IN THE HIGH COURT OF AUSTRALIA
ADELAIDE OFFICE OF THE REGISTRY

No A5 of 2011

BETWEEN

PETER NICHOLAS MOLONEY t/as MOLONEY & PARTNERS

Appellant

and

WORKERS COMPENSATION TRIBUNAL

First Respondent

and

ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA

Second Respondent

WRITTEN SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE STATE OF SOUTH AUSTRALIA

Filed by:
The Crown Solicitor for the
State of South Australia
Level 9, 45 Pirie Street
ADELAIDE SA 5000

Ref: Beverley Wilson
Telephone: (08) 8207 1720
Facsimile: (08) 8207 2500
E-mail: wilson.beverley@agd.sa.gov.au
Ref: CSO: 0099884

Solicitor for the Attorney-General of the State of South Australia

PART I SUITABILITY FOR PUBLICATION

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

PART II STATEMENT OF ISSUES

2. The issue arising in this matter is whether rule 31(2) of the *Workers Compensation Tribunal Rules 2009* is a valid exercise of the rule making power conferred by s 88E(1) of the *Workers Rehabilitation and Compensation Act 1986* (the Act). The impugned rule regulates costs as between a client worker and the worker's representative by establishing a procedure by which such costs are to be assessed.

3. The following issues arise concerning the extent of the rule making power conferred by s 88E(1) of the Act:

   3.1 Is the expression "regulating costs" in s 88E(f) of the Act limited to the regulation of party-party costs or does the rule making power extend to making rules regulating solicitor-client costs also?[1]

   The Second Respondent submits that the expression "regulating costs" extends, at least, to the regulation of both party-party costs and solicitor-client costs (see [12]-[17] below).

   3.2 Does s 88G of the Act give rise to an implied limitation on the rule making power conferred by s 88E(1) of the Act?

   The Second Respondent accepts that s 88G of the Act impliedly restricts the rule making power conferred by s 88E(1) of the Act, but submits that the restriction only operates so as to prevent the fixing of a scale that imposes a maximum amount that can be charged or recovered as solicitor-client costs (see [18]-[21] below).

---

[1] In this Written Submission "solicitor-client" costs and "party-party" costs have the meanings set out in paragraph [12] below. However, it should be noted that the Act refers to "costs of representation" because the right of audience before the Tribunal extends beyond legal practitioners.

4. The following issue arises concerning the operation of rule 31(2):

4.1 Does rule 31(2) fix a scale of costs that imposes a maximum amount that can be charged or recovered as solicitor-client costs?

The Second Respondent submits that rule 31(2) does not fix a scale of costs or impose a maximum amount that can be charged or recovered as solicitor-client costs. Rather, rule 31(2) establishes a procedure by which solicitor-client costs can be assessed (see [22]-[24] below).

PART III SECTION 78B OF THE *JUDICIARY ACT 1903*

5. The Attorney-General has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth) and has concluded that no notice is required.

PART IV MATERIAL FACTS

6. The material facts are set out in the Statement of Facts and Question of Law referred to the Full Court of the Supreme Court. The Attorney-General does not contest those facts.

PART V APPLICABLE LEGISLATIVE PROVISIONS

7. The applicable legislative provisions are ss 88E and 88G of the Act and rule 31(2) of the Rules

8. Section 88E of the Act provides as follows:

> **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.

9. Section 88G of the Act provides as follows:

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.

10. Rule 31 of the Rules provides as follows:

(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 [sic] 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.

PART VI STATEMENT OF ARGUMENT

11. The Attorney-General agrees with the general approach to determining the validity of delegated legislation identified in the Appellant's written submissions.[2] The Court must (1) ascertain the meaning of the words used to confer the grant of power so as to determine the character of the rules that may be made, (2) ascertain the scope, legal operation and effect of the impugned rule, and (3) determine whether the rule has a sufficient relationship to the grant of power as to fall within its ambit.[3]

Construing the rule making power – "regulating costs"

12. Section 88E(1)(f) authorises the President to make rules of the Workers Compensation Tribunal (the Tribunal) "regulating costs". In its conventional legal context, the expression "costs" may be used in at least the following two senses:

12.1 the remuneration for work performed by a solicitor or his or her employee, pursuant to a retainer agreement (solicitor-client costs);[4] and

---

2 Appellant's Written Submissions at [9].

3 *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 155, per Dixon J; *Brunswick Corporation v Stewart* (1941) 65 CLR 88 at 93, per Rich ACJ and at 99 per Williams J; *South Australia v Tanner* (1989) 166 CLR 161 at 164-165, per Wilson, Dawson, Toohey and Gaudron JJ and at 173 per Brennan J; *McEldowney v Forde* [1971] AC 632, per Lord Diplock; *Taylor v Guttilla* (1992) 59 SASR 361 at 365, per King CJ; Pearce and Argument, *Delegated Legislation in Australia* (3rd ed) at [12.4].

4 *Cachia v Hanes* ((1994) 179 CLR 403 at 409, per Mason CJ, Brennan, Deane, Dawson and McHugh JJ; *Elders Trustee and Executor Company Ltd v Estate of Herbert* (1996) 111 NTR 25 at 30, per Gallop J (Thomas J agreeing at 39).

12.2 the amount which the party to whom an order is directed must pay to another party to the litigation as a partial indemnity for the professional legal fees and expenses actually incurred by that party in the course of the litigation (party-party costs).[5]

13. Contrary to the submissions of the Appellant, the rule making power found in s 88E(1)(f) should not be read down so that it is restricted to the regulation of party-party costs for the following reasons:

13.1 Section 88E(1)(f) is expressed in broad terms. As the Full Court correctly held,[6] a grant of power of the kind conferred by s 88F(1)(f) should be construed liberally so as to confer on the President of the Tribunal an ample power to regulate the operation of the Tribunal.[7]

13.2 The Act expressly deals with both party-party costs (see ss 88F and 95) and solicitor-client costs (see ss 88G, 95(2)(a) and 95A). To limit the rule-making power found in s 88E(1)(f) to the making of rules relating to party-party costs would be anomalous because it would confer a power on the President to make rules with respect to only one category of costs dealt with by the Act.

13.3 There is no novelty in the regulation of solicitor-client costs in the context of the Act or its predecessors. Historically, workers' compensation payments have been protected from the payment of excessive legal costs (albeit the methods have not always been uniform) through legislation dating from the introduction of the progenitor of the current Act through to the present day.[8] The rationale for regulating such costs is to prevent the compensation awarded to a worker being eroded unduly by the payment of legal costs.

---

5 Dal Pont, *Law of Costs* (2nd ed) at [1.4]-[1.6] and see *Cachia v Hanes* ((1994) 179 CLR 403 at 410, per Mason CJ, Brennan, Deane, Dawson and McHugh JJ.

6 *Moloney v Workers Compensation Tribunal* (2010) 108 SASR 1, [3] per Doyle CJ, [58] per Layton J.

7 *Harrington v Lowe* (1996) 190 CLR 311 at 341, per Kirby J; Pearce and Geddes, *Statutory Interpretation in Australia* (6th ed) at [9.2] citing *Bull v Attorney-General (NSW)* (1913) 17 CLR 370 at 384, per Isaacs J; *Re JJT; ex parte Victoria Legal Aid* (1998) 195 CLR 184 at [14], [64], per Kirby J.

8 *Scammell & Co v WorkCover Corporation* (2006) 95 SASR 278 at [93]-[99], per Layton J (Nyland and Sulan JJ agreeing at [1] and [2]); *Moloney v Workers Compensation Tribunal* (2010) 108 SASR 1, [30]-[49], per Layton J.

13.4 It may be that the notion of "costs" found in s 88E(1)(f) is even broader than the conventional categories of legal costs identified above, namely party-party and solicitor-client costs. Section 95(2)(a) extends the notion of "costs" to those of representation by "an officer or employee of an industrial association". Further, s 95(2)(b) contemplates that regulations may be made to identify costs other than the costs of representation that may be awarded. The recognition of these kinds of costs by the Act is inconsistent with the narrow construction of the word "costs" contended for by the Appellant.

14. Even if s 88E(1)(f) is not broad enough to support a rule regulating solicitor-client costs, such a rule may be supported by the very wide terms of s 88E(1)(g) which confers power on the President to make rules "dealing with any other matter necessary or expedient for the effective and efficient operation of the Tribunal".

15. The detailed historical analysis found at paragraph [14] of the Appellant's submissions seems to be directed to the conclusion reached in [14.9.2] that the insertion of s 95A into the Act in 2008 cannot have expanded the notion of "costs" in s 88E(1)(f) of the Act from party-party costs to also include solicitor-client costs. The following points are made in response:

15.1 The meaning of "costs" was not limited under the Act prior to the insertion of s 95A. Immediately prior to the insertion of s 95A the Act contained ss 88G and 95(2)(a) in their current forms.

Section 95(2)(a) made express reference to the "cost of representation". Moreover, prior to making an award pursuant to s 95(1) the Tribunal must ascertain the solicitor-client costs in accordance with s 95(2)(a). The term "regulating costs" in s 88E(1)(f) would at least have included the power to make rules to assist the Tribunal to ascertain the solicitor-client costs for this purpose.

Section 88G provided for the making of a scale of solicitor-client costs. The term "regulating costs" in s 88E(1)(f) would at least have included the power to make rules of the kind identified by Chief Justice Doyle in the decision of the Full Court, including rules regulating the time within which a claim must be made or governing the procedure for the making of and adjudication of such claims.[9] The fact that s 88G of the Act does not use the word "costs" is of no

[9] *Moloney v Workers Compensation Tribunal* (2010) 108 SASR 1, [10] per Doyle CJ.

significance; the provision plainly deals with the topic of solicitor-client costs. This was obvious to the drafter of the heading of the provision.[10]

15.2 Even if it could be shown that the meaning of "costs" in s 88E(1)(f) of the Act was limited to party-party costs in the context of the Act as it stood immediately prior to the insertion of s 95A (although it is not accepted that this is so), the insertion of s 95A would have had the effect of expanding the meaning of "costs" in s 88E(1)(f) to included solicitor-client costs. If this were not the case then the President would be deprived of the power to make rules with respect to proceedings pursuant to s 95A of the Act.

16. Although in certain circumstances the presumption against the interference with common law rights may have considerable force, any such presumption has little force in the context of the history of the Act. The unique nature of the jurisdiction conferred on the Tribunal has caused legislatures for over 100 years to provide special means by which to protect workers' compensation payments from erosion by the charging of excessive solicitor-client costs. Sections 88G and 95A of the Act in its current form expressly intrude upon the common law relationship between solicitor and client. For the reasons already given in paragraph [13] above, any force that may otherwise be attributable to the presumption is overborne by other considerations in this case.

17. The Appellant submits that "in the context of a statute that establishes an inferior court and confers powers on its President to make orders as to costs ... the prima facie meaning is party-party costs".[11] In support of the submission the Appellant cites *Re JJT; Ex parte Victoria Legal Aid*[12] and *Richfort Pty Ltd v Baluyut*.[13] Each case must be understood in light of the specific provisions read in their statutory context.

17.1 In *JJT*, the relevant provision (s 117 of the *Family Law Act 1975* (Cth)) made repeated references to "party", "parties" and "party to proceedings", and referred also to "security for costs". The subject matter of the section was "costs" in the sense referred to at paragraph [12.2] of these submissions. The Court held that an order that effectively required a non-party to provide legal aid was not an order for "costs" within the meaning of s 117.

---

10 Although it is accepted that by virtue of s 19 of the *Acts Interpretation Act 1915* (SA) the heading does not form part of the Act.

11 Written Submissions at [19].

12 (1998) 195 CLR 184 at 218-219 [89]-[91], per Hayne J.

13 (1999) 152 FLR 203 at 206, per Gallop J.

17.2 In *Richfort*, the relevant provision (s 95(1)(a) of the *Work Health Act 1986* (NT)) authorised rules "regulating and prescribing the *awarding*, scales and taxation of costs". The notion of an "*award*" of costs is understood as usually referring to costs *inter partes*. The provision was not expressed in the general terms of s 88E(1)(f) of the Act. Furthermore, the *Work Health Act* provided no basis for interference by the Court in the fees solicitors charged their clients. By contrast, the Act expressly regulates the common law contractual relationship between solicitor and client for the purposes of litigation in the Tribunal.

Construing the rule making power – limitation implied by s 88G

18. The rule making power conferred by s 88F(1) of the Act is impliedly limited by s 88G of the Act. In order to understand the extent of that limitation it is necessary to have close regard to what s 88G does and does not do. Section 88G does not regulate solicitor-client costs exhaustively. It does the following things:

18.1 It empowers the Governor in Executive Council to make a regulation that fixes a scale of costs by reference to which the maximum allowable amount of solicitor-client costs may be ascertained.

18.2 It creates an offence for a representative to charge or seek to recover costs in excess of this amount.

19. The *Anthony Hordern* principle applies when the statute in question "confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power".[14] The case law variously identifies the principle as applying when two powers are the "same power", or are with respect to the same subject matter, or where "the general power encroaches upon the subject matter exhaustively governed by the special power".[15]

20. It is accepted that the "special power", in this case s 88G, deals exhaustively with the "subject matter" set out in paragraph [18]. It is therefore accepted that a rule made

---

14 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at [59] per Gummow and Hayne JJ.

15 As above.

under s 88E(1)(f) cannot (i) fix a scale of costs which has the effect of setting the maximum amount that may be charged or recovered as solicitor-client costs or (ii) impose criminal liability on a representative who seeks to charge or recover in excess of the amount arrived at by reference to the scale (for the reasons given at [22]-[24] below, rule 31(2) does not purport to encroach upon these subject matters).

21. The reliance placed by the Appellant on the *Anthony Hordern* principle is misplaced. The Appellant submits that s 88G of the Act deals exhaustively with the regulation of solicitor-client costs such that solicitor-client costs cannot be dealt with by a rule made pursuant to s 88E(1)(f).[16] However, for the following reasons, the "subject matter" of s 88G identified by the Appellant is too broad:

21.1 The identification of the subject matter with which s 88G is exhaustively concerned may be informed by the general purposes of the Act. A central concern of the Act is to establish a scheme that "provides fair compensation for employment-related disabilities". In light of this purpose, the subject matter with which s 88G is concerned should be understood to be the setting of a scale that marks out a *maximum* payment that can be made to an injured worker's representative. Often such payment will be made out of any award that a worker might receive for a compensable injury. Often the recipient of compensation will have a limited practical capacity to evaluate the services provided by their representative and the reasonableness of the solicitor-client costs that are charged. In this context, s 88G should not be regarded as excluding other means of regulating the charging and recovery of solicitor-client costs. The Act serves the express purpose of protecting the rights of injured workers. It does not set out to protect the "rights of solicitors"[17] who appear before the Tribunal.[18]

21.2 If the exhaustive subject matter of s 88G were taken to be the regulation of solicitor-client costs generally then rules relating to purely procedural aspects of solicitor-client costs would also be excluded from the ambit of s 88E(1)(f). This would deny to the President of the Tribunal the capacity to make rules of the kind identified by Chief Justice Doyle in the decision of the Full Court, including

---

16 Appellant's Written Submissions, paragraphs [22.1] and [39].
17 Appellant's Written Submissions, paragraphs [45].
18 See *Hansard* (HA) 18 October 1995 at 299-300 and 304.

rules regulating the time within which a claim must be made or governing the procedure for the making of and adjudication of such claims.[19]

21.3 The suggestion that s 88G of the Act intends to deal exhaustively with the subject matter of the charging and recovery of solicitor-client costs is contradicted by the terms of s 95A of the Act.

The scope of the impugned rule

22. The Court's second task when determining whether a rule is a valid exercise of power is to ascertain the scope, legal operation and effect of the impugned rule.

23. Rule 31(2) provides for the procedure by which a representative who wishes to claim costs from a worker, over and above those payable by the compensating authority, can make that claim and have it adjudicated.[20] It applies when a representative seeks (1) to recover from that worker any costs in respect of proceedings under the Act in addition to those payable by the compensating authority or (2) to claim a lien in respect of such costs or (3) to deduct such costs from a sum awarded as compensation. The representative is required to file an application and a supporting affidavit. The Presidential Member may then make a range of orders for the purpose of informing and facilitating an assessment of that claim.

24. In substance, the rule imposes a procedure for the judicial assessment and adjudication of the entitlement to recover costs pursuant to the solicitor's retainer. The assessment is in the discretion of the Tribunal. However, the discretion is not at large. It is to be exercised judicially and in accordance with established legal principles pertaining to the law of costs.[21] Further, the discretion is also to be exercised consistently with the powers conferred, or limitations imposed, by the Act itself.[22]

---

19 *Moloney v Workers Compensation Tribunal* (2010) 108 SASR 1, [10] per Doyle CJ.
20 *Moloney v Workers Compensation Tribunal* (2010) 108 SASR 1, [13] per Doyle CJ.
21 *Osborne v Kelly & Klimenco* (1999) 75 SASR 392 at [23]-[26], per Doyle CJ (Mullighan and Wicks JJ agreeing at [70]-[71].
22 *Moloney v Workers Compensation Tribunal* (2010) 108 SASR 1, [6] per Doyle CJ.

The rule is within power

25. Properly characterised, rule 31(2) is within power. The rule establishes a procedure for the judicial assessment of solicitor-client costs. For the reasons given above, the regulation of such costs are within the ambit of s 88E(1)(f).

26. As for the implied limitation on the rule making power arising from s 88G of the Act, that provision is confined to the making of a regulation that fixes a scale of costs by reference to which the maximum allowable amount of solicitor-client costs may be ascertained and prohibiting a representative from charging or seeking to recover costs in excess of that amount by the creation of an offence. The impugned rule does neither of those things. In particular, the rule:

    26.1 says nothing at all about a representative's right to *charge* for services;[23]

    26.2 does not impose an upper limit upon the amount of costs that may be recovered;

    26.3 does not create a scale by which a maximum amount of solicitor-client costs may be ascertained;

    26.4 does not and could not create an offence.

    For these reasons rule 31(2) does not impermissibly intrude upon the subject matter exhaustively regulated by s 88G of the Act.

27. The rule is proportionate to the rule making power when that power is understood in the context of the legislative history and purposes of the Act as explained above. The rule making power must also be understood in light of the express incursions into the solicitor / client relationship by ss 88G and 95A. It cannot be said that the creation of a procedure for the assessment and adjudication of solicitor-client costs is disproportionate in the face of provisions that expressly provide for the capping of solicitor-client costs and provide for their disallowance in certain circumstances.

28. Without conceding the relevance of the matters raised by the Appellants in paragraph [45] of its Written Submissions, the Second Respondent says:

---

23 Cf Appellant's Written Submissions at [3.1.2.1], [3.1.2.2.2], [16], [17], [20.1], and [43].

28.1 In support of its claim that the rule is disproportionate the Appellant submits that a solicitor cannot recover interim costs. However, rule 31(2) does not impose a limitation of this kind.

28.2 It is true that r 31(2) operates only in respect of the representative of a worker. The rationale of the rule is to prevent the compensation awarded to a worker being unduly eroded by the payment of legal costs. In so operating, the rule is within the objects sought to be advanced by the Act. The same considerations do not arise in the context of representatives for a compensating authority.

28.3 Many of the matters raised by the Appellant deal with questions of policy and whether the interests of one group should be preferred over those of another in the making of the rule. These matters are not relevant to the Court's considerations.[24]

Disposition of proceedings

29. It is respectfully submitted that the appeal should be dismissed with costs.

Dated 4 April 2011

Mr M Evans QC
Counsel for the Second Respondent
Telephone: (08) 8207 1720
Facsimile: (08) 8212 6161
Email: evans.michael@agd.sa.gov.au

Mr D Mackintosh
Crown Solicitor's Office
Telephone: (08) 8207 1644
Facsimile: (08) 8207 1724
Email: mackintosh.don@agd.sa.gov.au

[24] *Coulter v The Queen* (1988) 164 CLR 350 at 357, per Mason CJ, Wilson and Brennan JJ; *South Australian River Fishery Association Inc v South Australia* (2003) 85 SASR 373 at 393, per Doyle CJ, at 416 per Gray J; *Minister for Primary Industries v Lawrie* (1994) 64 SASR 359 at 377, per Lander J (Cox and Prior JJ agreeing); *Commissioner of Waterworks v Colton, Palmer & Preston Ltd* [1926] SASR 199 at 203, per Poole J and Murray CJ.

ANNEXURE A - LEGISLATIVE HISTORY

1. South Australian statutes providing for workers' compensation enacted between 1900 and 1986 have prohibited representatives from recovering costs from their clients unless those costs had been authorised by the court.[25]

The Workmen's Compensation Act 1900

2. Clause 12 of the Second Schedule to *The Workmen's Compensation Act 1900* provided:

> "[A workmen's] solicitor or agent shall not be entitled to recover from him or to claim a lien on or deduct any amount for costs from the said sum awarded for any costs except such as have been awarded in the arbitration. On an application made by either party to determine the amount of costs to be paid to the said solicitor or agent, such sum to be awarded subject to taxation and to the scale of costs prescribed by rules of court."

3. Clause 6 of the Second Schedule provided that the costs of and incidental to the arbitration and proceedings connected therewith shall be in the discretion of the arbitrator. The costs could not exceed the limit prescribed by rules of court, and were to be taxed in the manner prescribed by those rules.

The Workmen's Compensation Act 1911

4. Clause 10 of the Second Schedule to *The Workmen's Compensation Act 1911* provided:

> "[N]o solicitor and no agent of a person claiming compensation under this Act shall be entitled to recover from him any costs in respect of any proceedings in an arbitration under this Act, or to claim a lien in respect of such costs on, or deduct such costs from, the sum awarded or agreed as compensation, except such sum as may be awarded by the arbitrator or Special Magistrate, on an application made either by the person claiming compensation, or by his solicitor or agent, to determine the amount of costs to be paid to the solicitor or agent; and any such sum, unless it is a lump sum, shall be awarded subject to taxation and to the scale of costs prescribed by Rules of Court."

---

[25] See also clause 14 of the Second Schedule to the *Workmen's Compensation Act 1906* 6 Edw VII c.58 (Imp).

Workmen's Compensation Act 1932

5. Section 58 of the *Workmen's Compensation Act 1932* provided:

> "No solicitor and no agent of a person claiming compensation under this Act shall be entitled to recover from him any costs in respect of any proceedings in an arbitration under this Act, or to claim a lien in respect of such costs on, or deduct such costs from, the sum awarded or agreed as compensation, except such sum as may be awarded by the arbitrator or Special Magistrate, on an application made either by the person claiming compensation, or by his solicitor or agent, to determine the amount of costs to be paid to the solicitor or agent; and any such sum, unless it is a lump sum, shall be awarded subject to taxation and to the scale of costs prescribed by rules of court."

6. Section 46 provided that costs of an arbitration and proceedings connected therewith shall be in the discretion of the arbitrator or special magistrate.

Workmen's Compensation Act 1971

7. Section 41(2) and (3) of the *Workmen's Compensation Act 1971* provided:

> "(2) No solicitor for the person claiming compensation under this Act shall be entitled to recover from that person any costs in respect of any proceedings under this Act or to claim a lien in respect of such costs on or to deduct such costs from any sum awarded as compensation unless those costs have been awarded by the Court.
>
> (3) No agreement by a person claiming compensation to pay any amount by way of costs greater than the amount awarded by the Court shall be binding on that person and any amount paid by that person by way of costs in excess of the amount so awarded shall be recoverable by that person as a debt due to him."

8. Section 41(1) empowered the Court to award costs against any party thereto. Section 41 was amended in 1973 by inserting s 41(1a). That subsection provided that the Court was not to make an order for costs against a worker unless satisfied that some special reason existed why it was proper that those costs be so ordered.

Workers Rehabilitation and Compensation Act 1986

9. When enacted in 1986, s 92 of the Act *for the first time* protected (to an extent prescribed by regulation) the costs of a worker who had acted reasonably in bringing the proceedings, irrespective of whether or not the worker succeeded or was unsuccessful in whole or in part. In short, a worker was *entitled* to costs, *win, lose or draw*, unless he or she had acted unreasonably. No previous legislation had imparted such a measure of protection.

10. Section 92 was repealed by the *Workers Rehabilitation and Compensation (Miscellaneous Provisions) Amendment Act 1991* and replaced by a new s 92a. Section 92a(1)(b) provided that a party (other than the Corporation or an exempt employer, namely a worker) who was represented by a legal practitioner or officer of an industrial association was entitled (subject to limits set by the regulations) to the *costs of representation*.[26] The costs could be paid directly to the representative. If the proceedings were frivolous or vexatious, costs (which could exceed the limits fixed by the regulations) could be awarded *against* the party by whom the proceedings were brought. A review authority could decide not to award costs to a party that would otherwise be entitled to them if it formed the view that the party had acted unreasonably in bringing or conducting the proceedings.

11. Section 92a was amended by the *Workers Rehabilitation and Compensation (Review Authorities) Amendment Act 1993*. The amendment inserted new subsections (5a) and (5b). Relevantly, the new provisions provided that the representative of a person in proceedings before a review authority must neither charge nor seek to recover in respect of his or her representation an amount by way of costs in excess of the amount allowable under scales published by the Minister in the Gazette. The Act therefore clearly dealt with the contractual relationship between representative and client. The provisions of s 92a(5a) and (5b) were a clear analogue to s 88G in the Act as it currently stands.

12. Sections 88E(1)(f), 88F, 88G and 95 formed part of a suite of amendments introduced at the same time by the *Workers Rehabilitation and Compensation (Dispute Resolution) Amendment Act 1995*.

13. Reference to Hansard in connection with the Bill that lead to the introduction of ss 88E(1)(f), 88F, 88G and 95 reveals that the provisions were a legislative response to a deep and abiding concern of the Government and Opposition that costs must be kept under control if compensation payments to workers were to be maintained at their current level.[27] Nothing in Hansard supports the view that "costs" in s 88E(1)(f) should

---

26 Section 92a(1)(a) dealt with the separate question of the entitlement of a party to the costs of the proceedings.

27 That concern was held by both the government of the day and the opposition. See *Hansard* (House of Assembly) 17 October 1995 at 271 (Minister for Industrial Affairs - Second Reading Speech), 18 October 1995 at 296-297 (Deputy Leader of the Opposition), at 299-300 (Minister

not bear the meaning contended for by the Attorney. Contrary to the submissions of the Appellant,[28] the Second Reading speech and debates do not "make it clear" that the purpose of the amendments "was not to confer power upon the President to make rules regulating solicitor-client costs". Rather, Hansard indicates that the particular beneficial purpose to be served by the new costs provisions was to promote the wider interest of plaintiff workers at the expense of others, *including the legal profession.*[29] Furthermore, the Minister expressly referred to the President of the Tribunal having "*management responsibility* ... to *control the costs*".[30]

---

for Industrial Affairs) and at 302-304 (Minister for Industrial Affairs and Deputy Leader of the Opposition).

28 Written Submissions at [15].

29 See *Hansard* (HA) 18 October 1995 at 299-300 and 304.

30 See *Hansard* (HA) 18 October 1995 at 302 (emphasis added). This can only have been a reference to the rule making power to be conferred upon the President by proposed s 88E(1).