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

SECOND RESPONDENT'S SUBMISSIONS

PART I: INTERNET CERTIFICATION

1. The second respondent ("**WorkCover**") certifies that the submissions are in a form suitable for publication on the Internet.

PART II: CONCISE STATEMENT OF THE ISSUES

2. The appeal presents the issue of whether cl. 11 in Schedule 8 to the *Workers Compensation Regulation 2010* ("**WC Regulation 2010**"), introduced by the *Workers Compensation Amendment (Transitional) Regulation 2012* (NSW) ("**2012 Amending Regulation**"), was a valid transitional regulation made pursuant to cl. 5 of Part 19H of Schedule 6 of the *Workers Compensation Act 1987* ("**WCA**").

PART III: S 78B NOTICES

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

PART IV: RELEVANT FACTS

4. WorkCover agrees that the relevant facts and procedural history are as set out in the appellant's submissions.

Date of document: 29 November 2013
Filed by: WorkCover Authority of New South Wales
Legal Group, Level 1 60-70 Elizabeth Street
SYDNEY NSW 2000
DX 731 SYDNEY

Tel: (02) 4321 5022
Fax: (02) 9287 5022
Ref: Joanne Webber

PART V: APPLICABLE CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

5. WorkCover agrees that the relevant statutory provisions are as set out in the appellant's list of authorities.

PART VI: ARGUMENT

6. WorkCover sought and obtained leave to intervene in these proceedings in the Court of Appeal. In the Court below it supported the position of the appellant. Similarly, WorkCover here supports the position of the appellant. The following submissions are intended to supplement those of the appellant. They address the following matters:

   (a) the statutory scheme;

10 (b) the nature of "savings and transitional" measures;

   (c) the reasoning of Basten JA.

The statutory scheme

7. The operation of the statutory scheme with respect to the type of claims at issue here – assuming validity of all its components – is as follows:

   (a) On 27 June 2012 Schedule 2 of the *Workers Compensation Legislation Amendment Act 2012* ("**2012 Amending Act**") commenced, enacting a new s. 66 which introduced a requirement that there must be greater than 10% permanent impairment in order to qualify under that section for lump sum compensation for permanent impairment.

20 (b) Pursuant to cl 3(1) of Part 19H of Schedule 6 of the =WCA, amendments made to the WCA by the 2012 Amending Act *do* apply to undetermined claims for compensation, but subject to contrary provision in either Part 19H itself or in the regulations.

   (c) There *was* contrary provision in cl 15 of Part 19H of Schedule 6, which provided that an amendment made by Schedule 2 (being the relevant schedule) 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.

(d) But then cl 11(1) of Sch 8 to the WC Regulation 2010 itself makes further contrary provision. It was part of amendments made by the 2012 Amending Regulation to add a series of clauses to Schedule 8 to the WC Regulation 2010. The Schedule is headed "Savings and transitional provisions". It provides that the amendments made by Schedule 2 to the 2012 Amending Act "extend to a claim for compensation made before 19 June 2012, but not to a claim that specifically sought compensation under section 66 or section 67 of the 1987 Act". Clause 11(2) makes clear that cl 15 of Part 19H of Sch 6 to the WCA is to be read subject to cl 11(1). Basten JA, at [22], correctly found that cl 11 operates to vary the operation of cl 15 of Part 19H of Schedule 6.

(e) The conclusion that cl 11(1) alters the provision otherwise made by cl 15 of Part 19H of Schedule 6 is confirmed by a further consideration. Clause 1(2) of Schedule 8 of the WC Regulation 2010, being the Schedule in which cl 11 is contained, provides that "[t]he provisions of Part 19H of Schedule 6 to the 1987 Act are deemed to be amended to the extent necessary to give effect to this Part".

8. It is not in dispute that the first respondent did not, prior to 19 June 2012, make a claim that specifically sought compensation under ss. 66 or 67 of the 1987 Act. The effect of cl 11 of the 2012 Amending Regulation in such circumstances is that the amendments made to the WCA by the 2012 Amending Act do apply to the first respondent's claim for compensation. The only live question is whether cl 11 of the 2012 Amending Regulation is invalid, as found by the Court of Appeal.

9. The relevant source of power to make a regulation which varies the transitional arrangements stemming from the 2012 Amending Act is cl 5 of Part 19H of Schedule 6 to the WCA, read together with Part 20 of Schedule 6. Specifically:

(a) The general power to make regulations is found in s. 280(1) of the WCA, which provides that the Governor "may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act".

(b) Clause 1(1) of Part 20 of Schedule 6 to the WCA provides that the regulations may "contain provisions of a savings or transitional nature consequent on the enactment

of" a number of specified Acts, including the WCA, and "any other Act that amends [the WCA]".

(c) Clause 1(4) of Part 20 of Schedule 6 to the WCA provides that a provision referred to in cl 1(1) "shall, if the regulations so provide, have effect notwithstanding any other clause of this Schedule".

(d) Clause 5(1) of Part 19H of Schedule 6 to the WCA provides that "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".

(e) Clause 5(3) of Part 19H of Schedule 6 to the WCA provides that a provision referred to in cl 5(1) has effect, if the regulations so provide, despite any other provision of Part 19H.

(f) Clause 5(4) of Part 19H of Schedule 6 to the WCA provides that 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 are deemed to be amended in the manner specified in the regulations".

10. Clause 5(4) expressly expands the regulation-making power in Part 20 of Schedule 6 to authorise the making of regulations "of a savings or transitional nature" consequent on the enactment of the 2012 Amending Act which alter the way in which the provisions of the WCA are amended by that Act (ie the provisions of the WCA are "deemed to be amended in the manner specified in the regulations"). Clause 5(4) of Part 19H of Schedule 6 to the WCA is therefore a Henry VIII clause, in that it authorises the making of regulations which amend the Act under which they are made.[1] In so far as altering the operation of Schedule 6 to the WCA is concerned, there is some overlap with cl 1(4) of Part 20 of Schedule 6, which operates to confer a power analogous to that conferred by a Henry VIII

[1] *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 293 ALR 450 at [18] per French CJ and authorities there cited.

clause. Clause 1(4) authorises the making of regulations that have effect, if they so provide, notwithstanding any other clause of Schedule 6.

11. Clause 5(1) of Part 19H of Schedule 6 to the WCA, read together with cl 5(3) of Part 19H, also confers a power analogous to that conferred by a Henry VIII clause. Clause 5(1) authorises the making of regulations of a savings or transitional nature consequent on the enactment of the 2012 Amending Act that take effect as from a date that is earlier than 27 June 2012 (being the date of assent to the 2012 Amending Act). Clause 5(3) provides that such a provision has effect, if the regulations so provide, despite any other provision of Part 19H.

10 12. There is no constitutional infirmity with Henry VIII clauses or clauses which confer analogous powers,[2] and the validity of the provisions in question has not been challenged. Nor do they attract any special principles of construction, such that the power conferred by such a clause is narrower than would otherwise be suggested by the plain meaning of the words used, understood in context.

Regulations of a "savings or transitional nature"

13. As has been seen, each of the empowering provisions in cl 5(1) and 5(4) of Part 19H of the WCA Act, together with cl 1(1) of Part 20 of that Act, refer to making regulations of a "saving or transitional nature". The regulation in question, cl 11 of Sch 8 of the WC Regulation 2010, is in a schedule headed "Savings and transitional provisions". It is
20 important, thus, to address the nature and scope of such a power, including what a saving or transitional measure *is* (with particular focus here on transitional measures). The Court of Appeal did not consider this issue. The topic has not been the subject of extensive judicial exegesis.

14. It is commonplace that when new legislation is introduced, or existing legislation is amended, issues arise as to how the new norms apply in relation to circumstances which, in one way or another, pre-date the amendments. In the case of the amendment of

---

[2] *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73; [1932] ALR 22; [1931] HCA 34. See generally Pearce and Argument, 2012, pp 22–4 and 139–40; cited by French CJ in *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 293 ALR 450 at 456, [18]; see *Permanent Trustee v State Revenue* (2004) 220 CLR 388 at 420-421, [75]-[78].

legislation such as the WCA that confers rights to claim certain benefits, issues inevitably arise as to how new norms apply to different classes of claims that straddle the old and new regimes, such as claims which have been made but are undetermined and new claims that relate to past circumstances. Such issues give rise to familiar questions about what arrangements apply for the purposes of transitioning from one set of norms to a new set of norms.

15. Where no express provision is made for transitional situations, inferences must be drawn as to the intended operation of amendments.[3] Ascertaining such matters by a process of construction and implication can lead to obvious difficulties, uncertainty and expense. In the circumstances, it has understandably become conventional for the legislature to make express provision to deal with transitional matters, including through the conferral of powers to make regulations of a savings or transitional nature. Regulations "of a savings or transitional nature, by definition, will save some things under the repealed law and provide a transition to other things under the new law".[4]

16. There are perhaps two defining characteristics of a "transitional" measure:

    (a) That it deals with the "transition" from one legal regime to another. Transitional provisions answer the kinds of questions alluded to above as to the application of different norms to facts and circumstances that straddle the period surrounding an amendment.

    (b) That its operation is expected to be temporary. Such a provision becomes spent when all the past circumstances with which it is designed to deal have been dealt with.[5]

17. The powers at issue here to make regulations of a "savings or transitional nature" are expressed in clear and conventional terms. The Parliament has recognised the need that can arise to specify, with some detail and precision, how amending legislation applies to

---

[3] Noted *Australasian Meat Industry Employees Union v Hamberger* (2000) 102 FCR 74 at [42] per Beaumont, Lee & Gyles JJ, , citing *Halsbury's Laws of England* (4th ed.) Vol 44(1), par 1294.

[4] *Tugun Cobaki Alliance Inc v Minister for Planning* [2006] NSWLEC 396 at [188] per Jagot J

[5] *Australasian Meat Industry Employees Union v Hamberger* (2000) 102 FCR 74 at 94, [42] citing *Halsbury's Laws of England* (4th ed.) Vol 44(1), par 1294; *R v Secretary of State for Social Security; Ex parte Britnell* [1991] 1 WLR 198 at 202 per Lord Keith; *Bennion on Statutory Interpretation* (5th ed, 2008) pp 314–5; *Empire Waste Pty Ltd v District Court of New South Wales* [2013] NSWCA 394 at [77] per Bathurst CJ (with whom Beazley P and Hoeben JA agreed)

existing matters/claims. And it has provided broad powers to do so in the form of regulations containing provisions of a savings or transitional nature. Effect should be given to the terms in which those powers are conferred. There neither is, nor should be, any principle of statutory construction that dictates that regulation-making powers of the kind at issue here should be given a narrow construction.

18. Clause 11 of Sch 8 of the WC Regulation 2010 is clearly a measure of a transitional nature, consequent on the enactment of the 2012 Amending Act, in that it is:

    (a) a provision that regulates the transition from the relevant norms under the WCA prior to, and post, the 2012 Amending Act;

    (b) temporary in effect, in that it only applies to the limited class of claims that straddle the divide between the pre and post-amendment regimes, and its operation will soon be spent;

    (c) in terms a provision that modifies the operation of cl 15 of Part 19H of Schedule 6 to the WCA, which in turn had modified cl 3 of Part 19H. As the heading to Schedule 6 indicates, that Schedule includes provisions of a savings and transitional nature. The provisions in cll 3 and 15 of Part 19H of Schedule 6 are themselves plainly transitional measures dealing with the application of the 2012 Amending Act to circumstances pre-dating the amendments.

19. Although cl 11 appears as part of the WC Regulation 2010, there is no reason why it could not have been enacted as one of the "transitional provisions" in Part 19H of Schedule 6 which are consequent on the enactment of the 2012 Amending Act. Whilst ordinarily a regulation cannot modify a statute, the situation is different where there is an express conferral of power to vary by regulation the operation of the Act, as there is here. Clause 11 comes within the extended aspect of the regulation-making power that is created by cl 5(4) of Part 19H of Schedule 6. That is because cl 11 specifies the manner in which the provisions of the WCA are deemed to be amended.

20. Clause 11 of the 2012 Amending Regulation is also a transitional provision "consequent on the enactment of the 2012 Amending Act", given that it deals in terms with the application of the amendments introduced by that Act.[6]

21. The failure of the Court of Appeal to give effect to the key phrase "provisions of a savings or transitional nature" in the regulation-making power is a key error in its reasoning. Aside from the single reference at [26] of Basten JA's reasons, dealing briefly with cl 5(4), no consideration was given to the phrase. Basten JA observed at [26] that "it is not obvious that [cl 5(4)] would permit a regulation to do more than vary the savings and transitional provisions in Schedule 6". Yet that is precisely what cl 11 did. It varied the operation of cl 15 of Part 19H of Schedule 6 of the WCA, which is headed "Provisions consequent on enactment of [the 2012 Amending Act]", and which contains clauses 3 and 15, being transitional measures.

22. The short and complete answer to the question arising on the appeal is that cl 11 of the WC Regulation 2010 is a provision of the kind expressly authorised by cl 5(4) of Part 19H of Schedule 6 to the WCA, read together with cl 1(1) of Part 20 of Schedule 6.

23. In the alternative, cl 5(1) of Part 19H of Schedule 6, read together with cl 5(3) of Part 19H and cl 1(1) of Part 20, provides a source of power for cl 11 of the 2012 Amending Regulation. Clause 11 is a provision of the kind described in cl 5(1), namely a regulation of a transitional nature consequent on the enactment of the 2012 Amending Act that "takes effect" as from a date that is earlier than 27 June 2012. Clause 11 of Sch 8 of the 2012 Amending Regulation "takes effect" from a date earlier than the date of assent to the 2012 Amending Act because it has a legal operation in relation to claims made before that date. To the extent that cl 11 serves to vary the transitional arrangements otherwise provided for in the WCA, that is a matter expressly provided for in cl 11(2) and expressly contemplated in cl 5(3) of Part 19H of Schedule 6.

---

[6] See *Empire Waste Pty Ltd v District Court of New South Wales* [2013] NSWCA 394 at [78] per Bathurst CJ (with whom Beazley P and Hoeben JA agreed).

The reasoning of Basten JA in finding that cl 11 is invalid

24. As the Appellant notes at [27], the reasoning of the Court of Appeal is not, with respect, entirely clear. Nevertheless, the Second Respondent will attempt to set out and address that reasoning as it understands it.

25. Basten JA apparently concluded that, despite cl 5 of Part 19H of Schedule 6, cl 11 is invalid (see at [7], [24]-[28] and [36]). His Honour's reasoning appears to involve the following steps:

(a) Clause 1(1) of Part 20 of Schedule 6 to the WCA should be construed as not authorising regulations which interfere with accrued rights (see at [24]). That is so because whilst cl 1(2) of Part 20 authorises the backdating of regulations so as to take effect from the date of assent to the Act, cl 1(3) provides that any such backdating cannot prejudicially affect accrued rights. If backdated regulations cannot affect accrued rights, then nor should non-backdated regulations be able to do so.

(b) Clause 5 of Part 19H of Schedule 6 to the WCA does expand the regulation-making power in Part 20 cl 1 in three respects ([26]-[27]). But, critically, it does not expand the basic regulation-making power in Part 20 cl 1(1). Thus that power is still limited in that it does not extend to making regulations which prejudicially affect accrued rights ([27]-[28]). The respects in which cl 5 of Part 19H expands Part 20 cl 1 are not relevant for the following reasons:

i. Clause 5(1) of Part 19H permits a regulation to take effect from a date earlier than the date of assent of the Act. But that merely alters the date that would otherwise have been possible pursuant to Part 20 cl 1(2). And that does not affect the scope of the regulation-making power in Part 20 cl 1(1), thus it does not authorise any effect on accrued rights.

ii. Clause 5(4) of Part 19H is not relevant (at [26]), first, because Part 20 cl 1(4) already permits regulations under cl 1(1) to have effect notwithstanding any other clause of Schedule 6, and the clause purportedly being varied here (cl 15 of Part 19H) was within that Schedule – ie there was already an available Henry VIII clause, so cl 5(4) adds nothing. Secondly – perhaps – cl 5(4) only

relates to regulations varying the savings and transitional provisions in Schedule 6, and (seemingly) cl 11 of the Regulation is not such a provision.

iii. Clause 5(2) of Part 19H provides that cl 1(3) of Part 20 – which provides that back-dating of a regulation cannot prejudicially affect accrued rights – does not limit the operation of clause 5. But cl 5(2) should not be construed as expanding the power in Part 20 so as to permit regulations which extinguish accrued rights, because there "is nothing to that effect expressly stated in cl 5 or which arises as a matter of necessary implication" ([27]). The absence of the power under Part 20 to make such regulations did not arise from cl 1(3), thus cl 5(2) is simply not to the point.

(c) Clause 11 does prejudicially affect accrued rights, thus it is not supported by Part 20 cl 1, thus it is invalid.

26. There are a number of difficulties with this reasoning.

27. As to step (a), his Honour's reasoning both overstates the inference to be drawn from cl 1(3) of Part 20 and gives it no work to do. The point of that sub-clause is to prevent any backdated regulations made under cl 1(1) from prejudicially affecting accrued rights. But Basten JA construes cl 1(1) as not authorising any regulations, whether backdated or not, from prejudicially affecting accrued rights. That means cl 1(3) was unnecessary. Clause 1(3) has a specific and limited effect – it provides that where a provision of the kind referred to in cl 1(1) is stated to take effect from a date earlier than its publication in the Gazette, it does not operate prejudicially to affect pre-existing rights or to impose liabilities in respect of any act or omission prior to publication. The plain presupposition is that, otherwise, regulations made under the clause might prejudicially affect such rights.

28. Importantly, cl 1(3) of Part 20 does not limit the operation of clause 5 of Part 19H: cl 5(2) of Part 19H. Step (b) of Basten JA's reasoning means that cl 5(2) of Part 19H has no work to do in stating that cl 1(3) of Part 20 does not limit the operation of cl 5, because on his Honour's approach cl 1(3) had no work to do anyway. Yet the Parliament clearly meant for the dis-application of cl 1(3) to mean something. The obvious intent *was to authorise* the making of regulations which did have a prejudicial affect on accrued rights. This may be taken to undercut Basten JA's reasoning at step (a). But even if Basten JA was right in step (a), the Parliament's manifest intent in cl 5 of Part 19H should be given effect.

29. Clause 5(2) of Part 19H is also a complete answer to any suggestion that the question of construction is governed by the general position in s. 30(1)(c) of the *Interpretation Act 1987* (NSW), namely that the amendment of an Act does not affect any right accrued under that Act. The application of s. 30(1)(c) is subject to any contrary intention appearing in the relevant Act: s. 5(2) of the *Interpretation Act 1987* (NSW). Clause 5(2) of Part 19H of Schedule 6 manifests a contrary intention which operates to displace s. 30(1)(c) of the *Interpretation Act 1987* (NSW).

30. It is therefore wrong to approach the issue, as Basten JA did at [24], on the basis that the regulation must "conform to the power conferred in Pt 20, cl 1 of Sch 6 to the Act", such that the effect of cl 5 of Part 19H can be put "to one side". This reasoning ignores the fact that cl 5 expressly expands the regulation making power, including by dis-applying the limitation which would otherwise arise from cl 1(3) of Part 20 of Schedule 6.

31. Moreover, it is necessary to consider what the Parliament meant to convey by the phrase "take effect". On the limited view apparently taken by his Honour at [28] (last sentence) this simply refers to the commencement date of the regulation. However, *taking effect* suggests a concern more with the substance relating to the effect of the regulation, rather than merely its formal commencement date. It is true that here cl 11 of the 2012 Amending Regulation did not state in terms that the relevant statutory amendments "take effect as from date X". Yet the restrictions on when a regulation may take effect are directed to restricting retroactive operation of the measures. The effect of cl 11 is that the relevant statutory restrictions take effect from a date prior to the commencement date of the 2012 Amending Regulation, encompassing all non-determined claims for compensation which had arisen prior to 19 June 2012, save for claims which had specifically sought compensation under ss 66 or 67 of the WCA.

32. In any case, irrespective of whether the 2012 Amending Regulation "takes effect" at a date prior to the date of assent to the 2012 Amending Act, cl 5(4) provided a source of power for the making of cl 11 of the 2012 Amending Regulation. Clause 5(4) extends the power in Part 20 to authorise the making of regulations of a savings or transitional nature that specify the manner in which the provisions of the WCA are deemed to be amended. For the reasons set out above, cl 11 of the 2012 Amending Regulation is a regulation of a "transitional" nature.

33. The analysis of Basten JA unduly complicated the issues. In enacting cl 5 of Part 19H of Schedule 6, the Parliament granted a broad power to make savings and transitional regulations with respect to the relevant amendments, including regulations which take effect prior to the date of assent to the 2012 Amending Act such as to have retroactive effect, and where it was expressly contemplated that such regulations may both override the savings and transitional provisions made in the Act itself and prejudicially affect accrued rights.

34. One premise which may be implicit in the reasoning of the Court of Appeal is that extraordinarily clear and express terms are required to overcome the presumption against interfering with accrued rights. In terms of understanding the scope of a power to make regulations of a savings or transitional nature, there is no warrant for such an approach. Such reasoning may perhaps inform the construction of transitional provisions themselves in order to ascertain whether a clear intention to interfere with accrued rights is manifested.[7] However, the same reasoning does not extend to the underlying source of power to make such regulations, for the reasons addressed above with respect to the nature of such powers to enact savings and transitional measures.

35. In any event, where that power is conferred in general, conventional terms as a power to make regulations of a savings or transitional nature, the intention to authorise interference with existing rights is plain regardless of the strictness of interpretation. In the context of a statute such as the WCA that creates and closely regulates rights to compensation, it is inherent in the nature of a transitional provision consequent on an enactment to the WCA that existing rights may be affected.[8] To confer a power to make regulations of a savings and transitional nature consequent upon enactment of an amending Act, in circumstances where the power extends to making regulations that take effect prior to the date of assent and that override the provisions of the Act, necessarily entails authorising interference with existing rights. It is also significant that cl 3 of Part 19H of Schedule 6, which was part of the Amending Act, expressly modified accrued rights. Clause 11 of the 2012

---

[7] See *Buck v Comcare* (1996) 137 ALR 335 at 340 per Finn J. However, the special principles of construction that apply in circumstances where a statute interferes with fundamental common law rights have not been extended generally to the situation of existing statutory rights being modified by amendment.

[8] Note, analogously, the discussion in *Attorney-General (NT) v Chaffey* (2007) 231 CLR 651 at [30], [46]-[49] and [60].

Amending Regulation was thus made pursuant to powers that were conferred as part of a suite of provisions that were clearly intended to modify accrued rights.

36. It is otherwise difficult to see what words would suffice to establish the clear intention which the Court of Appeal found lacking. If the reasoning of Basten JA is to be understood as meaning that the legislature must say in terms that a transitional provision may interfere with accrued legal rights, then that is to elevate form over substance.

37. Clause 11 was authorised and should have been given effect.

PART VII: ORAL ARGUMENT

38. WorkCover estimates that approximately 30 minutes will be required for the presentation of its oral argument.

Dated: 29 November 2013

J K Kirk
Ph: 02 9223 9477
Fax: 02 8028 6060
kirk@wentworthchambers.com.au

S J Free
Ph: 02 9233 7880
Fax: 02 9232 7626
stephenfree@wentworthchambers.com.au