NSW LR 247 at 253-255 and 262-266 respectively.

28. The history of interaction between amendment and interpretation in New South Wales has no parallel in the Northern Territory. It seems to me that the judgements of the majority (Meagher and Handley JJA) cannot be understood independently of that history: that, for example, when Meagher JA writes (on p 261):

> "Apportionment of liability is a different concept from seeking contribution toward the payment of a liability. 'Contribution' is not mentioned in s 22".

29. His Honour is not, or is not merely, speaking ex cathedra to an unenlightened legislature, but is noting that the legislature has failed to address matters raised by the courts in relation to previous legislative forays into the same region and that their failure therefore ought to be interpreted as wilful and deliberate.

30. It is also apparent from this decision that the legislation in New South Wales never resembled s 126A of the Act at all closely. For these two reasons, I was unable to derive any real assistance from that line of authority.

31. Section 126A(1) speaks of a situation in which "the approved insurer may allege … *the liability to indemnify the employer (whether in whole or in part)* was that of another improved insurer" [my emphasis]. There seems to me to be two ways of giving that provision meaning. First, that the legislature is intending to permit the splitting of liability into parts; second, that the provision is limited to these cases in which the worker's incapacity may be caused by a combination of two distinct injuries, eg, to an eye, during the time the former insurer was on risk and a toe, during the time on risk of the later insurer. Such cases are rare, but not unknown, whereas cases of successive injuries of the same sort – to the spine, knee, shoulder or mind - are common. I cannot bring myself to believe that s 126A was intended to cater only to the rare case: in my judgment it was intended to permit liability in such a case as this to be split and that Allianz may, in the

circumstances of this case, allege that the liability was in whole or in part that of TIO.

The Question of Notice

32. The history of the matter relevant to questions raised by subsection 126A(2) is contained in the affirmation of Allison Margaret Robertson affirmed 6 March 2007 and the annexures thereto which is in the bundle Exhibit 1. Nothing seems to arise from the 2000 injury. Concerning the 2001 injury, the affirmation says:

> "4. On 14 August 2001 Nayda suffered injury in the course of his employment, and on 17 August 2001 he lodged a claim form for Work Health benefits. Annexed hereto and marked "AMR1" is a copy of the worker's claim form.
>
> 5. On 30 August 2001, Allianz, on behalf of Newmont Mining Services, accepted the claim and commenced payments to and on behalf of the worker.
>
> 6. Allianz made weekly compensation reimbursement payments to the employer in respect of the worker's incapacity for work in the period 15 November 2001 to 30 May 2002 inclusive. Annexed hereto and marked "AMR2" is a true copy of a schedule of weekly compensation payments made by Allianz.
>
> 7. On 3 June 2002, Allianz received a report of Dr John Bastian, who had examined the worker on behalf of the employer. At the time of Dr Bastian's examination, the worker was undergoing a graduated return to work program with the employer. Annexed hereto and marked "AMR3" is a true copy of the report of Dr Bastian dated 3 June 2002".

33. The report of Dr Bastian of 3 June 2002 includes these statements:

> (i) "Mr Nayda was a 27 year old chap who presented with ongoing back problems stemming back to 1993 (p 1);

(ii) "In around 1993, Mr Nayda stated that he was lifting a fish tub full of dirt weighing 80kg. He reported experiencing the sudden onset of back pain. He was deemed unfit for work for around one week. He returned to work and though his back did stabilise, he continued to experience intermittent ongoing back pain (p 2)";

(iii) "He denied any back injuries prior to 1993 (p 3)";

(iv) "However, it is my opinion, Mr Nayda's presentation is consistent with an aggravation of an ongoing back condition which stems back to 1993, as detailed in the body of the report. In my opinion the aggravation has resulted in a deterioration of his back condition and capacity for work which is permanent. Prior to the incident in question (ie, the 2001 injury), Mr Nayda was performing his normal duties, despite ongoing low back pain. In my opinion there has been an increase in 'pathology' (p8)".

34. Mr Walsh, for TIO, submitted that this report, in the hands of Allianz, gave Allianz sufficient information for it to realise that another approved insurer may be liable to indemnify the employer for all or a part of the compensation paid. I accept that submission. Dr Bastian's report could hardly be clearer in indicating to the incapacity following the 2001 injury. The report describes how the injury occurred (making it clear enough that it was a work related injury), that its effects persisted and that in Dr Bastian's opinion, the 2001 injury was an aggravation of the 1993 injury and not a distinct new injury.

35. Mr McManamey, counsel for Allianz, submitted that the report of Dr Bastian did not give Allianz "reasonable ground for supposing that there is a claim for contribution". (I quote from his written outline of submission, paragraph 3.) I accept that submission also, but I do not believe it is to the

point. The obligation that s 126A(2) uses the words "… another approved insurer may …" and speaks in s 126A(2) (a) and (b) of the other insurers' "potential liability". It seems to me that the legislature is not requiring the later insurer to be very sure at all of the earlier insurer's liability. In my opinion, the information in Dr Bastian's report should have alerted Allianz to the possibility that the 1993 insurer – TIO as it turned out - might well be at least partly liable. This is, in my judgement, the order of belief that the legislature had in mind when it used the word "potential": more, that is than an inkling, but a long way short of a comfortable confidence.

36. In my view, Allianz ought to have notified TIO as soon as practicable after receiving Dr Bastian's report. Allianz, as Ms Robertson's affirmation discloses, did nothing of the sort. The affirmation offers no explanation for their having done nothing and it is, I think, unsafe to infer any particular reason. Perhaps those at Allianz who read the report missed the significance of Dr Bastian's references to the 1993 injury. Perhaps they mistakenly believed Allianz was the insurer then too. Perhaps they were optimistic that Mr Nayda's return to work would be long lasting. Perhaps they were of the belief that the law did not permit contribution. At any rate, TIO received no notice.

37. For whatever reason then, Allianz did nothing at that time. Nor, of course, did it commence proceedings against TIO within the six months spoken of in s 126A(a)(b). According to Ms Robertson's affirmation, nothing significant happened until May 2005 when Allianz had Mr Nayda examined by Dr Nicholas Burke. The upshot of that examination was that Allianz came on 19 August 2005 to serve a Form 5 on Mr Nayda, who was made redundant by Newmont on 31 August 2005. Ms Robertson's affirmation goes on to say in paragraph 14:

> "On or about 23 September 2005, Allianz received a supplementary report of Dr Burke, in which Dr Burke attributes 80% of responsibility for the worker's condition and symptoms to 1993 event

> and 20% to the 2001 event. Annexed hereto and marked "AMR7" is a true copy of the supplementary report of Dr Nicholas Burke dated 23 September 2005".

38. On 5 September 2005, Mr Nayda had given NT Work Safe notice of a dispute and Cridlands were instructed by Allianz on 24 October 2005. On 4 November 2005, Ms Robertson gave TIO notice pursuant to s 126A, on instructions from Allianz. If the supplementary report by Dr Burke were the first notice Allianz had had of TIO's possible liability to contribution, then I think I would accept that notice on or about 4 November would be just about within the bounds of "as soon as practicable".

39. Ms Robertson goes on to describe an exchange of correspondence between herself and TIO in November 2005, after which there is a lull in the action until 7 April 2006, when Mr Nayda filed his Statement of Claim.

40. This seems to have spurred Allianz into action on two fronts: they had Mr Nayda examined again, this time by Dr Graham, and, Dr Graham's report and a supplementary report on contribution issues having been received on 2 June 2006, Ms Robertson wrote to TIO claiming contribution from TIO of 53.75 percent. On or about 15 June 2006, TIO replied requesting that Allianz not file proceedings against TIO without notice to it. I do not understand TIO to be arguing that any time that ran after this letter should be counted against Allianz by me. In any event, after further exchanges, the proceedings, pursuant to s 126A were formally commenced on 15 August 2006.

41. Taking 15 June 2006 as the last relevant date, a little less than 9 months had passed since the receipt by Allianz of Dr Burke's supplementary report or 13 months since their receipt of Dr Burke's original report. (That original report is not before me and I cannot say whether it could be argued as a basis for awareness on the part of Allianz of TIO's potential liability. Paragraph 11 of Ms Robertson's affirmation suggests that its contents were,

in that regard, more or less like those of Dr Bastian's report; but since I cannot know how much more or less, I disregard that date).

42. If 23 September 2005 were the starting date, then it would seem to me that the discretion of the Court to allow a longer period than 6 months for the commencement of proceedings, should be exercised in favour of Allianz. I do not mean to imply that any extra time in general or three months in particular are of no account. However, in this particular case, it is very difficult to point to even a theoretical prejudice that TIO could suffer by that length of delay in mid-2006. I suppose that, served a little earlier, it could have begun to make provision for a potential pay-out a little earlier too, but apart from this, I can think of nothing. It is difficult to point to prejudice precisely because the accident which gave rise to Allianz's liability and thus to Allianz's claim on TIO for contribution, had occurred so long before, in 2001. Two or three months' delay close to that date might well create irremediable prejudice by, for example, denying the earlier insurer an opportunity to investigate the injury, or the circumstances of the accident, for that matter. As I have already said, I would regard the giving of notice to TIO on 4 November, after Allianz had been in possession of Dr Burke's supplementary report for about 6 weeks, as being just within the bounds of "as soon as practicable". If I am wrong about that, it surely is not far outside of them. In *HIH v TIO*, Kearney J seems to hold that failure to comply with s 126A(2)(a) is a factor to be considered by the court when deciding to extend time pursuant to s 126A(2)(b). On the facts of this particular case, on that starting date, I am of the view that it would not be a powerful factor.

43. But for the reasons given above, I am of the view that the starting date is the date of Dr Bastian's report, 3 June 2002. There is, as I have noted above, no explanation of Allianz's failure to act under s 126A after receiving this report. A court being asked to extend time ought to have some explanation of the delay placed before it by the party seeking the extension. In the

absence of any explanation why the party did nothing, it is difficult to argue or find that it would be unjust to that party for the court to do nothing, ie decline to permit an extension of time.

44. Furthermore and quite independently and more importantly, it is a great deal easier to imagine that substantial prejudice of various kinds could result to TIO over the period of three years or so, from 3 June 2002 to 2 June 2005 (when TIO finally got notice of the 2001 injury) or to 7 April 2006. For one thing, although I cannot say whether TIO's opportunity to investigate the medical questions about the aetiology of Mr Nayda's overall injury would have been substantially better in 2002 than in 2005, they can't have been any worse. For another, had TIO been on notice or served with an application for contribution, it might have hoped to have some input into the management of Mr Nayda's injury and work. Having been kept in the dark throughout the last years of Mr Nayda's employment at Newmont. TIO was, in 2005, presented with faits accomplis: Newmont's Form 5 and Mr Nayda's termination, among other things. For a third, given the potential size of this claim, mentioned early in these reasons, the opportunity for TIO to make provision over a few years (as opposed to a few months) is something TIO might have liked to have had. In my judgement, these factors are sufficient reason not to allow a longer period for the commencement of proceedings.

45. Quite apart from these considerations, I think I can, in the context of this case, grasp why it may have been that the legislature fixed the comparatively short period of six months in s 126A(2). The matter that was listed to be heard before me on 7 March 2007 was not merely the dispute between Allianz and TIO, but also the action between Mr Nayda and Newmont. This action was settled between the parties, as far as I know on the morning of the first day listed for the hearing, with Allianz and TIO, I was told, both approving the settlement and agreeing between themselves as to the proportion each was to contribute, supposing (a) that contribution

could legally be ordered and (b) that Allianz would be granted leave to extend time to apply for contribution from TIO.

46. Whether the existence of the dispute between TIO and Allianz delayed the resolution of the dispute between Mr Nayda and Newmont is not something I can be sure of, although it seems quite likely. Certainly the s 126A complication could not speed up that resolution. If notice is not given as soon as practicable from one insurer to another and if proceedings are not commenced within six months by one insurer against another, then the resolution of the worker's primary claim may, in practice, be delayed by the complications of what is in effect a sort of third party claim being run alongside it. The Act is beneficial legislation aimed at putting compensation in the hands of deserving workers without unnecessary delays. In my view, the six months prescribed in s 126A(2)(b) should be taken at least as strictly as ordinary limitations on actions, and sometimes more so. Insurance companies ought to be able to conduct their business to fit within that limit, or not far outside it at worst.

47. The application for leave nunc pro tunc to commence proceedings is refused.

48. I will hear the parties as to costs.

Dated this 30th day of August 2007.

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R J Wallace
STIPENDIARY MAGISTRATE