

## **MOLONEY v WORKERS COMPENSATION TRIBUNAL & ANOR (A5/2011)**

Court appealed from: Full Court of the Supreme Court of South  
Australia  
[2010] SASCFC 17

Date of judgment: 2 August 2010

Date special leave granted: 11 February 2011

The appellant, a legal practitioner whose practice involved acting for claimant workers before the Workers Compensation Tribunal, sought a declaration from the Supreme Court of South Australia that r 31(2) of the Workers Compensation Tribunal Rules 2009 was invalid as being ultra vires of s 88E(1)(f) of the *Workers Rehabilitation and Compensation Act 1986* (SA) ("the Act"). Section 88E(1)(f) gave the power to the President to make rules of the Tribunal "regulating costs". Section 88G(1) provided "*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.*" Rule 31(2) provided:

*"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..."*

The appellant contended that s 88E(1)(f) only authorised the President to make rules regulating party/party costs and not solicitor/client costs and that the word "costs" in the phrase "regulating costs" in s 88E(1)(f) was intended to have the same meaning as the word "costs" referred to in s 88G, namely costs of proceedings, being a reference to party/party costs.

The Full Supreme Court (Doyle CJ, Anderson and Layton JJ) dismissed the application. Doyle CJ, with whom Anderson J agreed, held that a power of the kind conferred by s 88E should be read liberally. His Honour found that there was no inconsistency or direct conflict between a power to make rules relating to and regulating a claim by a representative for the costs of representation against the party represented, and a power to specify a maximum amount recoverable by a representative as a result of such a claim. Rule 31(2) established a procedure by which a representative who wished to claim costs from a worker over and above those payable by the compensating authority could make that claim and have it adjudicated. His Honour concluded that the power conferred by s 88E(1)(f) authorised the making of rules limiting the entitlement of a solicitor to exercise contractual rights to remuneration, and claim remedies in support of those rights such as a lien. That was an aspect of a power to regulate costs.

Layton J found that the meaning of the word “costs” in s 88E(1)(f) and the power conferred on the President to make rules on costs should not be read down by implication as contended for by the appellant to refer only to party/party costs. The term “costs” was broad and the content of other sections of the Act relied on by the appellant did not imply that the expression was limited. There was no inconsistency between s 88E(1)(f) and s 88G. Rule 31(2) did not provide for a scale of costs and was different in content to the regulating power expressed in s 88G. As the rule covered the topic of costs it was prima facie within the rule making power in s 88E(1)(f).

The grounds of appeal include:

- the Full Court erred in construing the phrase "regulating costs" in s 88E(1)(f) of the Act to include regulating the costs which a worker has agreed to pay his or her representative ("solicitor-client costs") rather than as only regulating costs as between the Relevant Compensating Authority and a worker ("party-party costs").
- in the alternative, if and in so far as the phrase "regulating costs" in s88E(1)(f) of the Act includes a power to regulate solicitor-client costs, the Full Court erred in failing to construe such power as limited to making rules regulating the practice and procedure relating to the exercise of the power conferred by s 95A and, possibly, s 88G(1) of the Act.