IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S201 of 2013

BETWEEN

ADCO Constructions Pty Ltd
Appellant

and

Ronald Goudappel
First Respondent

WorkCover Authority of NSW
Second Respondent

APPELLANT'S SUBMISSIONS

PART I. Certification re Internet Publication

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

PART II. Issues

2. The appeal raises an issue of the validity and proper construction of delegated legislation made by the State of New South Wales pursuant to a 'Henry VIII' type clause contained in the *Workers Compensation Act 1987* (NSW).

3. The principal issue for the Court's consideration is whether the regulation in question (*Workers Compensation Amendment (Transitional) Regulation 2012* (NSW) (**2012 Regulation**)) was valid and had valid application to the first respondent, contrary to the findings of the Court of Appeal of the Supreme Court of NSW.

PART III. Judiciary Act 1903, s 78B

4. The appellant considers that notice is not required pursuant to s.78B of the *Judiciary Act 1903* (Cth).

Date of document:	15 November 2013		
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PART IV. Report of reasons for judgment

5. The decision of the Court of Appeal is unreported; its internet citation is [2013] NSWCA 94. The decision of the Workers Compensation Commission at first instance is also unreported; its internet citation is [2012] NSWWCCPD 60.

PART V. Relevant Facts

6. The relevant facts, and procedural history, are set out below:

   (a) On 17 April 2010, the first respondent suffered injury in the course of his employment with the applicant (CA[3]);

   (b) On 19 April 2010 workers compensation was claimed pursuant to the *Workers Compensation Act 1987* (NSW) (**WCA**) with respect to lost wages and medical expenses (and this was in due course paid);

   (c) On 14 July 2011, a medical practitioner made an assessment of the first respondent's injury as resulting in the respondent having a degree of whole person impairment of 6% (WCC[5]).

   (d) On 20 June 2012, the first respondent's solicitors made a claim for lump sum compensation pursuant to s.66 of the WCA in accordance with the assessment obtained from the medical practitioner, which equated to a claim for $8,250 (WCC[6]).

   (e) On 27 June 2012, the *Workers Compensation Legislation Amendment Act 2012* (NSW) (**2012 Amending Act**) received royal assent, and, *inter alia*:

      (i) Schedule 2 to that Act commenced, enacting a new s.66 which provided that no compensation was payable for permanent impairment unless the degree of impairment was greater than 10%, whereas previously there was no such general threshold) (**lump sum compensation amendments**);

      (ii) Schedule 12 to that Act commenced, enacting transitional provisions which selected 19 June 2012 (the day before the first respondent made the claim for lump sum compensation) as the date on and from which the lump sum compensation amendments applied;

   (f) On 3 July 2012, the scheme agent for the appellant's workers compensation insurer declined liability for the first respondent's claim on the basis that the impairment was below the new threshold created by the new s 66;

(g) Proceedings were then commenced in the Workers Compensation Commission of NSW (**WCC**), and on 9 September 2012 an Arbitrator in the WCC (with the consent of the parties and the leave of the WCC) referred a question of law for the opinion of the WCC constituted by the President, as to whether the new s.66 applied to the first respondent;

(h) On 1 October 2012, the 2012 Regulation made under the WCA commenced, making further transitional provisions in relation to the lump sum compensation amendments which had been introduced by the 2012 Amending Act.

(i) On 22 October 2012 the WCC (President, Judge Keating) handed down a decision, finding the amendments to s.66 WCA made by the 2012 Amending Act did apply to claims made on and after 19 June 2012 (including the first respondent's claim) without relying, however, upon the 2012 Regulation.

(j) On 29 April 2013, the NSW Court of Appeal allowed an appeal; given its reversal of the WCC decision it did need to consider the effect of the 2012 Regulation, and ruled that it was beyond power and invalid to the extent to which it sought to prejudicially affect the first respondent's rights (CA[33]).

PART VI. Argument

The legislative framework of the WCA and the 2012 Amending Act

7. It is necessary to set out in some detail the relevant legislative provisions, to show the sources of power which enabled the making of the 2012 Regulation.

8. Schedule 6 of the WCA was entitled "Savings, transitional and other provisions".

9. When the 2012 Amending Act came into effect to introduce the lump sum compensation amendments, it also included Schedule 12 ("Amendments relating to savings and transitional provisions"). That schedule provided for the insertion into Schedule 6 of the WCA of a new Part (styled Part 19H ("Provisions consequent on enactment of Workers Compensation Legislation Amendment Act 2012").

10. The new Part 19H contained clause 3:

> **3 Application of amendments generally**
>
> (1) Except as provided by this Part or the regulations, an amendment made by the 2012 amending Act extends to:
>
> (a) an injury received before the commencement of the amendment,

(b) a claim for compensation made before the commencement of the amendment, and

(c) proceedings pending in the Commission or a court immediately before the commencement of the amendment."

11. It may be observed that this provision laid down a general rule that the amendments the subject of the 2012 Amending Act were to have retrospective effect, and apply to all pending claims for compensation. This would include that made by the first respondent on 20 June 2012, 7 days before the commencement of the 2012 Amending Act. However, Item 3 was not the end of the matter, as it was expressed to be subject to both "*this Part*" and "*the regulations*"[1].

12. In fact, "*this Part*" (Part 19H) did otherwise provide. Clause 15 went on to say:

> **15 Lump sum compensation**
>
> An amendment made by Schedule 2 to the 2012 amending Act extends to a claim for compensation made on or after 19 June 2012, but not to such a claim made before that date.

13. The effect of this provision was to carve out from the general retrospectivity for which Item 3 provided a limited subclass of cases, namely those where a claim for compensation was made before 19 June 2012. Thus the lump sum compensation amendments *did not* apply to claims for compensation made before 19 June 2012. However, there remained an issue as to what amounted to such a "claim for compensation". In particular if a worker had claimed weekly compensation prior to 19 June 2012 but made a lump sum compensation claim after 19 June 2012 (a situation expected to be very common[2]), was there a claim for compensation made before that date? This was the focus of the debate in the WCC and the Court of Appeal in the present case, and the Court of Appeal found, contrary to the view taken by the WCC) that the cl.15 exception also encompassed lump sum compensation claims which though made after 19 June 2012 were deemed (by reason of provisions of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) (**WIM Act**) (ss 260-263)) to have been made at the first time any form of compensation was claimed (CA[14]-[18]). No issue is now taken with that conclusion.

14. On the basis of clauses 3 and 15, the situation was that the lump sum compensation amendments did not apply to persons in the first respondent's position. That conclusion, however, must be qualified by reference to the following:

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1 The WCA into which Part 19H was being inserted defined "the regulations" to mean "*regulations made under this Act.*

2 Refer to CA[6] and WCC[22] and [145], as to the number of other cases which turn on this issue.

(a) *First*, the application of the amendments made by the 2012 Amending Act remained subject to "*the regulations*" providing otherwise than the general retrospectivity for which Item 3 provided;

(b) *Secondly*, and significantly, clause 5 of Part 19H contained within it an expanded regulation-making power.

The regulation-making power

15. Clause 5 of Part 19H was in the following terms:

> (1) Regulations under Part 20 of this Schedule that contain provisions of a saving or transitional nature consequent on the enactment of the 2012 amending Act may, if the regulations so provide, take effect as from a date that is earlier than the date of assent to the 2012 amending Act.
>
> (2) Clause 1(3) of Part 20 does not limit the operation of this clause.
>
> (3) A provision referred to in subclause (1) has effect, if the regulations so provide, despite any other provision of this Part.
>
> (4) The power in Part 20 to make regulations that contain provisions of a saving or transitional nature consequent on the enactment of the 2012 amending Act extends to authorise the making of regulations whereby the provisions of the Workers Compensation Acts[3] are deemed to be amended in the manner specified in the regulations."

16. Part 20 of Schedule 6 of the WCA, referred to in cl 5 (above), was entitled "Savings and transitional regulations". It was the section of the schedule containing savings and transitional provisions which permitted the Governor to make regulations containing "*provisions of a saving or transitional nature*" consequent upon a number of enactments (Pt 20 cl 1(1)). The 2012 Amending Act added itself to their number.[4] In this way, the 2012 Amending Act expanded the reach of Part 20 so as to enable the making of regulations containing transitional provisions consequent on the 2012 Amending Act.

17. If Pt 20 cl 1(3) of Schedule 6 of the WCA applied however, no regulation made under Pt 20 or cl 5 would be able to prejudicially affect the rights of persons which had accrued prior to gazettal of the regulation. However, the 2012 Amending Act ensured, by cl 5(2), that Pt 20 cl 1(3) did not apply so as to limit the ability of the Governor to make transitional regulations under cl 5 which did prejudicially affect rights which had accrued prior to gazettal of the regulation.

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3 "Workers Compensation Acts" was a term defined in s 3 WCA by reference to s 4 of the WIM so as to include the WCA itself.

4 Item [2] of Schedule 12 to the 2012 Amending Act, added at the end of cl 1(1) of Schedule 6 Part 20 the following words: "*any other Act that amends this Act*" (i.e. any Act that amends the WCA).

18. Clause 5(3) made clear that a regulation enabled by Pt 20 r 1 (as expanded by Pt 19H cl 5(1)) may have effect "*despite any other provision of*" Part 19H. In this way such a regulation could override the terms of the Act itself. This was an expansion to the regulation-making power under Part 20.[5]

19. Clause 5(4) then expressly provided that the regulation-making power in Pt 20 extended to authorise the making of regulations whereby the provisions of the WCA are "*deemed to be amended in the manner specified in the regulations*". Clause 5(4) enabled regulations which amended the WCA itself. It thus represents a species of enactment commonly known as a 'Henry VIII' clause. Such clauses represent a qualification to the principle of repugnancy of delegated legislation, in that the inconsistency may be authorised by an empowering Act: *Vanstone v Clark* (2005) 147 FCR 299 at [120]-[123] (FCAFC). Such clauses may seem unattractive but is open to a State legislature to employ them: see *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* (2012) 87 ALJR 162 at 168 [18] per French CJ, citing *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73. The State's legislative power under s.5 of the *Constitution Act 1902* (NSW) is in this respect plenary.

20. The regulation-making powers for which Clause 5 provided were very significant. In combination, cl 5(4) permitted regulations to amend the WCA itself "*in the manner specified in the regulations*", and by reason of cl 5(2), such regulations could prejudicially affect pre-existing rights. These regulation-making powers significantly qualified the extent to which the other transitional provisions concerning application of the lump sum compensation amendments were fixed and unvariable. At all times, the provisions of cll 3 and 15 of Schedule 12 which might have otherwise protected persons in the first respondent's position from being subjected to the new regime, were qualified by the potential for regulations to be made which:

    (a) contained transitional provisions consequent on the enactment of the 2012 Amending Act which were different to cll 3 and 15;

    (b) had effect notwithstanding any other provision of Part 19H (including cll 3 and 15), and deemed the WCA to be amended; and

    (c) took effect from a date earlier than the gazettal of such regulations.

21. The 2012 Regulation contained provisions of this character.

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[5] Part 20 had contained provisions of this kind in the form of cl 1(5)-(6), but the power to make regulations pursuant to cl 1(5) was spent from 31 December 1999.

The 2012 Regulation

22. The relevant provision of the 2012 Regulation is Schedule 1, cl 11. It amended the *Workers Compensation Regulation 2010* so as to insert into Schedule 8 ("Savings and transitional provisions") of that regulation the following:

> **"11 Lump sum compensation**
>
> (1) The amendments made by Schedule 2 to the 2012 amending Act [i.e. the lump sum compensation amendments] extend to a claim for compensation made before 19 June 2012, but not to a claim that specifically sought compensation under section 66 or 67 of the 1987 Act.
>
> (2) Clause 15 of Part 19H of Schedule 6 to the 1987 Act is to be read subject to subclause (1)."

23. Clause 11(1) provides, in terms, that the lump sum compensation amendments "*extend to a claim for compensation made before 19 June 2012*", unless there was a specific claim under ss 66 or 67 made prior to that date. Given the proper construction of the expression a "claim for compensation made before 19 June 2012" encompassed lump sum compensation claims which though made in time after 19 June 2012 were deemed (by reason of provisions of the WIM Act (ss 260-263)) to have been made at the first time any form of compensation was claimed (see [13] above), cl 11 in terms governs the situation of workers who had claimed weekly compensation prior to 19 June 2012 but made a lump sum compensation claim after 19 June 2012. It is submitted that this was the evident purpose of the clause.

24. Clause 11(2) went on to say that cl 15 of Part 19H of Schedule 6 to the WCA was "*to be read subject to*" cl 11(1). In substance cl 11(1) amended cl 15, by making contrary provision for which classes of claimants were to be subject to the lump sum compensation amendments introduced by the 2012 Amending Act. It is to be noted that an earlier regulation made consequent upon the 2012 Amending Act, the *Workers Compensation Amendment (Miscellaneous) Regulation 2012*, which commenced on 17 September 2012, had already introduced into Schedule 8, Part 1, cl 1(2), which provided:

> "(2) The provisions of Part 19H to the 1987 Act are deemed to be amended to the extent necessary to give effect to this Part."

The combined effect of the substantive terms of cl 11(1) and cl 1(2) was that the WCA was deemed to be amended in the manner specified in cl 11(1). Part 19H was to be read as if it provided that the lump sum compensation amendments did apply to persons in the first respondent's position.

25. Pausing there, it is submitted that it can be seen that cl 11(1) was:

(a) a provision of a "transitional" nature, consequent on the enactment of the 2012 Amending Act, within the meaning of cl 5(1) of the 2012 Regulation;

(b) a provision which provided differently to cl 15 of Part 19H (as introduced by the 2012 Amending Act), and which by reason of cl 5(3) of Part 19H had effect "*despite any other provision of [Part 19H]*;"

(c) a provision which, by reason of the fact that it was inserted into Part 1 of Schedule 8 of the *Workers Compensation Regulation 2010*, was one upon which cl 1(2) of Part 1 of that Schedule operated so that it deemed Part 19H to be amended to the extent necessary to give effect to cl 11(1);

(d) a provision which, by reason of what is set out in (c) above, answered the description of regulations authorised by cl 5(4) of the 2012 Regulation; and

(e) a provision the operation of which was, by reason of cl 5(2), not limited by Pt 20 cl1(3) of the WCA, and so was one which *could* prejudicially affect the rights of workers which existed prior to gazettal of the 2012 Regulation.

26. In the result, cl 11 of the 2012 Regulation was a regulation that was within the express scope of the expanded regulation-making power conferred by cl 5(4) (of Part 19H of the WCA, as introduced by the 2012 Amending Act). Clause 11 was within power.

27. The express terms of cl.11 of the 2012 Regulation directly govern the case. Yet cl.11 was given no effect by the Court of Appeal. Instead, the Court of Appeal appears to have treated cl.11 as being, at least in presently relevant respects, as invalid.[6] The reasoning of the Court of Appeal in this regard, however, is at CA[24] to [28]. It is not entirely clear and the result is, with respect, erroneous.

28. It was said at CA[26] that cl 5(4) was limited to enabling regulations which varied the savings and transitional provisions in Schedule 6 (CA[26]). But why cl 11 of the 2012 Regulation was not exactly such a regulation was not explained by the Court of Appeal. With respect, for the reasons set out above, cl 11 was such a regulation.

Accrued rights

29. The Court of Appeal further considered that it was beyond the regulation making power for an amendment to be made which prejudicially affected accrued rights (CA[27]). No such implication, however, can be drawn from cl 5(4) (or indeed from

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[6] Both in the WCC and the Court of Appeal, the first respondent contended that cl.11 was invalid. The decision in the WCC did not turn on cl.11, because of the construction of cl.15 of Schedule 6 adopted by the President (WCC[175]-[178]).

cl 1(1) of Part 20). Clause 5(4) specifically "*extends to authorise*" regulations which amend provisions of the Workers Compensation Acts. The power under cl 5(4) to make regulations includes making regulations which effect an amendment of provisions of a saving or transitional nature consequent on the enactment of the 2012 amending Act. Provisions of a "transitional" nature of necessity deal with the extent to which new statutory rules can affect existing rights and obligations.

30. The legislative intention of Pts 19H and 20 of Schedule 6 to the WCA was to enable the making of regulations which amended the WCA in the manner specified by the regulation so as to provide for transitional provisions consequent on the enactment of the 2012 Amending Act. The legislature deliberately chose the broadest form of words imaginable. To read down the broad words "*in the manner specified in the regulations*" so as to carve out an ability to prejudicially affect accrued rights involved error.

31. To the extent any right to lump sum compensation might have accrued to the first respondent prior to the making of the 2012 Regulation, it was the specific object of cl 11 to extend the lump sum compensation amendments to claims for compensation made prior to 19 June 2012 unless lump sum compensation had been "*specifically sought*" prior to that date. That is what was "*specified*" by cl 11(1). General principles of interpretation, such as that amendments do not affect accrued rights, do not assist when the statutory rule by which the amendment is effected, and the provisions enabling it, provide that the amendment takes effect "*in the manner specified*".[7]

32. Moreover, cl 5(2) specifically provides that the protections against prejudice to accrued rights which might otherwise have been afforded by Pt 20 cl 1(3) did not limit such regulations. The Court of Appeal gave no effect to the deliberate choice by Parliament to disapply the protection otherwise given in relation to accrued rights. That disapplication did not, as the Court of Appeal found, mean only that rights which accrued during the "*period of backdating*" could be extinguished by regulation. Properly construed, the effect of cl 5(2) was to ensure that the power pursuant to cl 5(4) to make regulations which "deemed" the Act to be amended "*in the manner specified in the regulations*" was not limited (expressly or by implication) by Pt 20 cl 1(3).

33. The analysis of the Court of Appeal which referred to prejudicial affectation of accrued rights rather sought to overcome the plain effect of the amendment to the WCA "*specified*" in cl 11, and its conclusion (at CA[33]) that the regulation was beyond power and invalid to the extent it sought to prejudicially affect the first respondent's accrued rights is, with respect, difficult to understand.

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7 See *Interpretation Act 1987* (NSW), s 30(1), (3).

PART VII. Relevant Provisions

34. See the List of Authorities filed with these Submissions pursuant to Practice Direction No 1 of 2013, and attached hereto as an Annexure.

PART VIII. Orders sought

35. The appellant seeks the orders set out in the Notice of Appeal.

36. It is noted that the formulation of those orders reflects the way in which the Court of Appeal reframed the WCC's orders at CA[34]-[35], the criticism of the assumption on which the question was framed being a valid one.

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PART IX. Estimate

37. The appellant's estimate is that 1½ hours will be required for the presentation of its oral argument.

Dated: 15 November 2013

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BETWEEN

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APPELLANT'S LIST OF LEGISLATION

A. Legislation

	Name	*Date*	*Page No.*
1.	*Workers Compensation Act 1987* (NSW)*	30.01.2012 26.06.2012	
	Section 3		2
	Part 3, Division 4 (ss 65-73)		6
	Sections 280, 282		18
	Schedule 6 – Part 20		21
2.	*Workers Compensation Legislation Amendment Act 2012* (NSW)*	27.06.2012	
	Sections 1-2		25
	Schedule 2		27
	Schedule 12		32

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3.	*Workers Compensation Act 1987* (NSW)*	Current	
	Section 3	(identical to that in force as from 27.06.12)	41
	Part 3, Division 4 (ss 65-73)		44
	Sections 280, 282		51
	Schedule 6 – Part 19H		54
	Schedule 6 – Part 20		61
4.	*Workers Compensation Regulation 2010* (NSW)*	17.09.12 – 30.09.12	
	Schedule 8 Part 1 (Items 1-15)		64
5.	*Workers Compensation Amendment (Miscellaneous) Regulation 2012* (NSW) *	17.09.2012	
	Whole		67
6.	*Workers Compensation Amendment (Transitional) Regulation 2012* (NSW)*	28.09.2012	
	Whole		72
7.	*Workers Compensation Regulation 2010* (NSW)*	Current	
	Schedule 8 Part 1 (Items 1-15)	(relevantly identical to that in force as from 1.10.12 – 6.10.12)[8]	92
8.	*Work Injury Management and Workers Compensation Act 1998* (NSW)*	Current	
	Section 4		98
	Sections 260-263		107
9.	*Interpretation Act 1987* (NSW)*	Current	
	Sections 30-31		111

[8] The only difference is the date in Item 8 (which is not relevant to these proceedings).

B. AUTHORITIES

	Name	*Passages to be read*
10.	*Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* (2012) 87 ALJR 162	168 [18]
11.	*Vanstone v Clark* (2005) 147 FCR 299	[120]-[123]

All references to legislation in this list were extracted from the authorised electronic form of each Act accessed through the NSW Legislation Website (maintained by the NSW Government): http://www.legislation.nsw.gov.au.

All of the legislation referred to above is either still in force or, if repealed or amended, the later provisions and transitional provisions have also been reproduced in this list.