

HIGH COURT OF AUSTRALIA
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THE REGISTRY ADELAIDE

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No A5 of 2011

10 BETWEEN:

PETER NICHOLAS MOLONEY t/a
MOLONEY & PARTNERS

Appellant

and

WORKERS COMPENSATION TRIBUNAL

First Respondent

20

and

ATTORNEY-GENERAL FOR THE STATE OF
SOUTH AUSTRALIA

Second Respondent

30

APPELLANT'S WRITTEN SUBMISSION AND CHRONOLOGY

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Part 1– SUITABILITY FOR PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

Part II– ISSUES

The general issue

2. The general issue is whether or not Rule 31(2) of the Workers Compensation Tribunal Rules 2009 made by the President of the Workers' Compensation Tribunal ("the Tribunal"), which restricts the common law rights arising out of the contractual relationship between workers and their representatives, is within the rule-making power contained in section 88E of the Workers Rehabilitation and Compensation Act, 1986 as amended ("the Act").

The particular issues

3. What is the proper interpretation of the rule-making power, section 88E? In particular:
 - 3.1. What power is granted by section 88E (1) (f)? In particular:
 - 3.1.1. Does the word "costs" mean solicitor-client costs as well as party-party costs?¹
 - 3.1.2. If "costs" includes solicitor-client costs:
 - 3.1.2.1. Does the power include, prima facie, a power to make a rule restricting the right of a worker's representative to charge or seek to recover solicitor-client costs?
 - 3.1.2.2. If so, is that power circumscribed by section 88G? In particular:
 - 3.1.2.2.1. What is the subject matter of the section 88G power? Is it the power to make subordinate legislation restricting the right of a party's representative to charge or seek to recover solicitor-client costs or is it simply the power to fix a maximum that a party may charge and recover solicitor-client costs?

¹ In this summary, "solicitor-client costs" means the costs which the representative of a party in relation to proceedings under the Act is entitled to charge and recover from that party and "party-party cost" means the costs to which one party to proceedings under the Act may be entitled as against another party or which one party may be ordered to pay to another ("party-party costs"). The term "solicitor-client costs" will be used for the sake of convenience even though the Act does not limit representation of workers to legal practitioners. The Act provides that a person (including a worker) is entitled to appear by representative in conciliation proceedings or other proceedings before the Tribunal: section 85B (1). The Act contemplates representation of a worker by a legal practitioner and by an officer or employee of an industrial association: section 95 (2) (a). "Industrial association" is defined in section 3. The Act also refers to a "professional representative", defined as legal practitioner or other person who has been engaged or appointed to represent "a party" to proceedings (that is, any party, not necessarily a worker) whether personally or through an employee or agent: section 95A (1).

3.1.2.2.2. If the former, does the Act give only one power to make subordinate legislation restricting the right of a party's representative to charge or seek to recover solicitor-client costs, namely section 88G?

3.1.2.3. What is the extent of the power in section 88E (1) (f) to make rules regulating solicitor-client costs?

3.2. What power is granted by section 88E (1) (c)? In particular:

3.2.1. Is whatever power that is granted by section 88E (1) (c) to make rules regulating costs circumscribed by section 88E (1) (f): i.e. is section 88E (1) (f) intended to be the only source of a power to make rules regulating costs?

3.2.2. If not, does the power to make rules "*regulating practice and procedure*" include, prima facie, a power to make a rule restricting the right of a party's representative to charge or seek to recover solicitor-client costs?

3.2.3. If so:

3.2.3.1. Is that power circumscribed by section 88G?

3.2.3.2. What is the extent of that power?

3.3. What power is granted by section 88E (1) (g)? In particular:

3.3.1. Is whatever power that is granted by section 88E (1) (g) to make rules regulating costs circumscribed by section 88E (1) (f)?

3.3.2. If not, does the power to make rules "*dealing with any other matter necessary or expedient for the effective and efficient operation of the Tribunal*" include a power to make a rule restricting the right of a party's representative to charge or seek to recover solicitor-client costs?

3.3.3. If so:

3.3.3.1. Is that power circumscribed by section 88G?

3.3.3.2. What is the extent of that power?

4. The proper interpretation of Rule 31 (2) and its effect on the common law rights of workers' representatives arising out of their contractual arrangements with workers and in particular:

4.1. What were those rights when Rule 31 (2) was made? Did they include the right to claim and enforce either a general or a particular lien in respect of outstanding solicitor-client costs? Is *Scammell v Work Cover Corporation* [2006] 95 SASR 278; [2006] SASC 258 correct in holding that the Act did away with the general lien?

4.2. How does Rule 31 (2) restrict these common law rights?

5. Is Rule 31 (2) a valid exercise of the rule-making power or powers conferred by section 88E? In particular:

- 5.1. Is Rule 31(2) within the power granted by section 88E (1) (f), (c) and/or (g)?
- 5.2. If the general subject matter of Rule 31 (2) is, prima facie, within one or more of the rule-making powers, is Rule 31(2) a reasonably proportionate exercise of such power?

Part III- SECTION 78B OF THE JUDICIARY ACT

6. Consideration has been given to the question whether notice pursuant to s.78B Judiciary Act, 1903 (CTH) should be given with the conclusion that this is not necessary.

Part IV- CITATIONS

- 10 7. The South Australian Full Court judgment is reported at (2010) 108 SASR 1; [2010] SASCFC 17.

Part IV- FACTS

8. The material facts are set out in the Statement of Facts and Question of Law referred to the Full Court of the Supreme Court.

Part VI- ARGUMENT

The general approach to validity

- 20 9. The task facing the court is to determine (1) the meaning of the words used in the statute to describe the rules which the President is authorised to make, that is to determine the true nature and purpose of the rule-making power; (2) the meaning of Rule 31 (2) itself; and (3) whether Rule 31 (2) complies with that description.²

The errors of the Full Court

10. It is submitted that Doyle CJ, with whom Anderson J agreed, erred in finding that:
 - 10.1. The "*starting point*" was that the ordinary meaning of "costs" in section 88E (1) (f) includes solicitor-client costs and that section 88E (1) (f) should be construed as conferring power to make rules regulating not only party-party costs, but also a solicitor-client costs: [4] - [5], including the power to make a rule such as Rule 31 (2) limiting the entitlement of a solicitor to exercise contractual rights to remuneration and claim remedies in support of those rights such as a lien: [18]; and having started from that point, posing the question whether section 88G limited the section 88E (1) (f) power either in scope or operation: [7].

² See *McEldowney v Forde* [1971] AC 632 at 658 per Lord Diplock cited with approval by King CJ in *Taylor v Guilla* (1992) 59 SASR 361 at 365; *South Australia v Tanner* (1989) 166 CLR 161. *Williams v. Melbourne Corporation* (1933) 49 CLR 142, at p 155.

- 10.2. The section 88G power is limited to making a regulation fixing by a scale the maximum amount allowable to a representative: [8], [16]; and is not a power to regulate in general terms the mutual rights and entitlements of a party and its representative as to costs: [9] and that, therefore, there is no general inconsistency or direct conflict between the two powers: [10], [17].
- 10.3. Rule 31 (2) is not invalid because it is consistent with the section 88G power so construed in that Rule 31 (2) does not limit the amount recoverable by the representative, but merely it establishes a procedure by which a representative may claim additional costs and have that claim adjudicated: [12], [16].

10 11. It is submitted that Layton J erred in finding that:

- 11.1. The legislative history from 1900 showed a clear legislative intention to control, one way or another, the common law right of a solicitor to contract with workers and recover costs, including by claiming a lien and that this history supported the interpretation of section 88E (1) (f) as including a power to regulate solicitor-client costs and as authorising Rule 31(2): [30], [49], [74].
- 11.2. The word “costs” in section 88E (1) (f) is broad and the section 88E (1) (f) power should not be read down by implication to refer only to party-party costs: [58].
- 11.3. The power given in section 88E (1) (f) to regulate costs implies the power to regulate both the circumstances in which costs may be payable and the amount of those costs, apparently applying *Jacobs v OneSteel Manufacturing Pty Ltd* (2006) 93 SASR 568 at [38] per Debelle J: [76].
- 11.4. Section 88E (1) (f) is not inconsistent with section 88G because, inter alia, the subject matter of section 88G is “*solicitor-client costs which can be charged and recovered*” and section 88G is not exhaustive on that subject matter because it says nothing about the circumstances by which such costs can be recovered and the process of recovery: [66] – [68]; and Rule 31 (2) does not provide for a scale of costs: [70].
- 11.5. Rule 31(2) deals with costs and is therefore prima facie within the rule-making power in section 88E (1) (f): [70].
- 11.6. Rule 31 (2) is reasonably proportional to the rule-making power because it is only a qualified limitation on a representative’s common law rights because it says nothing about the right to charge costs and it does not bar a right to sue for costs or a lien or deduction of costs from compensation moneys so long as those additional costs have been awarded by the Tribunal in a proper judicial process: [72].

The appellant’s central propositions

12. The appellant’s central propositions are that:

- 12.1. The only relevant rule-making power is section 88E (1) (f), either because it was intended to be the only power to make rules regulating costs, or because (c) and

(g) are no broader than (f) and if the Rule is not authorised by (f), it could not be authorised by (c) or (g).

12.2. The word "costs" in section 88E (1) (f) means party-party costs and does not include solicitor-client costs and therefore section 88E (1) (f) does not authorise Rule 31 (2). The Full Court was in error in finding that "costs" included solicitor-client costs.

12.3. In the alternative, if "costs" includes solicitor-client costs, it means only certain types of solicitor-client costs, namely:

12.3.1. Those solicitor-client costs allowable under a scale fixed by regulation pursuant to section 88G. The power to make rules regulating such solicitor-client costs is conditional (in the jurisdictional sense) upon the making of a regulation fixing such a scale, and since no such regulation has been made, there is no power to make any rule regulating such solicitor-client costs and, in any event, Rule 31 (2) does not deal with them and is therefore beyond power.

12.3.2. Those solicitor-client costs which may be the subject of an order pursuant to section 95A (3) (a). Since Rule 31 (2) does not deal with such costs and it is beyond power.

12.4. If "costs" includes solicitor-client costs generally, the section 88E (1) (f) power is limited to making rules regulating practice and procedure and does not extend to making rules restricting the right of a party's representative to charge or seek to recover solicitor-client costs. Rule 31 (2) does the latter. There was no power to make the Rule, or if there was power to make a rule of that general kind, Rule 31(2) is an unreasonably disproportionate exercise of the power and is invalid.

12.5. In the further alternative, section 88G was intended to be the only power to make subordinate legislation restricting the right of a party's representative to charge or seek to recover solicitor-client costs and the general power conferred by section 88E (1) (f) must be confined by reference to the restrictions in the grant of the section 88G power and therefore does not authorise Rule 31 (2) which is invalid.

The Legislative History of the Act

13. The legislative history of the Act indicates that Parliament did not intend to confer a power on the President to make rules regulating solicitor-client costs, or if it did, that the power was limited to making rules regulating the practice and procedure of the taxation of solicitor-client costs under any scale fixed by regulation and did not extend to making a rule restricting the right of a party's representative to charge or seek to recover solicitor-client costs.

14. The predecessors of the Act put in place an express statutory regime to control solicitor-client costs in terms similar to Rule 31(2). When Parliament enacted the Act in 1986, it

abandoned this previous regime and left solicitor-client costs to be regulated by the general law³:

- 14.1. The predecessors of the Act each had an *express* provision similar in effect to Rule 31 (2): see clause 12 of Schedule 2 to the *Workmen's Compensation Act* 1900 (SA); section 58 of the *Workers Compensation Act* 1932 (Act No. 2103 of 1932) and section 41(2) of the *Workers Compensation Act* 1971 (Act No. 36 of 1971) which was amended immaterially by Act No. 36 of 1971. Further, section 42 (3) of the 1971 Act provided that no agreement to pay solicitor-client costs greater than the amount awarded by the Court shall be binding and that any amount paid by the worker in excess of that amount shall be recoverable as a debt and section 130 of the 1971 Act provided expressly that "*the power to make rules under section 160 of the Industrial Code 1967, as amended, shall include power to make Rules of Court... for generally regulating the practice of the Court...and for carrying into effect this Act so far as it relates to or affects the Court...and such rules may also prescribe such forms and scale of fees, costs and expenses as may be necessary or convenient for the purposes of this Act.*" Read with section 41, this was an express power to make rules prescribing scales of solicitor-client costs.
- 14.2. There was no provision in any of these predecessor acts similar to section 88G. To the contrary, section 130 of the 1971 Act empowered the Court to make rules prescribing a scale of solicitor-client costs.
- 14.3. Thus, between 1906 and 1986, there was an *express* statutory regime to control solicitor-client costs in a way similar to the President's attempt to do so by Rule 31 (2).
- 14.4. When Parliament enacted the Act in 1986 and repealed the 1971 Act, not only did it not re-enact the previous regime or anything like it, but it also chose not to control solicitor-client costs at all, leaving them to be regulated by the general law.
- 14.5. By the Act of 1986:
- 14.5.1. The objects of the Act were set out in section 2.
- 14.5.2. The Workers Compensation Tribunal ("the Tribunal") was established.
- 14.5.3. The repealed regime for controlling solicitor-client costs was not re-enacted in any form.
- 14.5.4. A worker who was represented in proceedings and who succeeded or who did not succeed but who acted reasonably, was entitled to be reimbursed to an extent prescribed by regulation for the costs of

³ That is, by contract as qualified by the Legal Practitioners Act (sections 41 and 41), the Supreme Court Act (the statutory power to make rules as to solicitor-client costs is section 72 (1) (h)) and the Supreme Court Rules and Scales.

proceedings unless the action was frivolous or vexatious, in which case he could be ordered to pay costs to any other party: section 92.

- 14.5.5. The only rule-making power in the 1986 Act was to make rules as to “practice and procedure”: section 82.
- 14.5.6. Section 92(1) allowed a person to be represented before a review authority and provided that a represented party (not just a worker) who succeeded was entitled to be reimbursed its party-party costs.
- 14.5.7. The Tribunal had no power to make orders against parties or their representatives affecting solicitor-client costs or tax solicitor-client bills of costs.
- 14.5.8. The President of the Tribunal had no power to make rules regulating solicitor-client costs and the Act did not regulate solicitor-client costs.
- 14.5.9. It follows that Parliament intended that the objects of the Act could be achieved without the need for the repealed regime controlling solicitor-client costs.
- 14.6. The Act was amended in 1991 by Act No. 4 of 1991⁴:
- 14.6.1. Section 92 was repealed and replaced by a new section 92 which replicated the right of parties to be represented but not the entitlement of a party to costs if successful. A new section 92a was enacted which entitled a party to costs payable by the Corporation (subject to limits fixed by regulation) regardless of success unless the proceedings were frivolous or vexatious or the party had acted unreasonably in which case the review authority could make a contrary costs order.
- 14.6.2. The rule-making power in section 82 to make rules as to “practice and procedure” was not amended.
- 14.6.3. The Tribunal had no power to make orders against parties or their representatives affecting solicitor-client costs or to tax solicitor-client bills of costs.
- 14.6.4. The President of the Tribunal had no power to make rules regulating solicitor-client costs and the Act did not regulate solicitor-client costs at all.
- 14.6.5. It follows that Parliament intended that the objects of the Act could be achieved without the need for the repealed regime controlling solicitor-client costs.
- 14.7. The Act was amended in 1993 by Act No. 52 of 1993:
- 14.7.1. Section 92a was amended making it an offence for a party’s representative to either charge or seek to recover an amount by way of costs in excess of the amount allowable under scales published from time to time by the Minister in the Government Gazette (new sub-

⁴ The Act has been amended many times. Only those amendments thought to be relevant are mentioned.

section 92a (5a)) and to provide that the Minister must consult with the Crown Solicitor before fixing or varying a scale (new sub-section 92a (5b)).

14.7.2. The rule-making power, section 82, was amended, but not relevantly, so that the rule-making power remained limited to regulating “practice and procedure”. Despite the Minister’s power to set scales of solicitor-client costs, it was not thought necessary to amend the rule-making power to grant an express power to make rules regarding taxation on such scales as should be published or to “regulate costs”.

14.7.3. The Tribunal still had no power to make orders against parties or their solicitors affecting solicitor-client costs or to tax solicitor-client bills of costs.

14.7.4. The President of the Tribunal still had no power to make rules regulating solicitor-client costs.

14.7.5. Thus, for the first time since the 1971 Act was repealed and the Act was passed in 1986, the Legislature granted the power to restrict the right of a party’s representative to charge or seek to recover solicitor-client costs solicitor-client costs, but it did so:

14.7.5.1. *Expressly* by section 92a (5a) and (5b).

14.7.5.2. In a manner entirely different from the repealed regime, by empowering the Minister to publish scales of costs, and by making it an offence for a representative to charge over scale.

14.7.6. Thus, despite the enactment of sections 92a (5a) and (5b) giving power to the Minister to publish scales, solicitor-client costs were left to be regulated by the general law *unless and until* the Minister should do so.

14.7.7. No scales were ever published by the Minister pursuant to section 92a (5a) from which one can infer that the Minister did not think it was necessary to do so.

14.8. The Act was amended in 1995 by Act No. 75 of 1995⁵:

14.8.1. Wholesale changes were made to the way in which workers’ claims were to be dealt with so as to encourage conciliation and speedy resolution and minimise costs to the WorkCover scheme.

14.8.2. Part 6 of the Act which contained sections 82, 92 and 92a was repealed and new Parts 6, 6A and 6B were enacted.

14.8.3. The Tribunal was given an express discretion (and therefore an implicit power) as to the costs of proceedings [i.e. party-party costs], unfettered save that the power was “subject to this Act” [e.g. subject to section 95]: section 88F.

⁵ Sections 88E, 88F, 88G and 95 came into operation on 3 June 1996.

- 14.8.4. Section 92 was repealed and replaced by section 95 which maintained the entitlement of a party (other than the relevant compensating authority) to an award of the party's costs subject to limits prescribed by regulation unless the proceedings were vexatious etc, but limited the entitlement to that the party's reasonable costs and confined the entitlement to cost of certain proceedings under the Act: section 95 (1).
- 14.8.5. Section 95 (5) provided that an award of legal costs [i.e. party-party costs] cannot exceed 85% of the amount allowable under the relevant Supreme Court scale if the proceedings were in the Supreme Court.
- 14.8.6. Sections 92a (5a) and (5b) were repealed and replaced by section 88G which prohibits a party's representative from either charging or seeking to recover an amount exceeding the amount allowable under a scale fixed by regulation and requires the Minister to consult with the Crown Solicitor before proposing a regulation fixing a scale to the Executive Council.
- 14.8.7. It is significant that the words "*an amount by way of costs*" which had appeared in the repealed section 95A (5a) were omitted from section 88G (1) in which the term "*costs*" does not appear at all. By a change in drafting, section 88G (1) states that a representative must not charge or seek to recover "*for work*". The omission of the words "*an amount by way of costs*" indicates an intention to avoid using the word "*costs*" in the sense of solicitor-client costs" and thus to avoid providing the basis for an interpretation of "*costs*" in section 88E (1) (f) as extending to solicitor-client costs.
- 14.8.8. The rule-making power, section 82, was repealed and replaced by section 88E. The purpose of enacting section 88E (1) (f) was to give the President power to make rules prescribing party-party scales of costs so that a party's party-party costs under section 95 (1) could be quantified within the limits and maxima set by section 95(5) and the regulations made under section 95(1), which regulations may set a limit on a party's reasonable costs, but not prescribe a scale of costs.⁶
- 14.8.9. Wherever the word "*costs*" appeared in the Act, it was either defined so as to have a particular and discrete meaning⁷, or it meant party-

⁶ *Jacobs v OneSteel* (2006) 93 SASR 568 (Full Court) per Besanko J at [08]. It may be arguable that the purpose of enacting section 88E (1) (f) was also to give power to make rules regulating the taxation of solicitor-client costs on such scale as should be fixed by regulation under section 88G, but it is not obvious that section 88G contemplates taxation or carries with it an implied power in the Tribunal to tax a representative's bill of costs on a scale fixed by regulation.

⁷ Section 2 (1) (v) ("*employers' costs*"), sections 32 and 32A (1) where it has the particular meaning defined in section 32 (1) and (2) (i.e. cost of medical treatment), section 45C (2) (cost of counseling for a deceased worker's family), section 64 (3) ("*the costs incurred by the Corporation in performing its functions...; the costs incurred by*

party costs as in: section 42 (4) (the Corporation's liability to indemnify the worker for reasonable costs of obtaining advice up to a limit fixed by regulation), section 93B⁸, section 94C (2) ("costs of proceedings"), section 95 (1) ("the party's reasonable costs"); section 95 (2) ("Costs") section 95 (2) (a) ("the cost of representation"); section 95 (2) (b) ("costs of a kind..."); section 95 (3) (a) ("an award of costs in favour of the party..."); section 95 (4): ("an award of costs to cover professional advice or assistance..."); section 95 (5): ("an award of legal costs") and section 97C ("the costs of proceedings"). Where a word in a statute is used consistently in the statute, it should be given the same meaning consistently.⁹

14.8.10. Thus, the 1995 amendments continued the 1993 regime for controlling solicitor-client costs, but modified it by requiring any scale of costs to be fixed by regulation rather than by the Minister by publishing scales in the Gazette. The requirement of prior consultation with the Crown Solicitor was preserved.

14.8.11. The Tribunal still had no power to make orders against parties or their solicitors affecting solicitor-client costs or to tax solicitor-client bills of costs.

14.8.12. Thus, solicitor-client costs were left to be regulated by the general law unless and until a scale should be fixed by regulation pursuant to section 88G.

14.8.13. No regulation has been made by regulation pursuant to section 88G in the 15 years since its enactment, from which one can infer that neither the Minister nor the Executive Council thought it necessary to do so.

14.8.14. It is, therefore, clear that when section 88E (1) (f) was enacted, "costs" either meant party-party costs or the solicitor-client costs under a scale fixed by regulation made under section 88G.

14.9 The Act was amended in 2008 by Act No. 17 of 2008:

14.9.1 The Tribunal was given express power, where a "professional representative" has caused costs to be incurred improperly or without reasonable cause or to be wasted by undue delay or negligence (section 95A (2)), to order: (1) that all or any of the "*costs between the professional representative and his or her client be disallowed or that the professional representative repay to his or her client the whole or part of*

the Minister or the Crown...; the costs of the system of dispute resolution etc); section 73 (d) ("all other costs attributable to the employer"); section 98J (the costs of support staff); section 120 ("to reimburse costs incurred by the applicant in investigating and prosecuting an offence); section 5A of Schedule 1 (Motor Accident Commission may recoup expenditure covering liabilities under section 118g and "associated administrative and legal costs");

⁸ Enacted by the 1995 Amendment Act but repealed by section 65 of the 2008 Amendment Act.

⁹ Pearce at [4.4]; *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 per Mason J. Although "costs" also appears in sections 32 and 32A(1) it has the particular meaning defined in section 32;

any money paid on account of costs”: section 95A (3) (a); (2) as well as make orders that the professional representative reimburse the client for party-party costs the client has been ordered to pay (section 95A (3) (b)); or (3) pay the costs of any other party (section 95A (3) (c)).

14.9.2 Orders (2) and (3) are in the nature of orders that a third party pay the costs of proceedings of the kind referred to in *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 that would be authorised by section 88F and to this extent, section 95A has nothing to say about the meaning of “costs” in section 88E (1) 9f). Order (3) is plainly an order affecting solicitor-client costs and may imply a power to tax or otherwise quantify the costs to be disallowed or repaid.¹⁰

14.9.3 Does the enactment of section 95A impliedly amend the meaning of “costs” in section 88E (1) (f)? Assuming an implied power to tax incidental to the section 95A (3) (a) power, it does not follow that section 95A impliedly amended the word “costs” in section 88E (1) (f) to give it an extended meaning that it did not have before. Any such implied incidental power to make rules as to the quantification of the costs to be disallowed or repaid pursuant to a section 95A could be found in section 88E (1) (c) or (g), but not section 88E (1) (f).

20 15. The Second Reading speech of the responsible Minister relating to the 1995 amending Act in relation to the 1995 Bill¹¹ make it clear that:

15.1. The Government appreciated that the costs scale to be fixed by regulation was a controversial topic amongst lawyers and intended to undergo lengthy consultation about any scale, not limited to consultation with the Crown Solicitor required by 88G(2), but including with the Law Society and employers [155], [161].

15.2. The only mention of section 88E was in the context of section 95 party-party costs.

30 15.3. The purpose of the 1995 amendments was not to confer power upon the President to make rules regulating solicitor-client costs.

¹⁰ As to implied incidental powers, see e.g. *Dunkel v Commissioner of Taxation* (1990) 27 FCR 524.

¹¹ Hansard 18 October 1995. At common law, the second reading speech of the responsible Minister can be considered to determine, inter alia, the mischief to which an Act is directed: *K Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; per French CJ at [50] – [53]; *Gerhardy v Brown* (1985) 159 CLR 70 at 104 per Mason J, 111 per Wilson J; *Hoare v The Queen* (1989) 167 CLR 348 at 360-361; *Owen v South Australia* (1996) 66 SASR 251 at 256-257 per Cox J, 257 per Prior J; see also *Nemer v Holloway* (2003) 87 SASR 147 at 166-167 per Vanstone J and generally, in relation to South Australia, Pearce and Geddes, *Statutory Interpretation in Australia*, 6th ed (2006) at 70-71 [3.6].

16. Given this history, it would require clear words (such as have been used in section 88G) or manifest intention if the Legislature intended by section 88E (1) (f) to authorize the President of the Tribunal to make rules restricting the right of a worker's representative to charge or seek to recover solicitor-client costs.
17. Further, given this history, it is clear that the Legislature intended that if the right of a worker's representative to charge or seek to recover solicitor-client costs were to be restricted, it must be done by the exercise of the power granted by section 88G to fix a scale of costs by regulation and by the criminal sanction in section 88G (2) and not by a general power to make rules regulating costs granted by section 88E (1) (f). It is absurd to suppose that the Legislature intended that even though the Executive Council had not made a regulation pursuant to section 88G fixing a scale, the President could step in and make a rule such as Rule 31 (2) restricting the right of a worker's representative to charge or seek to recover solicitor-client costs.
18. There is no justification for finding that the appellant's construction of the Act was inconsistent with the objects of that Act which are as set out in section 2.

"Costs" in section 88E (1) (f)

19. The Full Court's "*starting point*" was wrong. Doyle CJ failed to consider the meaning of the word in its full statutory context.¹² The word "costs" has two well known meanings: see *Quick on Costs* at [1.30]; G E Dal Pont, *Law of Costs*, (2003) at 2-3; *Richfort Pty Ltd v Baluyut* (1999) 152 FLR 203 at 206 per Gallup J. In the context of a statute that establishes an inferior court and confers powers on its President to make orders as to costs (*a fortiori* rules of court), the *prima facie* meaning is party-party costs: see e.g. *Re JJT*; *Ex parte Victoria Legal Aid* (1998) 195 CLR 184 at 218-219 [89] – [91] per Gaudron J and Hayne J; *Richfort Pty Ltd v Baluyut* (1999) 152 FLR 203 at 206 per Gallup J.
20. This *prima facie* meaning is ancient and derives from the time costs were first provided for by statute, costs in common law courts being entirely a creature of statute.¹³ By contrast, the whole field of solicitor-client costs (which includes (a) the right of a solicitor to charge for professional work and (b) the means of quantifying the solicitor's remuneration) is a completely different field of discourse from the power of courts to

¹² *K Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [46]; *Toronto Suburban Railway Co v Toronto Corporation* [1915] AC 590 at 597; *Minister for Lands (NSW) v Jeremias* (1917) 23 CLR 322 at 332; *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312 per Gibbs CJ, 315 per Mason J, 321 per Deane J.

¹³ See the history set out in *Garnett v. Bradley* (1878) 3 App. Cas. 944 at 962 quoted by Mason CJ and Deane J in *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at [5]; *Quick on Costs*, volume 1, [2.30] – [2.90]. The courts of chancery asserted an inherent jurisdiction to award costs: *Quick* at [2.70], [2.100] – [2.110].

make orders for the costs of proceedings inter partes,¹⁴ *a fortiori* the power to make rules of court regulating costs.

20.1. The fact that section 88E (1) (f) appears in a section that gives the President of the Tribunal power to make rules as to “*practice and procedure*” is a strong indication that “costs” was not intended to include solicitor-client costs or at least that the rule-making power was intended to be confined to regulating the practice and procedure as to costs, not to making rules restricting the right of a worker’s representative to charge or seek to recover solicitor-client costs.

20.2. The Court should have approached the issue by identifying the subject matter of section 88E (1) (f), and in particular the meaning of the term “costs”, rather than by assuming that “costs” was used in its broadest sense as including solicitor-client costs and then considering whether there was any implied limitation to that meaning: see *M v W* (2006) 96 SASR 105 at [62] per Besanko J.

21. The term “costs” is not defined in the Act.

22. There are clear indications in the Act that “costs” in section 88E (1) (f) is intended to mean only party-party costs:

22.1. Section 88G was intended to cover the field of regulation of solicitor-client costs (i.e. by regulation or not at all), subject to the field carved out by the later and specific section 95A.

¹⁴ As to the jurisdiction of a court over solicitor and client costs: (1) a solicitor’s right to charge for work arises from his or her retainer. Without a contract of retainer, a solicitor has no right to charge fees: *JH Milner & Son v Percy Bilton Ltd* [1966] 2 All ER 894; Quick at [3.30]. Apart from the retainer, in South Australia the solicitor’s right to charge is also conditioned by sections 41 and 42 of the *Legal Practitioners Act 1981 (SA)* and the 2006 Supreme Court Rules. (2) The amount of remuneration that a solicitor is able to charge his or her client is determined in one of three ways: (a) a costs agreement; (b) by court proceedings by the solicitor for the amount of the bill; and (c) by taxation of the bill: Quick at [2.1220]; *Hargrave v Miller* (1925) SASR 379 at 382-383. (3) Absent a costs agreement, the solicitor’s right to remuneration is on a quantum meruit” *Ibid.* (4) The quantum of the remuneration is determined by taxation. (5) Taxation is the exercise by a superior court of its jurisdiction to ascertain the costs claimed by a lawyer: *Woolf v Snipe* (1933) 48 CLR 677 per Dixon J at 678. (6) The jurisdiction to tax arises from one of three sources: (a) statute, (b) a general supervisory jurisdiction enjoyed by superior courts (which may be affected by statute) and (c) the ordinary jurisdiction of a court to deal with contested claims including a contested claim for costs: *In re Park; Cole v Park* (1889) 41 Ch 326 at 332; *Woolf v Snipe* (1933) 48 CLR 677 per Dixon J at 678 – 679; (7) As to these, (a) there is no statutory power for the Tribunal to tax costs as between solicitor and client; (b) it has no inherent jurisdiction at all: by section 79, its jurisdiction is confined to that conferred by statute, which states the obvious: as a creature of statute, it has no inherent jurisdiction and only the powers expressly or impliedly conferred by the legislation which governs it: see the statement of principle in *DJL v Central Authority* [2000] HCA 17 at 25] – [26]; *Parsons v Martin* (1984) 5 FCR 235 at 240 – 241); and (c) the “contested claims” jurisdiction can not apply to the Tribunal in respect of solicitor and client costs because the jurisdiction of a court over “contested claims” is a jurisdiction which presupposes that the court has jurisdiction to hear contested claims between solicitors and clients over bills of costs, because by exercising this basis of its jurisdiction to tax, the court is merely permitting the solicitor and client (or other person with an interest in the bill of costs, such as a beneficiary) to avoid having to issue *separate proceedings* in the court to determine the proper costs and to that end, the court places them [i.e. the party taxing] “*as nearly as maybe, having regard to the different forms of procedure, in the position in which they would have been if they had brought an action at common law against [the other party]*”: *In re Park; Cole v Park* (1889) 41 Ch 326 at 332; cited with approval by Dixon J in *Woolf v Snipe* (1933) 48 CLR 677 per Dixon J at 679. There can be no suggestion that the Tribunal has jurisdiction to deal with claims by solicitors for costs against their clients or claims by clients against their solicitors for overcharging.

- 22.2. Section 88G shows that the legislature regarded solicitor-client costs as sufficiently important to be dealt with by regulations and sufficiently important that the Minister be required to consult the Crown Solicitor before proposing any regulation. This is inconsistent with a legislative intention to authorise the President to make rules on the subject.
- 22.3. As noted above, it is significant that section 88G (1) omits the term “costs”.
- 22.4. Where the term “costs” appears elsewhere in the Act (where it is not specifically defined or plainly has a different meaning), it means party-party costs and “costs”: see paragraph 14.8.9 above. The only exception is section 95A, as to which, see paragraph 14.9 above.
- 22.5. The only provision of the Act which gives the Tribunal the power to make orders as to costs between a worker and his/her own legal representative is section 95A (2) which confers that power expressly which indicates that the Legislature thought it necessary to do so because it understood section 88E as not authorising the President to make rules to the same effect, which it would do if the interpretation of the Full Court were correct.
- 22.6. The Act does not give the Tribunal jurisdiction to hear either (a) claims by solicitors for costs against their clients or (b) claims by worker clients against their solicitor or even to tax solicitor-client costs, other than incidentally to the specific and limited power granted by section 95A.
- 22.7. This interpretation of the word “costs” in section 88F is consistent with the decision in *Richfort Pty Ltd v Baluyut* (1999) 152 FLR 203 and in particular with the reasoning of Gallup J at 206, albeit the two statutes are not in pari materia.

Presumption against interference with common law rights

23. It is submitted that there is still a presumption¹⁵ that a statute was not intended to interfere with common law rights, and thus that there is a presumption against interpreting section

¹⁵ There is a question whether the presumption still exists as regards ordinary common law rights and, if so, its continued force. There have been pronouncements by single judges of this Court on the issue in *Malika Holdings v Stretton* (2001) 204 CLR 290 at 298-299 [28] – [30] per McHugh J; in *Gifford v Strang Patrick* (2003) 214 CLR 269 at 284 [36] per McHugh J; in *Electrolux v AWU* (2004) 221 CLR 309 at 328 - 330 [19] – [23] per Gleeson CJ and at 357 – 358 [[117] – [120] and per McHugh J; in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 520 [47] per French CJ citing *Potter v Minahan* and *Bropho* as well as *Coco*, but not *Malika Holdings*, *Gifford v Strang* or *Electrolux*. The Court of Appeal relied upon the presumption in relation to the common law right to claim damages for gratuitous services in *Grice v State of Queensland* [2006] 1 Qd R 272 per McMurdo P at [25] with whom Williams JA agreed at [44] and *Kriz v King* [2006] Aust. Torts Rep. 81-859; [2006] QCA 351 per McMurdo P at [18] with whom Jerrard JA and Helman J agreed. The Victorian Court of Appeal in *Alcoa Portland Aluminium Pty Ltd v Victorian WorkCover Authority* (2007) 18 VR 146 followed *Grice*. Neave JA applied the presumption: 163 [50] and Chernov J cited the passage from *Grice* with apparent approval [38]. There are conflicting judgments in the NSW Court of Appeal in *Harrison v Melhem* (2008) 72 NSWLR 380 per Spigelman CJ at 382 -384 [2] – [11] doubted that the presumption still existed as regards ordinary common law rights and held that the presumption very weak if it still exists at all. Beazley JA at 403 [191] agreed [191] with Spigelman CJ. Basten JA [193], [209] held that while the principle is undoubted [212], it had muted (if any) influence on the case at bar and that it would only operate if the ambiguity were finely balanced [221], [235]. Mason P held that the presumption

88E (1) (f) as empowering the President to make rules regulating solicitor-client costs and that the presumption is strong here given the legislative history, the fact that section 88E (1) (f) concerns a rule-making power, and in particular the rule-making power of an inferior court and in particular the power to make rules as to “costs” which in that context are ordinarily means party-party costs and given section 88G.

24. The Full Court did not deal with the Applicant’s argument on the presumption.
25. The Full Court erred in failing to apply and give substantial weight to the presumption that a statute does not invade general common law rights unless it does so expressly or the intention to do so is manifest. Such an intention is not expressed or manifest in section 88E (1) (f).
26. A solicitor has the common law right to contract with his or her client (which it is acknowledged Rule 31 (2) does not prevent). Without a contract of retainer, a solicitor has no right to charge fees.¹⁶
27. A solicitor with a retainer has the common law right to *recover* from the client the fees to which the solicitor is entitled pursuant to the contract of retainer, subject to any valid law limiting that right.¹⁷
28. A solicitor’s right to “*recover*” fees would certainly include suing his or her client for fees due, owing and payable. It is not necessary for present purposes to decide whether “*recover*” here includes *claiming* his solicitor’s lien and *enforcing* it (see next paragraph). It would include enforcement of the lien by seeking an order against the judgment creditor who has notice of the lien for payment direct to the solicitor referred to in paragraph 38 below, if not merely asserting a lien. Suffice it to say that by barring the right to “*recover*” any costs in respect of the proceedings in addition to those payable by the compensating authority (i.e. in effect party-party costs on a very low scale), Rule 31 (2) at least bars the common law right to sue for fees.
29. A solicitor has at common law two rights which are termed liens: (a) a retaining lien, namely a right to retain property already in his possession until he or she is paid the full amount of the solicitor’s assessed costs due in his or her professional capacity, which is a general lien, and (b) a lien over a fund or the proceeds of a judgment, which gives the solicitor the right to ask the court to direct that personal property recovered under a judgment obtained by his or her exertions stand as security for his or her costs of such recovery, which is a particular lien.¹⁸

(apparently including the common law rights one) was “established and adopted the remarks of Neave JA at 397 [157]; see also 387 [106]. Giles JA agreed with Mason P at 403 [192].

¹⁶ *J H Milner & Son v Percy Bilton Ltd* [1966] 2 All ER 894; Quick at [3.30]. The solicitor’s right to charge is also conditioned by section 41 (1) of the *Legal Practitioners Act 1981 (SA)* and the 06 Rules, e.g. 271 and 273.

¹⁷ There are such laws: e.g. sections 41 and 42 of the *Legal Practitioner’s Act* and there is the power of the Supreme Court in its inherent jurisdiction to supervise solicitors. See Dal Pont, *Law of Costs*, at pages 72-73. It is noteworthy that even though the Supreme Court has inherent jurisdiction to oversee and tax a solicitor’s bill, section 72 (1) (h) of the *Supreme Court Act* expressly authorises the Supreme Court to make rules “*regulating the duties of the officers of the court and the costs of proceedings therein (including the costs to be allowed to practitioners of the court in respect of business transacted in the court or the offices thereof), and the conduct of any business coming within the cognizance of the court, for which provision is not expressly made by any Act;*” (emphasis added).

¹⁸ Halsbury’s *Laws of England*, 5th edition Vol. 66 at [996], [998], [1006]; *Bozon v Bolland* [1839] 4 My & Cr 354 at 357-358; *Ex parte Patience*; *Makinson v The Minister* (1940) 40 SR (NSW) 96; *Grogan v Orr* [2001] NSWCA 114 at [57] – [58].

30. As to the second, it has been held that the Act excludes such a lien for payment by the compensating authority from the Compensation Fund (other than a payment following an award of costs under section 95 (4) of the Act) such that a solicitor has no entitlement to require the compensating authority to pay the compensation directly to the solicitor notwithstanding that the solicitor may have given notice to the compensating authority of his claim to a lien.¹⁹
31. But it is submitted that *Scammell* was wrongly decided such that the lien survives the Act.
32. A solicitor has always been treated as possessing equitable rights in the judgment independently of any declaration of those rights, and the court's assistance is invoked not to create the rights but to enforce them.²⁰ Though the solicitor has no common law title to the client's right to receive the money or to any part of that right, he acquires the right to have his costs paid out of that money, a right analogous to the right which would be created by an equitable assignment of a corresponding part of the money by the client to the solicitor. Thus, if the solicitor gives notice of his or her lien to the person obliged to pay the client, only the solicitor and not the client can give a good discharge to that person for an amount of the money equivalent to the solicitor's costs and if the person liable to pay refuses, after notice, to pay the costs of the solicitor, the solicitor may obtain a rule of Court directing that the amount of his costs be paid to him and not to the client.²¹
33. Rule 31 (2) bars a solicitor in effect from "*claiming any lien* in respect of costs additional to the amount recovered from the compensating authority (i.e. party-party costs on a very low scale).
34. Rule 31 (2) does not distinguish between the two common law liens and would prima facie cover both. The reference to "*claim*" does not obviously indicate that the Rule is directed at one rather than the other and "*claim*" is apt to include both asserting a retaining lien over property and a lien over a fund and applying to the court for orders in aid of a lien over a fund, such as a declaration that the solicitor has a charge on the fund or an injunction to prevent the client from receiving payment without notice to himself²² or presumably from disposing of or dealing with the fund without regard to the solicitor's lien or, when notice has been given to the judgment debtor, for an order that he pay the solicitor direct.
35. Further, if the money in respect of which the solicitor claims the lien is already in his or her hands, the solicitor may retain out of it the amount of his or her costs and pay over the balance to the client.²³
36. Thus, by barring the right to "*claim*" a lien, Rule 31 (2) effectively bars the solicitor from claiming all the remedies to which the retaining lien and the active lien (to the extent that it survives the Act) would entitle the solicitor.
37. Rule 31 (2) would bar a solicitor from retaining fees out of a fund already in the solicitor's hands and also from obtaining an order that the judgment debtor pay the solicitor direct.
38. The Court should prefer the construction of the Act that would avoid these drastic infringements of legal rights, i.e. find that "*costs*" in section 88E (1) (f) means inter partes costs or that section 88E does not authorise Rule 31(2).

¹⁹ *Scammell & Co v WorkCover Corporation* (2006) 95 SASR 278.

²⁰ *Ex parte Patience; Makinson v The Minister* (1940) 40 SR (NSW) 96 at 100 per Jordan CJ.

²¹ *Ibid.*

²² *Ibid* at [1009].

²³ Halsbury's Laws of England, 5th edition Vol. 66 at [1009].

The Anthony Hordern principle

39. If section 88 (1) (f) were to authorize Rule 31(2), it would, at least to that extent, be inconsistent with section 88G in that section 88G was intended to cover the field of the control of the right of workers' representatives to charge and recover solicitor-client costs. The scale fixed by regulation under section 88G must, as Doyle CJ observed, fix a maximum that a representative can charge.
40. In considering whether an interpretation of section 88 (1) (f) that would authorize Rule 31(2) was consistent with section 88G, the *Anthony Hordern*²⁴ principle applies (which general principle is used here to encompass the way the general principle has been expressed in *Anthony Hordern* and subsequent cases²⁵ and as including the principles *expressum facit cessare tacitum*²⁶ and *generalalia specialibus non derogant*²⁷) applies in respect of the combination of powers given in sections 88G and 95A on the one hand and the section 88E(1)(f) power on the other.
41. This general principle applies because it is "possible to say that the statute in question confers only one power to take the relevant action": *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 589 [59] per Gummow and Hayne JJ.
42. In this case the one power is section 88G. The relevant action is to make subordinate legislation restricting the right of a representative of a party to proceedings before the Tribunal to charge or seek to recover for work associated with that representation. The power is granted to the Executive Council.
43. Rule 31(2) is subordinate legislation²⁸ and it restricts the right of a representative of a party to proceedings before the Tribunal (namely a worker) to charge or seek to recover for work involved in or associated with that representation by prohibiting the representative from seeking to recover any costs in addition to those payable by the compensating authority, claiming any lien in respect of such additional costs and deducting such additional costs from the worker's compensation award unless and until the Tribunal makes an award of those additional costs. Each of these prohibitions constitutes a restriction upon the representative's right to "seek to recover for work involved in or associated with that representation" (to use the language of section 88G (1)). The section 88E (1) (f) power is "the same power" as the section 88G power: (2006) 228 CLR 566 at 589 [59] per Gummow and Hayne JJ.

²⁴ *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 per Gavan Duffy CJ and Dixon J.

²⁵ See *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at [54] and [59].

²⁶ This particular principle is stated in *R v Wallis; Ex parte Employers Association of Wool Selling Brokers and H V McKay Massey Harris Pty Ltd* (1949) 78 CLR 529 at 550 per Dixon J; its relationship to the *Anthony Hordern* principle is described in *Nystrom* at [54] and [61].

²⁷ This particular is stated in *Goodwin v Phillips* (1908) 7 CLR 1 at 14 per O'Connor J; its relationship to the *Anthony Hordern* principle is described in *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1948) 77 CLR 1 at 29 cited in *Nystrom* at [50].

²⁸ Section 4 of the Subordinate Legislation Act 1978.

44. Section 88G is the grant of power to make subordinate legislation which restricts such rights. Any grant of power in section 88E (1) (f) to make rules regulating costs must be confined "by reference to the restrictions in the grant of the former power": *Nystrom* (2006) 228 CLR 566 at 589 [59] per Gummow and Hayne JJ.²⁹

Proportionality

45. The consequences of the restrictions imposed by Rule 31(2) upon solicitors' substantive legal rights are serious, both in terms of the administration of justice and the rights of solicitors. Workers may be denied representation because solicitors may be unwilling to act because of the Rule because of its effects, e.g. the costs to which a solicitor may be entitled under a retainer cannot be determined until (a) the costs payable if the Compensating Authority have been fixed and (b) the solicitor's application for further costs has been heard and determined by the Tribunal. A solicitor cannot recover interim costs while the matter is proceeding or enforce either the retaining lien or an active lien which removes what is, in most cases, the only security for fees. It precludes a worker and a solicitor from reaching a retainer enforceable as to the costs payable there under and so the solicitor must carry out work when neither the solicitor nor the client can determine the solicitor's fee entitlement. An opportunistic client can take advantage of the Rule by delaying determination of the amount payable by the Compensating Authority. A client may receive compensation and dissipate the same before the solicitor can have the application for his additional costs determined. The client may terminate the retainer and instruct new solicitor. The first solicitor will not be entitled to claim either of the two liens and would have to hand over his/her file notwithstanding that fees may be outstanding. Rule 31(2) empowers the Tribunal to direct the worker to obtain independent legal opinion as to the reasonableness of the solicitor's claim for costs and implicitly possibly at the solicitor's expense. If the worker is ordered to pay the costs of the independent legal opinion, the worker will be aggrieved at having to pay further costs. If the solicitor has to pay these costs, it would reduce yet further the viability for acting for workers and discourage solicitors from doing work. The whole procedure contemplated by Rule 31(2) increases the costs of either or both of the worker or the solicitor. Solicitors will feel aggrieved at having to pay the costs of an application for an order for costs which would be due under the retainer but for the Rule. Even if the solicitor persuades the Tribunal to award additional costs, the Rule will cause significant delays in recovering payment over and above the usual delays. Rule 31(2) applies only to solicitors acting for workers and not to solicitors acting for employers or WorkCover. This imbalance has potentially serious repercussions for the administration of justice and is contrary to the express object of the Act of achieving a reasonable balance between the interests of the employer and the interests of workers: section 2(1) (a) (i) of the Act. The Rule pits a

²⁹ *Anthony Hordern* (1932) 47 CLR 1 at 7 per Gavan Duffy CJ and Dixon J; *K&S Lake City Freighters v Gordon and Gotch* (1985) CLR 309 at 312, 315; *Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat and Livestock Corporation (No. 2)* (1979) 29 ALR 333; (1980) 44 FLR 455; 38 per Deane J at 347.

solicitor against his/her client to a far greater extent than occurs in any event, which is deleterious to the administration of justice and contradicts the object of the Act of reducing litigation and adversarial contest to the greatest possible extent. In the absence of an order by the Tribunal allowing additional costs, the Rule restricts solicitors to the costs payable by the Compensating Authority in provided for in Regulation 7 which are meagre.

46. The direct abrogation of substantive legal rights by Rule 31(2) and the effects of the Rule are such that it cannot be said to be reasonably proportionate to the purpose of the power conferred, namely to regulate costs.

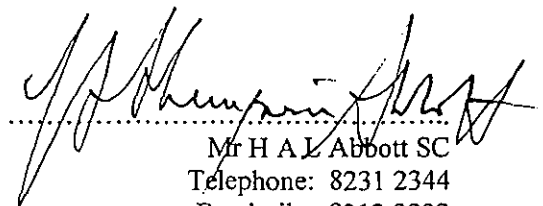
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Part VII-LEGISLATION

47. The legislative provisions are set out in Annexure A.

Part VIII- ORDERS SOUGHT

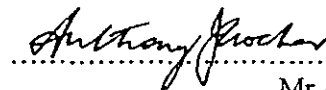
1. That the WorkCover Corporation of South Australia be joined as the third respondent to this appeal.
2. The orders of the Full Court made on 2 August 2010 be set aside.
3. The question of law should be answered in the negative.
4. Declaration that Rule 31(2) of the Workers Compensation Rules 2009 is invalid.
5. The respondents pay the appellant's costs of and incidental to this appeal.
6. The first respondent pay the appellant's costs of and incidental to the hearing below and of the action generally.
7. The second respondent and the WorkCover Corporation pay the appellant's costs of and incidental to the hearing below and of the action generally occasioned by their intervention.

Dated the 11th day of March 2011.

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**IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY**

No A5 of 2011

BETWEEN:

**PETER NICHOLAS MOLONEY t/a
MOLONEY & PARTNERS**

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Appellant

and

**WORKERS COMPENSATION
TRIBUNAL**

First Respondent

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and

**ATTORNEY-GENERAL FOR THE
STATE OF SOUTH AUSTRALIA**

Second Respondent

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ANNEXURE "A" TO APPELLANT'S WRITTEN SUBMISSION

The attached statutory provisions are in force at the date of this Submission save for Section 64(3a) of the Workers Rehabilitation & Compensation Act (SA) 1986 which was amended by Section 377 of the Statutory Amendment (Public Sector Consequential Amendments) Act (SA) 2009.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Workers Rehabilitation and Compensation Act 1986*.

2—Objects of Act

- (1) The objects of this Act are—
 - (a) to establish a workers rehabilitation and compensation scheme—
 - (i) that achieves a reasonable balance between the interests of employers and the interests of workers; and
 - (ii) that provides for the effective rehabilitation of disabled workers and their early return to work; and
 - (iii) that provides fair compensation for employment-related disabilities; and
 - (iv) that reduces the overall social and economic cost to the community of employment-related disabilities; and
 - (v) that ensures that employers' costs are contained within reasonable limits so that the impact of employment-related disabilities on South Australian businesses is minimised; and
 - (b) to provide for the efficient and effective administration of the scheme; and
 - (c) to establish incentives to encourage efficiency and discourage abuses; and
 - (d) to ensure that the scheme is fully funded on a fair basis; and
 - (e) to reduce the incidence of employment-related accidents and disabilities; and
 - (f) to reduce litigation and adversarial contests to the greatest possible extent.
- (2) A person exercising judicial, quasi-judicial or administrative powers must interpret this Act in the light of its objects without bias towards the interests of employers on the one hand, or workers on the other.
- (3) The Corporation, and the employer from whose employment a compensable disability arises, must seek to achieve a disabled worker's return to work (taking into account the objects and requirements of this Act).

3—Interpretation

- (1) In this Act, unless the contrary intention appears—

actuary means a Fellow or Accredited Member of the Institute of Actuaries of Australia;

Advisory Committee means the Workers Rehabilitation and Compensation Advisory Committee established under Part 2;

1.7.2009—Workers Rehabilitation and Compensation Act 1986
 Compensation—Part 4
 Conditions under which disability is compensable—Division 1

- (2) However—
- (a) a worker will not be presumed to be acting in the course of employment if the worker is guilty of misconduct or acts in contravention of instructions from the employer during the course of an attendance under section 30(3); and
 - (b) a disability is not compensable if it is established on the balance of probabilities that the disability is wholly or predominantly attributable to—
 - (i) serious and wilful misconduct on the part of the worker; or
 - (ii) the influence of alcohol or a drug voluntarily consumed by the worker (other than a drug lawfully obtained and consumed in a reasonable quantity by the worker).
- (3) Subsection (2)(a) does not apply in a case of death or permanent total incapacity for work and subsection (2)(b) does not apply in a case of death or serious and permanent disability.

31—Evidentiary provision

- (1) A disability is not compensable unless it is established on the balance of probabilities that it arises from employment.
- (2) However, if a worker suffers a disability of a kind referred to in the first column of Schedule 2 and has been employed in work of a type referred to in the second column of Schedule 2 opposite the disability, the worker's disability is presumed, in the absence of proof to the contrary, to have arisen from that employment.
- (3) A regulation made on the recommendation, or with the approval, of the Corporation or the Advisory Committee may extend the operation of subsection (2) to disabilities and types of work prescribed in the regulation.
- (4) Where a worker retires or is retired from employment on account of age or ill-health and the worker makes a claim for noise induced hearing loss after the expiration of two years from the date of the retirement, subsection (2) does not apply in relation to that claim.
- (5) Where—
 - (a) a worker's disability consists of the aggravation, acceleration, exacerbation, deterioration or recurrence of a pre-existing coronary heart disease; and
 - (b) the disability arises in the course of employment,
 it will be presumed, in the absence of proof to the contrary, that the employment contributed to the disability.

Division 2—Compensation for medical expenses etc

32—Compensation for medical expenses

- (1) Subject to this section, a worker is entitled to be compensated for costs of a kind described in subsection (2) reasonably incurred by the worker in consequences of having suffered a compensable disability—
 - (a) in accordance with a scale published by the Minister under this section; or

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- (b) if the relevant service is not covered by a scale under this section—to the extent of a reasonable amount for the provision of the service.
- (2) The costs referred to in subsection (1) are as follows:
- (a) the cost of medical services;
 - (b) the cost of hospitalisation and all associated medical, surgical and nursing services;
 - (c) the cost of approved rehabilitation;
 - (d) the cost of travelling, or being transported, to and from any place for the purpose of receiving medical services, hospitalisation or approved rehabilitation (but not where the worker travels in a private vehicle);
 - (e) where it is necessary for the worker to be accommodated away from home for the purpose of receiving medical services or approved rehabilitation—the cost of such accommodation (but not exceeding limits prescribed by regulation);
 - (f) the cost of attendance by a registered or enrolled nurse, or by some other person approved by the Corporation or of a class approved by the Corporation, where the disability is such that the worker must have nursing or personal attendance;
 - (g) the cost of the provision, maintenance, replacement or repair of therapeutic appliances;
 - (h) the cost of medicines and other material purchased on the prescription or recommendation of a medical expert;
 - (i) any other costs (or classes of costs) authorised by the Corporation.
- (3) Compensation in respect of costs to which this section applies may be paid—
- (a) to the worker; or
 - (b) directly to the person to whom the worker is liable for those costs.
- (4) Where a worker has been charged more than the amount that the worker is entitled to claim for the provision of a service in respect of which compensation is payable under this section, the Corporation may reduce the charge by the amount of the excess.
- (4a) A decision of the Corporation under subsection (4) is not reviewable.
- (5) Where—
- (a) services of a kind to which this section applies were provided to a worker in relation to a compensable disability; and
 - (b) the Corporation considers that the services were, in the circumstances of the case, inappropriate or unnecessary,
- the Corporation may disallow charges for the services.
- (6) Where the Corporation disallows or reduces a charge under this section—
- (a) it must give to the provider of the service a notice setting out—
 - (i) the basis of the Corporation's decision to disallow or reduce the charge; and

- (ii) where the charge has been disallowed under subsection (5) the provider's right to have the decision reviewed under this Act; and
- (b) the worker is not liable to the provider for the disallowed charge, or for more than the reduced charge, (as the case requires) and, if the worker has in fact paid an amount for which he or she is not liable, the Corporation will reimburse the worker for that amount and may recover it from the provider as a debt.
- (7) Where a worker travels in a private vehicle to or from any place for the purpose of receiving medical services, hospitalisation or approved rehabilitation, and the travel is reasonably necessary in the circumstances of the case, the worker is entitled to a travel allowance at rates fixed by a scale published by the Minister under this section.
- (8) A reference in this section to approved rehabilitation is a reference to rehabilitation programmes or services provided by a person who has an agreement with the Corporation for the provision of those programmes or services.
- (9) If a treatment protocol for a disability of a particular kind has been published by the Minister under this section, costs of medical services for treatment of a disability of the relevant kind (and related hospitalisation and nursing services) are only compensable where—
- (a) the services are provided in accordance with the protocol; or
- (b) the provider of the services establishes, to the Corporation's satisfaction, that services outside the terms of the protocol are justified in the circumstances of the particular case.
- (10) The amount of compensation for a service covered by a scale of charges published by the Minister under this section must be in accordance with the scale.
- (11) The Minister may, by notice in the Gazette, on the recommendation of the Corporation, publish—
- (a) scales of charges for the purposes of this section (ensuring as far as practicable that the scales comprehensively cover the various kinds of services to which this section applies);
- (b) treatment protocols for treatment of disabilities of particular kinds.
- (12) Subject to subsection (12a), a scale of charges published under this section must be based on the average charge to private patients for the relevant service (but the amount fixed for the service must not exceed the amount recommended by the relevant professional association).
- (12a) A scale of charges for services provided by a public hospital may be based on government charges for the relevant service.
- (13) Before the Corporation makes a recommendation to the Minister about the publishing of a scale of charges, or a treatment protocol, the Corporation must consult with—
- (a) professional associations representing the providers of medical services of the relevant kind; and
- (b) the Self-Insurers Association of South Australia Incorporated and associations representing self-managed employers; and

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- (c) associations representing employers (including the South Australian Employers Chamber of Commerce and Industry); and
- (d) associations representing employees (including the United Trades and Labor Council).

- (14) A person who provides a service for a disabled worker, knowing the worker to be entitled to compensation for the service under this section, must not charge for the service an amount exceeding the amount allowed under a scale of charges published under this section.

Maximum penalty: \$1 000.

32A—Special provisions for payment of medical expenses after initial notification of disability

- (1) A worker may, by application made to the Corporation in the designated manner and the designated form, apply to the Corporation for the payment of costs within the ambit of section 32 before the determination of a claim under Division 8.
- (2) The Corporation may, in connection with an application under subsection (1), require a worker to provide information specified by the Corporation.
- (3) The Corporation may, on application under subsection (1), determine that it is reasonable to accept provisional liability for the payment of compensation under section 32 and make a payment under this section.
- (4) The maximum amount payable under this section with respect to a particular disability is \$5 000 (indexed).
- (5) The acceptance of provisional liability under this section does not constitute an admission of liability under this Act or independently of this Act.
- (6) A payment under this section with respect to a particular cost discharges any liability that the Corporation may have with respect to that cost under section 32.
- (7) The Corporation may determine not to make a payment under this section despite the fact that the Corporation has previously made 1 or more payments with respect to the same disability under this section.
- (8) Subject to subsection (9), if the Corporation makes 1 or more payments under this section and it is subsequently determined that the worker was not entitled to compensation under this Act, the Corporation may, subject to and in accordance with the regulations—
 - (a) recover the amount or amounts paid as a debt; or
 - (b) set the amount off against a right to payment of compensation under this Act.
- (9) A right of recovery or set off under subsection (8) only arises if the worker has acted dishonestly in making an application or providing information for the purposes of this or any other section of this Act.
- (10) The following decisions are not reviewable:
 - (a) a decision to accept or not to accept liability under this section;
 - (b) a decision to make or not to make a payment under this section;
 - (c) a decision to exercise or not to exercise a right of recovery under this section.

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- (4) Subsection (3) does not affect the obligation of an employer to make a payment in the nature of an annual leave loading.
- (5) Where—
- (a) the entitlement of a worker to annual leave, or payment in lieu of annual leave, is governed by a law of the Commonwealth or a State or Territory of the Commonwealth (not being this State); and
 - (b) the worker is absent from employment in consequence of a compensable disability; and
 - (c) the period of absence is not taken into account as service for the purpose of calculating the worker's entitlement to annual leave or payment in lieu of annual leave,
- the worker is entitled by way of compensation to the monetary value of the annual leave that would have accrued if the worker had not been absent from employment.
- (6) Any compensation payable under subsection (5) shall be paid when the annual leave, or the payment in lieu of annual leave, would (assuming that the worker had not been absent from employment) have been granted or made.

41—Absence of worker from Australia

- (1) Where a worker who has suffered a compensable disability and who is receiving weekly payments is to be absent from Australia for a period in excess of 28 days, the worker shall, at least 28 days before leaving Australia, give the Corporation prescribed details of the proposed absence.
- (2) Where the Corporation is of the opinion that the absence may impair the prospects of the worker's rehabilitation, it may, after giving the worker at least 14 days notice, in a designated form, of its intention to do so, suspend or reduce the weekly payments to the worker.
- (3) The Corporation may suspend weekly payments that are being made to a worker who is absent from Australia—
- (a) if the Corporation cannot obtain, to its satisfaction, information relating to—
 - (i) the whereabouts of the worker;
 - (ii) the continuance of the worker's disability or incapacity for work;
 - (iii) the earning capacity of the worker; or
 - (b) if there is, in the opinion of the Corporation, some other proper reason justifying suspension of the weekly payments.
- (4) If a disabled worker leaves Australia without giving the notice required under subsection (1), the Corporation may suspend weekly payments to the worker.

Division 4A—Redemption

42—Redemption of liabilities

- (1) Any of the following liabilities may, by agreement between the worker and the Corporation, be redeemed by a capital payment to the worker—
- (a) a liability to make weekly payments;

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- (b) a liability to pay compensation under section 32.
- (2) An agreement for the redemption of a liability under this section cannot be made unless—
- (a) the worker has received competent professional advice about the consequences of redemption; and
 - (b) the worker has received competent financial advice about the investment or use of money to be received on redemption; and
 - (c) the Corporation has consulted with the employer out of whose employment the disability arose and has considered any representations made by the employer; and
 - (d) a recognised medical expert has certified that the extent of the worker's incapacity resulting from the compensable disability can be determined with a reasonable degree of confidence; and
 - (e) 1 (or more) of the following requirements are satisfied in the case of a proposed redemption under subsection (1)(a):
 - (i) the rate of weekly payments to be redeemed does not exceed \$30 (indexed);
 - (ii) the worker has attained the age of 55 years and the Corporation has determined that the worker has no current work capacity;
 - (iii) the Tribunal (constituted of a presidential member) has determined, on the basis of a joint application made to the Tribunal by the worker and the Corporation in contemplation of an agreement being entered into under this section, that the continuation of weekly payments is contrary to the best interests of the worker from a psychological and social perspective.
- (3) The amount of the redemption payment is to be fixed by the agreement.
- (4) If the Corporation notifies a worker in writing that it is prepared to enter into negotiations for the redemption of a liability by agreement under this section, the Corporation is liable to indemnify the worker for reasonable costs of obtaining the advice required under this section up to a limit prescribed by regulation.
- (5) If agreement is not reached within 3 months after redemption is first proposed (by the worker or the Corporation), either party may apply to the Tribunal for reference of the matter to a conciliation conference.
- (6) The Tribunal will then appoint a conciliator, and a conciliation conference will be held, in accordance with the rules of the Tribunal.
- (7) At the conciliation conference, each party must disclose information in the party's possession that may be relevant to the failure to reach agreement (including representation made by an employer about the redemption proposal).
- (8) The conciliator must make every practicable attempt to help the parties to settle their differences by agreement.
- (9) However, if agreement is not reached, a party cannot be compelled to agree to redemption of the liability.

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Part 4—Compensation

Division 6—Compensation payable on death

45C—Counselling services

- (1) If a worker dies as a result of a compensable disability, a family member is entitled to be compensated for the cost of approved counselling services to assist the family member to deal with issues associated with the death.
- (2) Compensation in respect of costs under this section may be paid—
 - (a) to the family member; or
 - (b) directly to the person to whom the family member is liable for those costs.
- (3) Compensation under this section—
 - (a) will be payable in accordance with scales determined or approved by the Minister and published in the Gazette; and
 - (b) will be subject, in any particular case, to a maximum entitlement prescribed by the regulations.
- (4) A reference in this section to approved counselling services is a reference to counselling services of a kind, or provided by a person, approved by the Corporation for the purposes of this section.
- (5) In this section—
family member means a spouse, domestic partner, parent, sibling or child of the worker or of the worker's spouse or domestic partner.

Division 7—Liability to pay compensation

46—Incidence of liability

- (1) Subject to this section, the Corporation is liable for the compensation that is payable under this Act on account of the occurrence of a compensable disability.
- (2) Where a compensable disability arises from employment by a self-insured employer, the self-insured employer is liable to make all payments of compensation to which any person becomes entitled in consequence of the occurrence of that compensable disability.
- (3) Subject to this section, where a worker is, as a result of a compensable disability, wholly or partially incapacitated for work and is in employment when the incapacity arises, the worker's employer is liable to pay compensation by way of income maintenance—
 - (a) if the period of incapacity is two weeks or less—for the whole period of the incapacity; or
 - (b) if the period of the incapacity is more than two weeks—for the first two weeks of the period of incapacity.
- (4) If separate periods of incapacity commence during the course of the same calendar year (whether attributable to the same disability or not), an employer is not liable to pay compensation under subsection (3) for those periods of incapacity in excess of an amount equal to twice the worker's average weekly earnings.

Section 45

Section 53 (but not the power to approve recognised medical experts for the purposes of section 53(2))

Section 106

Section 106A;

- (b) any other prescribed powers and discretions.
- (2) Delegated powers and discretions referred to in subsection (1) shall not be exercised by the Corporation in relation to the workers of the exempt employer.
- (3) Subject to this section, the Corporation shall not overrule or interfere with a decision of an exempt employer made in the exercise of delegated powers or discretions.
- (3aa) An exempt employer—
- (a) must notify the Corporation, in accordance with the regulations, of its intention to make an assessment under Division 4B of Part 4 (Compensation for Loss of Earning Capacity) and must not proceed to make the assessment except with the Corporation's consent; and
- (b) is subject to direction by the Corporation as to how it is to exercise its powers and discretions under that Division in relation to the workers, or a particular worker, of the employer.
- (3a) The Corporation may direct an exempt employer how the employer is to exercise its discretion regarding the maximum lump sum to be paid to an orphan child, or to orphan children.
- (4) A decision of an exempt employer made in pursuance of a power or discretion delegated under subsection (1) shall have the same force and effect as a decision of the Corporation and shall be subject to review and appeal in the same way as a decision of the Corporation.
- (5) A reference to the Corporation in the provisions of this Act referred to in subsection (1) shall, in relation to any matter over which an exempt employer has delegated powers or discretions, be construed as a reference to that exempt employer.
- (6) If an exempt employer exercises a power or discretion delegated under subsection (1) unreasonably, the Corporation may withdraw (in whole or in part) the delegation effected by subsection (1).
- (7) Where an employer ceases to be an exempt employer, the delegation to the employer under this section will, if the Corporation so determines, continue to such extent as the Corporation thinks fit in relation to disabilities that occurred before cessation of the exemption (and any act or omission of the employer within the scope of the delegation will be taken for the purposes of this Act, to be the Act or omissions of an exempt employer).

Division 3—The Compensation Fund

64—The Compensation Fund

- (1) The Corporation shall establish and maintain a fund entitled the "Compensation Fund".

- (2) The Compensation Fund shall consist of—
- (a) amounts received from the imposition of levies under this Part;
 - (b) any income and accretions produced by the investment of money from the Fund;
 - (c) any money advanced to the Corporation for the purposes of the Fund;
 - (d) other money received by the Corporation under this Act or in the administration of this Act;
 - (e) to the extent provided by regulation—money received by the Corporation under, or in the administration of, another Act.
- (3) The Compensation Fund shall be applied towards—
- (a) the payments of compensation that the Corporation is liable to make under this Act;
 - (b) the costs incurred by the Corporation in performing its functions under this Act;
 - (c) the costs of the system of dispute resolution established by this Act;
 - (d) to the extent provided by regulation—the costs incurred by the Corporation in carrying out its functions under another Act.
- (3a) The amount to be paid from the Compensation Fund under subsection 3(c) will be determined by agreement between the Chief Executive Officer of the department of the Minister to whom the administration of this Act is committed and the Corporation or, in default of agreement, by the Minister.
- (4) The Corporation may invest money that is not immediately required for the purposes of the Compensation Fund as the Corporation thinks fit.
- (5) Subject to subsection (6), in deciding how to invest funds that are available for investment, the Corporation shall endeavour to achieve the highest possible rates of return.
- (6) The Corporation is not required to comply with subsection (5) if the board unanimously decides, in relation to certain funds, to invest those funds at a lesser rate of return but so as to promote the economy of the State.
- (7) Until there are sufficient funds in the Compensation Fund to meet the liabilities of the Fund, the Treasurer may, as may be required from time to time, lend money to the Corporation on such terms and conditions as the Treasurer may determine.
- (8) The Treasurer may charge a fee of such amount as the Treasurer thinks fit in respect of any loan made to the Corporation under subsection (7).

Division 4—Imposition of levies

65—Preliminary

- (1) In this Division—
- class* of industry includes a subclass;

377—Amendment of section 64—Compensation Fund

Section 64(3a)—delete "Chief Executive Officer of the department of the Minister to whom the administration of this Act is committed" and substitute:

chief executive of the administrative unit that is, under the Minister,
 responsible for the administration of this Act

378—Amendment of section 81A—Conditions of appointment

Section 81A(3)(b)—delete "*Public Sector Management Act 1995*" and substitute:

Public Sector Act 2009

379—Amendment of section 99I—Staff

Section 99I(2)(a)—delete "*Public Sector Management Act 1995*" and substitute:

Public Sector Act 2009

380—Repeal of section 99N

Section 99N—delete the section

Part 168—Amendment of *Young Offenders Act 1993*

381—Amendment of section 4—Interpretation

Section 4, definition of *Department*—delete the definition and substitute:

Department means the administrative unit of the Public Service that is, under a Minister, responsible for the administration of the *Family and Community Services Act 1972*;

382—Amendment of section 38—Training Centre Review Board

Section 38(6a) and (6b)—delete subsections (6a) and (6b)

Part 169—Amendment of *Youth Court Act 1993*

383—Amendment of section 3—Interpretation

Section 3, definition of *Department*—delete the definition

384—Amendment of section 24—Persons who may be present in Court

Section 24(1)(b)—delete "of the Department of Family and Community Services" and substitute:

or employees of the administrative unit of the Public Service that is, under a Minister, responsible for the administration of the *Family and Community Services Act 1972*

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- (2) However, if the employer's belief on reasonable grounds under subsection (1) was that under section 6 the particular worker's employment was connected with another State, subsection (1) does not apply unless at the time of the relevant failure the employer had workers compensation cover in respect of the worker under the law of that other State.
- (3) In this section—
- State* includes a Territory;
- workers compensation cover* means insurance or registration under the law of a State in respect of liability for statutory workers compensation under that law.

Division 8—Miscellaneous**73—Separate accounts**

The Corporation shall, in a manner and form determined by the Corporation, maintain a separate account for each employer in which the Corporation records—

- (a) the levies charged to the employer; and
- (b) the amounts paid by an employer; and
- (c) the costs related to claims arising from employment by the employer, distinguishing the costs related to claims for unrepresentative disabilities and secondary disabilities from the other claims; and
- (d) all other costs attributable to the employer; and
- (e) any other matter that the Corporation thinks fit.

74—Liability to keep accounts

- (1) For the purpose of completing returns in accordance with this Part, an employer shall keep—
- (a) an accurate account of all remuneration paid or payable to the workers of the employer;
 - (b) such other information as may be required by the Corporation.

Maximum penalty: \$10 000.

- (2) Where an employer employs workers in more than one class of industry, the Corporation may require the employer to keep an account and other information under subsection (1) in respect of each separate class.
- (3) Any accounts and other information required to be kept under this section must be kept within the State and in writing in the English language or so as to be readily accessible and convertible into writing in the English language.
- (4) This section does not apply so as to require the retention of accounts or other information beyond 7 years or such lesser period as the Corporation may determine in a particular case from the end of the period to which the accounts or other information relates.

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- (3) A person who obstructs the Tribunal, or a person authorised by the Tribunal, in the exercise of a power of entry or inspection under this section commits a contempt of the Tribunal.

84D—Issue of evidentiary summonses

- (1) A summons under this Part may be issued on behalf of the Tribunal by—
- (a) a presidential member of the Tribunal; or
 - (b) a conciliation officer; or
 - (c) the Registrar.
- (2) However, the Registrar may only issue a summons at the direction of a presidential member or a conciliation officer or as authorised under the Rules.

Division 9—General principles and rules

85—Principles of equity and good conscience

The Tribunal must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.

85A—Hearings to be in public

- (1) The Tribunal must hear proceedings (other than interlocutory or conciliation proceedings) in a place open to the public.
- (2) However, the Tribunal may, in the interests of a party to proceedings hear the proceedings, or a particular part of the proceedings, in private.

85B—Representation

- (1) A person is entitled to appear personally or by representative in conciliation proceedings or other proceedings before the Tribunal.
- (2) However, a person is not entitled to be represented by a person whose name has been struck off the roll of legal practitioners or who, although a legal practitioner, is not entitled to practise the profession of law because of disciplinary action taken against the person.
- (3) If, in conciliation proceedings, the conciliator presiding at the proceedings wants to speak to a person privately in the absence of the person's representative, the representative must withdraw until—
- (a) the conciliator invites the representative to return; or
 - (b) the private interview is terminated.
- (4) A party is entitled to terminate a private interview with the conciliator held in the absence of the party's representative at any time after the conciliator has had a reasonable opportunity to put to the party proposals for which the conciliator initiated the private interview.

88E—Rules

- (1) The President may make Rules of the Tribunal—
 - (a) regulating the business of the Tribunal and the duties of the various officers of the Tribunal; and
 - (b) authorising conciliation officers to exercise any part of the jurisdiction of the Tribunal; and
 - (c) regulating the practice and procedure of the Tribunal; and
 - (d) imposing mutual obligations on parties to proceedings in the Tribunal to disclose to each other the contents of expert reports or other material of relevance to the proceedings before the proceedings are brought to trial; and
 - (e) regulating the form in which evidence may be taken; and
 - (f) regulating costs; and
 - (g) dealing with any other matter necessary or expedient for the effective and efficient operation of the Tribunal.
- (2) Before making Rules of the Tribunal, the President must consult with a rules committee consisting of—
 - (a) at least three presidential members; and
 - (b) at least two conciliation officers; and
 - (c) the Registrar.
- (3) The rules take effect as from the date of publication in the Gazette or a later date specified in the rules.

88F—Costs of proceedings

Subject to this Act, the costs of proceedings before the Tribunal are in the discretion of the Tribunal.

88G—Recovery of costs of representation

- (1) A representative of a party to proceedings before the Tribunal must not charge nor seek to recover for work involved in, or associated with, that representation an amount exceeding the amount allowable under a scale fixed by regulation.
Maximum penalty: \$2 000.
- (2) Before proposing a regulation under this section to the Executive Council, the Minister must consult with the Crown Solicitor.

88H—Power to set aside judgments or orders

- (1) The Tribunal may amend or set aside a judgment or order of the Tribunal—
 - (a) by consent of the parties; or
 - (b) in order to correct an error; or
 - (c) if the interests of justice require that the judgment or order be amended or set aside.

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- (2) However, if the amount of lump sum compensation is disputed by a worker and the amount the Tribunal proposes to award is less than, or the same as, or less than 10% above, the amount offered in conciliation proceedings, the worker is not entitled to costs of the proceedings under this Division.

Division 7—Costs**95—Costs**

- (1) A party (other than the relevant compensating authority) is entitled, subject to this Part and to limits prescribed by regulation, to an award against the relevant compensating authority for the party's reasonable costs of—
- (a) the initial reconsideration of a disputed decision; and
 - (b) any subsequent proceedings for resolution of the dispute under this Part (but not proceedings by way of an appeal or a reference of a question of law to a Full Bench of the Tribunal or the Supreme Court).
- (2) Costs may only be awarded to cover—
- (a) the cost of representation by a legal practitioner or an officer or employee of an industrial association; and
 - (b) costs of a kind authorised by the regulations that were reasonably incurred.
- (3) If the Tribunal is of the opinion that a party acted unreasonably, frivolously or vexatiously in bringing or in relation to the conduct of proceedings, the Tribunal may—
- (a) decline to make an award of costs in favour of the party and may further (if it thinks fit) make an award of costs against the party; or
 - (b) reduce the amount of the award to which the party would otherwise have been entitled.
- (4) An award of costs to cover professional advice or assistance may, if the Tribunal considers appropriate, be made in favour of the person who provided the professional advice or assistance.
- (5) An award of legal costs cannot exceed 85% of the amount that would be allowable under the relevant Supreme Court scale if the proceedings were in the Supreme Court.

95A—Costs liability of representatives

- (1) In this section—
- professional representative* means a legal practitioner or other person who has been engaged or appointed to represent a party to proceedings before the Tribunal (whether personally or through an employee or agent).
- (2) If a professional representative acting for a party to proceedings before the Tribunal under this Part (whether personally or through an employee or agent) has caused costs—
- (a) to be incurred improperly or without reasonable cause; or
 - (b) to be wasted by undue delay or negligence or by any other misconduct or default,

Part 6A—Dispute resolution

Division 1—Preliminary

89—Interpretation

In this Part—

applicant means the person who lodges a notice of dispute under this Part;

party to a dispute means—

- (a) the applicant; and
- (b) the relevant compensating authority; and
- (c) if the dispute is about a compensable disability and the worker who suffered or is alleged to have suffered the compensable disability is not the applicant—the worker; and
- (d) if the dispute is about a compensable disability and the employer from whose employment the disability arose or is alleged to have arisen is not the applicant—the employer; and
- (e) a person who has a direct interest in the dispute and has notified the Registrar of the interest;

relevant compensating authority in relation to a particular disputed decision means—

- (a) if the decision was made by the Corporation or a body corporate exercising powers delegated by the Corporation—the Corporation or the relevant delegate; or
- (b) if the decision was made by a self-insured employer—the self-insured employer.

89A—Reviewable decisions

- (1) The following decisions are reviewable—
 - (a) a decision on a claim for compensation including—
 - (i) a decision redetermining a claim¹; or
 - (ii) a decision on a claim by the Tribunal, made in the exercise of the Tribunal's special jurisdiction to expedite decisions on claims²;
 - (b) a decision about the nature of rehabilitation services provided, or to be provided, for a worker³;
 - (c) a decision to vary, suspend or discontinue weekly payments;
 - (d) a decision on an application by an employer to have weekly payments payable to a worker employed by, or formerly employed by, the employer reviewed;
 - (e) a decision to disallow or reduce a charge for a medical service (unless the decision merely brings the charge into conformity with a rate of charge prescribed by regulation).

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Part 6A—Dispute resolution

Division 1—Preliminary

- (2) However, a decision is not reviewable if declared not to be reviewable by or under this Act.

Notes—

- 1 See section 53(7) & (7a).
 2 See section 97B(3)(b).
 3 Section 28B also provides for the review of a rehabilitation and return to work plan.

Division 2—Notice of dispute

90—Notice of dispute

- (1) A person with a direct interest in a reviewable decision (the *applicant*) may lodge a notice of dispute with the Registrar.
- (2) A notice of dispute must be in writing and in the form prescribed by regulation.
- (3) A person has a direct interest in a reviewable decision if the person—
- (a) is directly affected by the decision; or
 - (b) is the employer from whose employment the compensable disability arose or is alleged to have arisen.

90A—Time for lodging notice of dispute

- (1) The notice of dispute must be lodged within one month after the applicant receives notice of the reviewable decision unless the Tribunal allows an extension of time.
- (2) The Tribunal's power to extend time may only be exercised by the President or a presidential member or conciliation and arbitration officer to whom the President has delegated the power to allow an extension of time.
- (3) An application for an extension of time must be made as in the manner and form prescribed by the regulations.

90B—Notice to be given by Registrar

- (1) On receiving a notice of dispute, the Registrar must immediately send copies of the notice of dispute to the other parties to the dispute.
- (2) The copy of the notice of dispute sent to the relevant compensating authority must be accompanied by copies of any documentary materials lodged with the notice of dispute.

Division 3—Initial reconsideration

91—Initial reconsideration

- (1) The relevant compensating authority must, on receiving a copy of a notice of dispute under this Part—
- (a) assign a suitable person to reconsider the disputed decision; and
 - (b) have the decision reconsidered in the light of the matters set out in the notice of dispute.

- (2) A person assigned to reconsider the disputed decision—
- (a) may (but need not be) an officer of the relevant compensating authority but must not be the person who made the disputed decision; and
 - (b) must be a person who has been nominated to the Registrar in accordance with the regulations as a person who may be assigned to reconsider disputed decisions under this Division.
- (3) On completion of the reconsideration, the relevant compensating authority must confirm or vary the disputed decision to conform with the result of the reconsideration and give the Registrar a written notice stating—
- (a) the result of the reconsideration; and
 - (b) whether the compensating authority has confirmed or varied the decision as a result of the reconsideration and, if the decision has been varied, how the decision has been varied.
- (4) If the disputed decision is varied, the written notice must also be given to the other parties to the dispute.
- (5) The relevant compensating authority must complete the reconsideration and give the notice or notices stating the result of the reconsideration within 7 days after receiving the notice of dispute or a longer time allowed by the Registrar on the authority's application.
- Maximum penalty: \$5 000.
- (6) The variation of a decision under this section is not to be regarded as a redetermination of a claim¹.
- (7) A decision on a claim by the Tribunal itself, made in the exercise of the Tribunal's special jurisdiction to expedite decisions on claims², is not liable to reconsideration under this section; if such a decision is disputed, the Registrar must immediately refer the dispute for conciliation.

Notes—

- 1 See section 53(7) and (7a).
- 2 See section 97B.

91A—Reference of disputes to conciliation

If—

- (a) the relevant compensating authority, on reconsideration of a disputed decision, confirms the decision; or
- (b) the relevant compensating authority, on reconsideration of a disputed decision, varies the decision and a party to the dispute expresses dissatisfaction with the result of the reconsideration in accordance with the rules,

the Registrar must refer the dispute for conciliation.

Division 4—Conciliation proceedings

92—Assignment of presidential member or conciliation officer to preside at conciliation proceedings

- (1) When a dispute is referred for conciliation—
 - (a) a presidential member or conciliation officer must be assigned in accordance with the rules to preside at the conciliation proceedings; and
 - (b) each party to the dispute must, in accordance with the rules—
 - (i) disclose to the conciliator the existence and nature of all evidentiary material in the party's possession relevant to the dispute; and
 - (ii) at the request of another party to the dispute, give the party access to the relevant evidentiary material.
- (2) However, if the conciliator agrees, a party need not give another party access to evidentiary material if—
 - (a) the material is a videotape, photographic material, or a report of surveillance; or
 - (b) the disclosure of the material could prejudice the investigation of a suspected offence.

92A—Obligation of conciliator

In conducting conciliation proceedings, the conciliator must—

- (a) seek to identify the issues in dispute and to narrow the range of the dispute; and
- (b) explore the possibilities of resolving the dispute by agreement.

92B—Calling of conciliation conference

- (1) A compulsory conference of the parties to a dispute that has been referred for conciliation must be called within the time fixed by the rules.
- (2) The Tribunal may summon the parties to the dispute and any other persons who may be able to assist in resolving the dispute to appear at the conference.
- (3) A compulsory conference may, at the discretion of the conciliator, be held in public or private or partly in public and partly in private.
- (4) A person who fails to attend a compulsory conference as required by summons or who, having attended, fails to participate in the conference as required by the conciliator presiding at the conference, commits a contempt of the Tribunal.

92C—Procedure in conciliation proceedings

- (1) In the course of conducting conciliation proceedings, the conciliator may interview the parties to the dispute separately or together.

- (2) The conciliator presiding at a conference may (subject to the rules) adjourn the conference from time to time to allow the parties to gather further information, to consider their respective positions or for other purposes relevant to the resolution of the dispute.
- (3) Evidence of anything said or done in the course of conciliation proceedings is only admissible in subsequent proceedings by consent of all parties to the proceedings.
- (4) However—
 - (a) evidence of a settlement reached in conciliation proceedings is admissible (without the consent of all parties) in subsequent proceedings; and
 - (b) evidence of the offers made in the course of conciliation proceedings is admissible (without the consent of all parties) in subsequent proceedings for the purpose of applying provisions for deciding questions about costs.
- (5) A settlement to which counsel or another representative of a party agrees at a conference is binding on the party.
- (6) The conciliator presiding at a conference may make a determination or order to give effect to a settlement reached at the conference.
- (7) A determination or order under subsection (6) is a determination or order of the Tribunal.

92D—Reference of dispute into Tribunal

If conciliation proceedings do not result in an agreed settlement of the dispute, the conciliator presiding at the conciliation proceedings must refer the dispute into the Tribunal for judicial determination.

Division 6—Judicial determination of dispute

94A—Constitution of Tribunal

- (1) For the purpose of making a judicial determination of a disputed claim, the Tribunal will be constituted of a single presidential member.
- (2) However, if the President decides that a particular dispute should be referred directly to a Full Bench of the Tribunal, the dispute will be heard and determined by a Full Bench of the Tribunal.

94B—Pre-hearing conference

- (1) Before the Tribunal proceeds with the hearing of the disputed claim, a pre-hearing conference of the parties must be held in accordance with the rules.
- (2) However, a presidential member of the Tribunal may dispense with a pre-hearing conference if there is proper reason for doing so.

94C—Determination of dispute

- (1) In proceedings under this Division, the Tribunal must decide the dispute without regard to decisions taken in earlier proceedings.

Workers Rehabilitation and Compensation Act 1986—1.1.2009

Part 6A—Dispute resolution

Division 6—Judicial determination of dispute

- (2) However, if the amount of lump sum compensation is disputed by a worker and the amount the Tribunal proposes to award is less than, or the same as, or less than 10% above, the amount offered in conciliation proceedings, the worker is not entitled to costs of the proceedings under this Division.

Division 7—Costs

95—Costs

- (1) A party (other than the relevant compensating authority) is entitled, subject to this Part and to limits prescribed by regulation, to an award against the relevant compensating authority for the party's reasonable costs of—
 - (a) the initial reconsideration of a disputed decision; and
 - (b) any subsequent proceedings for resolution of the dispute under this Part (but not proceedings by way of an appeal or a reference of a question of law to a Full Bench of the Tribunal or the Supreme Court).
- (2) Costs may only be awarded to cover—
 - (a) the cost of representation by a legal practitioner or an officer or employee of an industrial association; and
 - (b) costs of a kind authorised by the regulations that were reasonably incurred.
- (3) If the Tribunal is of the opinion that a party acted unreasonably, frivolously or vexatiously in bringing or in relation to the conduct of proceedings, the Tribunal may—
 - (a) decline to make an award of costs in favour of the party and may further (if it thinks fit) make an award of costs against the party; or
 - (b) reduce the amount of the award to which the party would otherwise have been entitled.
- (4) An award of costs to cover professional advice or assistance may, if the Tribunal considers appropriate, be made in favour of the person who provided the professional advice or assistance.
- (5) An award of legal costs cannot exceed 85% of the amount that would be allowable under the relevant Supreme Court scale if the proceedings were in the Supreme Court.

95A—Costs liability of representatives

- (1) In this section—

professional representative means a legal practitioner or other person who has been engaged or appointed to represent a party to proceedings before the Tribunal (whether personally or through an employee or agent).
- (2) If a professional representative acting for a party to proceedings before the Tribunal under this Part (whether personally or through an employee or agent) has caused costs—
 - (a) to be incurred improperly or without reasonable cause; or
 - (b) to be wasted by undue delay or negligence or by any other misconduct or default,

the Tribunal may make an order as specified in subsection (3).

- (3) The Tribunal may order—
 - (a) that all or any of the costs between the professional representative and his or her client be disallowed or that the professional representative repay to his or her client the whole or part of any money paid on account of costs;
 - (b) that the professional representative pay to his or her client all or any of the costs which his or her client has been ordered to pay to any party;
 - (c) that the professional representative pay all or any of the costs of any party other than his or her client.
- (4) Without limiting subsection (2), a professional representative is in default for the purposes of that subsection if any proceedings cannot conveniently be heard or proceed, or fail or are adjourned without any useful progress being made, because the professional representative failed to—
 - (a) attend in person or by a proper representative; or
 - (b) file any document which ought to have been filed; or
 - (c) lodge or deliver any document for the use of the Tribunal which ought to have been lodged or delivered; or
 - (d) be prepared with any proper evidence or account; or
 - (e) otherwise proceed.
- (5) The Tribunal may not make an order against a professional representative under subsection (3) unless the Tribunal has informed the professional representative of the nature of the order proposed and allowed the professional representative a reasonable opportunity to make representations, and call evidence, in relation to the matter.
- (6) The Tribunal may order that notice of any proceedings or order against a professional representative under this section be given to the client in such manner as the Tribunal directs.
- (7) A decision of the Tribunal constituted of a conciliation officer under this section may be reviewed, on application under the rules, by a presidential member of the Tribunal.
- (8) On a review under subsection (7), the presidential member of the Tribunal may—
 - (a) decide the matter and, if he or she thinks fit—
 - (i) make any order that may be made under this section at first instance;
 - (ii) vary or revoke the order that is the subject of the review;
 - (b) refer the matter back to the conciliation officer with directions the presidential member thinks fit;
 - (c) make consequential or related orders.

Division 8—Ministerial intervention

96—Ministerial intervention

The Minister may, if satisfied that intervention is justified in the public interest, intervene in proceedings before the Tribunal or the Supreme Court under this Part.

Part 6B—Special jurisdiction to expedite decisions

97—Special jurisdiction

- (1) A worker or employer who believes there has been undue delay in deciding a claim or other matter affecting the worker or employer may apply to the Tribunal, in the manner and form prescribed by regulation, for expedited determination of the matter.
- (2) However, an application cannot be made for expedited determination of—
 - (a) a question about the redemption of a liability¹; and
 - (b) a matter of a class excluded by regulation from the ambit of this section.
- (3) An application for expedited determination of a matter cannot be made until at least 14 days after the day the matter was placed before the decision-maker whose decision is required.

Note—

1 See section 42.

97A—Constitution of Tribunal for proceedings under this Part

For the purpose of proceedings under this Part, the Tribunal may be constituted of a presidential member or a conciliation officer.

97B—Powers of Tribunal on application

- (1) On an application for expedited determination of a matter, the Tribunal may—
 - (a) give directions the Tribunal considers necessary to expedite the determination of the matter; or
 - (b) decide the matter itself.
- (2) A person to whom a direction is given by the Tribunal under subsection (1) must comply with the direction.

Maximum penalty: \$5 000.

Prosecution of non-compliance as an offence does not prejudice enforcement of the direction in other ways.

- (3) If the Tribunal decides a claim under this section, the decision—
 - (a) is to be treated as a decision of the relevant compensating authority; and
 - (b) is a reviewable decision.

97C—Costs

Regulations may be made about the costs of proceedings under this Part.

Workers Rehabilitation and Compensation Act 1986—15.10.2009**Part 6C—Medical Panels****Division 2—Functions and powers**

- (4) For the purposes of determining any question or matter, the opinion of a Medical Panel on a medical question referred to the Medical Panel is to be adopted and applied by any body or person acting under this Act and must be accepted as final and conclusive irrespective of who referred the medical question to the Medical Panel or when the medical question was referred.

Division 3—Related matters**98I—Admissibility**

- (1) A certificate given by a Medical Panel is admissible in evidence in any proceedings under this Act.
- (2) A member of a Medical Panel is competent to give evidence as to matters in a certificate given by the Medical Panel of which he or she was a member, but the member may not be compelled to give any such evidence.
- (3) A consultant engaged to provide expert advice to a Medical Panel is competent to give evidence as to matters relating to that expert advice, but the consultant may not be compelled to give any such evidence.

98J—Support staff

- (1) The Minister must ensure that there are such administrative and ancillary staff as are necessary for the proper functioning of Medical Panels.
- (2) The staff may be—
 - (a) Public Service employees assigned to work in support of the Medical Panels;
or
 - (b) persons employed or engaged for the purposes of this Part.
- (3) The terms and conditions of appointment of a person under subsection (2)(b) will be determined by the Minister and such a person will not be a Public Service employee.
- (4) The costs associated with the staff under subsection (1) will be recoverable from the Compensation Fund under a scheme established or approved by the Treasurer after consultation with the Corporation.

119—Contract to avoid Act

- (1) Any agreement or arrangement entered into without the consent of the Corporation that purports to exclude, modify or restrict the operation of this Act is to that extent void and of no effect.
- (2) Any purported waiver of a right conferred by or under this Act is void and of no effect.
- (3) Any person—
 - (a) who enters into any agreement or arrangement with intent either directly or indirectly to defeat, evade or prevent the operation of this Act; or
 - (b) who attempts to induce a person to waive a right or benefit conferred by or under this Act,

is guilty of an offence.

Penalty: \$5 000 or imprisonment for one year.

120—Dishonesty

- (1) A person who—
 - (a) obtains by dishonest means a payment or other benefit under this Act; or
 - (b) dishonestly claims to be entitled to a payment or other benefit under this Act; or
 - (c) dishonestly makes a statement about a claim under this Act knowing the statement is false or misleading; or
 - (d) dishonestly makes an application, or gives a return, under this Act knowing the application or return to be false or misleading,

is guilty of an offence.

Penalty: \$50 000 or imprisonment for one year.

- (2) A person who—
 - (a) aids, abets, counsels or procures the commission of an offence against subsection (1); or
 - (b) solicits or incites the commission of any such offence,

is guilty of an offence.

Penalty: \$10 000 or imprisonment for one year.

- (3) Where a court convicts a person of an offence against this section, or finds a person guilty of such an offence without recording a conviction, the court must, on application by the Corporation or an exempt employer, order the person who committed the offence—
 - (a) to make good any loss to the applicant resulting from the commission of the offence; and
 - (b) to reimburse costs incurred by the applicant in investigating and prosecuting the offence.

120A—Evidence

- (1) In any legal proceedings, a certificate apparently signed by an officer of the Corporation, certifying—
 - (a) that a person was, on a day specified in the certificate, an employer;
 - (b) that a person was, on a day specified in the certificate, a worker,will, in the absence of proof to the contrary, be proof of the matters stated in the certificate.
- (2) In any legal proceedings against a person for failing to register with the Corporation as an employer, a certificate apparently signed by an officer of the Corporation, certifying that the person was not, on a specified day, registered as an employer will, in the absence of proof to the contrary, be proof of the matters stated in the certificate.
- (3) In any legal proceedings, a certificate apparently signed by an officer of the Corporation, certifying that an amount specified in the certificate is payable to the Corporation, by way of levy or fine, by a person named in the certificate, will, in the absence of proof to the contrary, be proof of the liability.
- (4) In any proceedings against a person for failing to furnish a return under this Act, a certificate apparently signed by an officer of the Corporation certifying that the return was not received before the expiration of the period within which it was required to be furnished will, in the absence of evidence to the contrary, be proof that the defendant failed duly to furnish the return.
- (5) In any proceedings, a certificate apparently under the seal of the Corporation certifying that an officer of the Corporation named in the certificate was, on a day specified in the certificate, invested with specified delegated powers or functions will, in the absence of evidence to the contrary, be proof of the matters stated in the certificate.
- (6) In this section—

officer of the Corporation includes a person who, although not an officer of the Corporation, is acting under a delegation of the Corporation.

122—Offences

- (1) A person who contravenes or fails to comply with a provision of this Act is guilty of an offence.
- (2) A person who is guilty of an offence against this Act for which no penalty is specifically provided shall be liable to a fine not exceeding \$2 000.
- (3) Proceedings for an offence against this Act shall be disposed of summarily.
- (3a) A prosecution for an offence against this Act must be commenced within three years after the date on which the offence is alleged to have been committed.
- (4) Subsection (1) does not render the Corporation, a member of the staff of the Corporation, or any person acting on behalf of the Corporation, liable to prosecution for any act or omission related to the administration or enforcement of this Act.

122A—Expiation fees

Expiation fees may be fixed, by regulation, for alleged offences against this Act.

(19) In this section—

date of transition means the date on which the *Workers Rehabilitation and Compensation (SGIC) Amendment Act 1996* comes into operation.

5A—Insurance Assistance Fund

- (1) The Insurance Assistance Fund must be established by separating out the part of the Compensation Fund identified in the accounts of the Corporation as the Insurance Assistance Fund immediately before the commencement of this clause.
- (2) The Governor may, by proclamation, transfer rights and liabilities of the insurer under a section 118g policy from the Motor Accident Commission to the Corporation.
- (3) The Motor Accident Commission may delegate to the Corporation its responsibility for administering claims under section 118g policies.
- (4) The Corporation may, by an authorised contract or arrangement—
 - (a) delegate its responsibility for administering claims under section 118g policies in relation to which the rights and liabilities of the insurer have been transferred to the Corporation under subclause (2); or
 - (b) subdelegate a responsibility for administering claims under section 118g policies delegated to it under subclause (3).
- (5) The Motor Accident Commission or the Corporation (as the case requires) may recoup expenditure covering liabilities under section 118g policies and associated administrative and legal costs (other than expenditure and costs covered by a contract of reinsurance) from the Insurance Assistance Fund and, if that proves insufficient, from the Statutory Reserve Fund.
- (6) In this clause—

authorised contract or arrangement means a contract or arrangement authorised by regulation under section 14 of the *WorkCover Corporation Act 1994*;

section 118g policy means a policy of insurance issued under section 118g(3) of the repealed Act.

5B—Investment of, and dealings with, the Funds

- (1) The Statutory Reserve Fund and the Insurance Assistance Fund may be invested in common with the Compensation Fund as if they formed part of the Compensation Fund.
- (2) If the Corporation is of the opinion that the balance of the Statutory Reserve Fund or the Insurance Assistance Fund exceeds the amount reasonably required for the purposes for which the relevant fund exists, the Corporation may, with the Minister's consent, transfer the surplus to the Compensation Fund.

5C—Entitlement to documents

The Corporation is entitled to possession of all documents and other materials in the possession or power of the Motor Accident Commission relevant to claims against the Statutory Reserve Fund or to liabilities under policies of insurance transferred to the Corporation under this Schedule.

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specifically made, no further allowances shall be made for conferences; reading time or preparation. Such refresher fees shall be awarded as follows:

- For time spent beyond 5 hours and up to 10 hours - at the rate of up to \$225.00 per hour.
- For time spent beyond 10 hours and up to 20 hours - at the rate of up to \$150.00 per hour.
- For time spent beyond 20 hours - at the rate of up to \$100.00 per hour.
- Where written submissions are provided costs shall be awarded on an hourly rate commensurate with 1.5 times that, which would apply, had the submissions been made orally.
- Where judgment is delivered in Court an amount of \$150.00 to receive judgment.

*For example: converting video evidence into a short passage of edited highlights for showing in court (subject of course to all video tapes being made available to the other parties to the dispute after cross-examination of the relevant witness has been completed); obtaining and providing to the other parties copies of notes that a witness may seek to rely upon in giving evidence; scheduling witnesses so as to ensure that sufficient time is allowed for the receipt of their evidence; agreeing where possible to interpose witnesses and if interposition is not possible to indicate that to the other parties at the earliest possible time; arranging witnesses so as to ensure that the available time is best utilised.

- (e) Notwithstanding the limitations on counsel fees previously expressed, if the presiding member is of the opinion that the party against whom a costs order is to be made has unnecessarily prolonged the hearing the presiding member may award an amount of up to \$225.00 per hour for counsel fees for any period of time spent in court after the first 5 hours.
- (8) If a party contends that some other order for costs is more appropriate to the circumstances to the proceedings than that which Rule 30(7)(d) stipulates, the party should advise the Tribunal and the other parties to the dispute at the earliest possible time. A failure to do so shall be taken into account in determining whether such an order should be made. Other factors to be taken into account shall include the complexity of the case, the need to engage senior counsel and the additional hearing time required as a result of the consolidation of actions or an agreement to expand the issues in dispute.
- (9) This rule does not apply to actions for recovery under s 54 or the Schedule 1 of the Act.

RULE THIRTY ONE - REPRESENTATION COSTS

- (1) A representative of a party shall not charge excessive representation costs. Unless there are exceptional circumstances representation costs greater than the Supreme Court scale as varied from time to time ("the Supreme Court scale") shall be regarded as excessive.
- (2) A representative acting for a worker in respect of proceedings under the Act is not entitled to recover from that worker any costs in respect of those proceedings in

addition to those payable by the compensating authority or claim any lien in respect of such costs or deduct such costs from sum awarded as compensation to the worker unless those additional costs have been awarded by a Presidential Member of the Tribunal. Where a worker's representative seeks such an award of costs the representative shall file an Application for Directions and a supporting affidavit and serve them upon the worker. The Application shall then be referred to a Presidential Member who shall make such orders or give such directions, as may be appropriate including, for example:

- (a) directing the worker's representative to prepare a short or long form bill of costs;
 - (b) directing the worker or the worker's representative to obtain an opinion from of an independent lawyer regarding the reasonableness of the claim for additional costs and directing who should bear the costs of obtaining that opinion;
 - (c) directing the worker or the worker's representative to participate in a conciliation conference to explore the resolution of any issues arising out of the claim for additional costs;
 - (d) directing the Registrar to conduct a taxation of costs and make recommendations such as what amount of additional costs are reasonable;
 - (e) directing the worker's representative to produce all files relating to the worker that are in the representative's possession, custody or control;
 - (f) directing that any documents produced in connection with the Application be marked confidential.
- (3) A Presidential Member in determining what, if any additional costs should be awarded shall have regard to the conduct of the worker, the amount of money involved, the importance of the case, the complexity of the issues in dispute, and any other relevant matter.
- (4) Sub-rules (2) and (3) only apply to matters in respect of which instructions were given on or after 1 January 2009.

RULE THIRTY TWO - FULL BENCH REFERRAL

- (1) A party wishing to refer a dispute directly to a Full Bench may apply to do so by an application for directions.
- (2) If a Presidential Member believes that it is appropriate for a dispute to be referred directly, the member shall complete a certificate in accordance with the form titled "Certificate of Referral to a Full Bench" and provide copies to all parties.
- (3) In either case the application or referral shall be listed before the President for the purpose of allowing the parties an opportunity to be heard prior to the President deciding whether or not to refer the matter to a Full Bench. Examples of orders, which may be made, are as set out in the form titled "Full Bench Referral Orders".