HIGH COURT OF AUSTRALIA

McHUGH, GUMMOW, KIRBY, HAYNE AND HEYDON JJ

BRADLEY JOHN DOSSETT APPELLANT

AND

TKJ NOMINEES PTY LTD RESPONDENT

Dossett v TKJ Nominees Pty Ltd [2003] HCA 69
4 December 2003
P118/2002

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Supreme Court of Western Australia made on 15 June 2001.*

3. *In place thereof order that the appeal to that Court be allowed with costs, the orders of the District Court of Western Australia made on 3 May 2000 be set aside, and the application for leave to commence proceedings be remitted to the District Court for determination according to law.*

On appeal from the Supreme Court of Western Australia

Representation:

B L Nugawela with J J Sheldrick for the appellant (instructed by Andrew Read & Associates)

M W Odes QC with G W Nutt for the respondent (instructed by Jackson McDonald)

CATCHWORDS

Dossett v TKJ Nominees Pty Ltd

Statutes — Interpretation – Amending Act – Appellant's workers' compensation claim did not fall within the specific saving provision in the amending Act – Whether the general saving provision in s 37(1) of the *Interpretation Act* 1984 (WA) applied to supplement the specific saving provision in the amending Act – Section 37(1) applied where a written law "repeals" an enactment – Whether a repeal accompanied by the substitution of provisions for those repealed was a "repeal" for the purpose of s 37(1) – Significance of the distinction between "amend" and "repeal" – Relevance of principle that abolition of common law rights must be made clearly.

Workers' compensation – Limitation on awards of common law damages – Whether appellant was entitled to a grant of leave to commence common law proceedings for personal injury – Amending Act creating a new and stricter regime provided a specific exemption for actions commenced before the assent date – Appellant had only applied for leave to commence proceedings before the assent date – Whether the general saving provision in the *Interpretation Act* 1984 (WA) applied to enable the appellant to proceed under the earlier regime.

Words and phrases – "repeal".

Workers' Compensation and Rehabilitation Act 1981 (WA), s 93D(4).
Workers' Compensation and Rehabilitation Amendment Act 1999 (WA), s 32(7).
Interpretation Act 1984 (WA), s 37.

1 McHUGH J. The question in this appeal is whether the Full Court of the Supreme Court of Western Australia correctly concluded that the enactment of the *Workers' Compensation and Rehabilitation Amendment Act* 1999 (WA) abolished the power to grant leave to the appellant to commence proceedings for damages at common law.

Statement of the case

2 In July 1998, Mr Bradley John Dossett applied to the District Court of Western Australia, as required by s 93D of the *Workers' Compensation and Rehabilitation Act* 1981 (WA), for leave to commence common law proceedings for the recovery of damages in respect of an employment injury. To obtain leave, Mr Dossett had to show that he was "likely to have future pecuniary loss resulting from the disability of an amount that is at least equal to the prescribed amount." On 5 October 1999, before the District Court determined his application, the *Workers' Compensation and Rehabilitation Amendment Act* received the Royal Assent. As a result, the *Workers' Compensation and Rehabilitation Act* thereafter imposed more restrictive conditions on the award of common law damages. Section 32(7) of the *Workers' Compensation and Rehabilitation Amendment Act*, however, enacted transitional provisions. It provided:

> "The amended provisions do not affect the awarding of damages in proceedings –
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> (a) commenced before the assent day; or
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> (b) for the commencement of which the District Court gave leave under the former provisions before the assent day,
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> and the former provisions continue to apply in relation to those proceedings."

3 Section 32(6) defined "assent day" to mean the day of the receipt of the Royal Assent.

4 The District Court held that the amended provision applied to Mr Dossett's application and that it had no power to give him leave to commence proceedings under the old s 93D. Mr Dossett appealed to the Full Court of the Supreme Court of Western Australia but that Court dismissed his appeal. Scott J (with whom Anderson J and Stein AJ agreed) said that, because the District Court had not determined Mr Dossett's application before 5 October 1999, the transitional provision in the *Workers' Compensation and Rehabilitation Amendment Act* did not save his application.

The Interpretation Act 1984

5 Mr Dossett contends that he is entitled to proceed under the earlier regime even though his application did not fall within the savings provisions in s 32(7) of the *Workers' Compensation and Rehabilitation Amendment Act*. He contends that, although his application was not saved by s 32, it was saved by the general savings provision in s 37 of the *Interpretation Act* 1984 (WA) and, in particular, by pars (b), (c) and (f) of s 37(1).

6 Section 37(1) of the *Interpretation Act* provides:

> "Where a written law repeals an enactment, the repeal does not, unless the contrary intention appears –
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> ...
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> (b) affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;
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> (c) affect any right, interest, title, power or privilege created, acquired, accrued, established or exercisable or any status or capacity existing prior to the repeal;
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> ...
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> (f) affect any investigation, legal proceeding or remedy in respect of any such right, interest, title, power, privilege, status, capacity, duty, obligation, liability, burden of proof, penalty or forfeiture,
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> and any such investigation, legal proceeding or remedy may be instituted, continued, or enforced, and any such penalty or forfeiture may be imposed and enforced as if the repealing written law had not been passed or made."

7 Section 37(2) declares:

> "The inclusion in the repealing provisions of an enactment of any express saving with respect to the repeals effected thereby shall not be taken to prejudice the operation of this section with respect to the effect of those repeals."

8 In response, TKJ Nominees Pty Ltd, the respondent to the appeal, contends that s 37 of the *Interpretation Act* did not save the application. It contends that s 37 applies only where an enactment has been repealed and that s 93D had not been repealed – the legislature had merely amended s 93D by substituting a new provision for the previous provision. This contention is without substance.

9 Upon the Royal Assent being given to the new s 93D, the old s 93D no longer operated according to its own terms. Its provisions ceased to affect legal rights, duties and relationships. Put simply, it was repealed. In so far as its provisions continue to have any legal effect, they do so only because of the transitional provisions and the operation of s 37 of the *Interpretation Act.* If there were any doubt about the matter – which there is not – it is put to rest by s 35 of the *Interpretation Act.* Section 35 declares:

> "Where a written law repeals an enactment and substitutes provisions for the enactment repealed, the repealed enactment remains in operation until the substituted provisions come into operation."

This section makes it clear that a substituted enactment effects a repeal of the earlier enactment.

10 TKJ Nominees points out, however, that s 37 of the *Interpretation Act* does not apply where another enactment contains a "contrary intention". It then contends that s 32(7) of the *Workers' Compensation and Rehabilitation Amendment Act* reveals such a "contrary intention". It argues that s 32(7) identifies with particularity those claims for damages that may proceed under the earlier regime although they arose "before the assent day". Accordingly, so TKJ Nominees argues, the irresistible inference is that the Legislature intended that the claims so identified are the *only* claims of this nature that can proceed. It appears from a statement made by the Minister for Labour Relations in the Legislative Assembly that she shared this view[1]. Her statement was made, however, 16 days after the *Workers' Compensation and Rehabilitation Amendment Act* received the Royal Assent and is not entitled to any special weight concerning the meaning of the amending legislation. In *Re Bolton; Ex parte Beane*[2], Mason CJ, Wilson and Dawson JJ pointed out that "[t]he words of a Minister must not be substituted for the text of the law." That *dictum* was expressed and applied in respect of a statement made by a Minister in introducing the Bill that became the Act under consideration in that case. Their Honours refused to give effect to the Minister's opinion concerning the meaning of the Act, notwithstanding that s 15AB of the *Acts Interpretation Act* 1901 (Cth) required that consideration should be given to the Second Reading speech. There is no requirement in the law of Western Australia that a court should give any special weight to a Minister's opinion concerning the meaning of legislation that has been enacted by the Legislature. And it would be contrary to the rule of law, the supremacy of Parliament and the doctrine of the separation of powers to give

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1 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 October 1999 at 2456.

2 (1987) 162 CLR 514 at 518.

any special weight to a Minister's opinion as to what an enacted law meant. The meaning of statute law is found in the text of legislation enacted by the Legislature. As Mason CJ, Wilson and Dawson JJ went on to say in *Re Bolton; Ex parte Beane*[3]:

> "The function of the Court is to give effect to the will of Parliament as expressed in the law."

11 In my opinion, s 32 contains no foundation for the inference of contrary intention upon which TKJ Nominees relies. Section 32(7) authorises the awarding of damages where proceedings for damages have been commenced and where leave to issue proceedings has been given but no action for damages has commenced. It has nothing to say about whether the right to apply for leave may continue. Nor does it say anything about the effect and operation of s 37(1) of the *Interpretation Act*. But in any event s 37(2) makes it clear that the inclusion in a repealing Act of an express saving provision does not prejudice the operation of s 37 with respect to the effect of the repeal.

12 In support of its argument, TKJ Nominees relies on this Court's decision in *G F Heublein and Bro Inc v Continental Liqueurs Pty Ltd*[4]. *Heublein* concerned an express provision made by the *Trade Marks Act* 1955 (Cth) – which repealed the *Trade Marks Act* 1905 (Cth) – preserving the rights of applications lodged under the repealed Act and pending when the 1955 Act came into operation. Kitto J found that s 8 of the *Acts Interpretation Act* 1901 (Cth) – the federal equivalent of s 37(1) – saved the pending application[5]. However, the Full Court (Dixon CJ, Taylor and Windeyer JJ) reversed his decision. *Heublein* does not support the argument of TKJ Nominees. The decision rested on the specific transitional provisions of the 1955 Act, provisions that the Full Court of this Court thought dealt exhaustively with the saving of existing proceedings and which, in the Full Court's view, left no room for the application of s 8 of the *Acts Interpretation Act*[6].

13 Moreover, the *Acts Interpretation Act* 1901 (Cth) contained no equivalent of s 37(2). The terms of that sub-section indicate that s 37(1) applies to *all* repeals in the absence of an express statement that it does not apply to the repeal. By themselves, the terms of s 37(2) constitute a sufficient ground for

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3 (1987) 162 CLR 514 at 518.

4 (1962) 109 CLR 153.

5 *Continental Liqueurs Pty Ltd v G F Heublein and Bro Inc* (1960) 103 CLR 422.

6 (1962) 109 CLR 153 at 161-162.

distinguishing the decision in *Heublein* – the *Acts Interpretation Act* containing no equivalent to s 37(2).

14 Once the conclusion is reached that s 32(7) contained no intention to oust the operation of s 37(1) of the *Interpretation Act*, it is impossible to conclude that "somehow by some means" s 32(7) impliedly repealed either s 37(1) or s 37(2) or both. An implied repeal of legislation is such a rare and unlikely event that it can be inferred only when "actual contrariety is clearly apparent."[7] Nothing in s 32(7) of the *Workers' Compensation and Rehabilitation Amendment Act* or that Act generally discloses any actual contrariety with s 37(1) or (2) of the *Interpretation Act*.

15 Section 32(7) deals with claims for damages that either have been commenced or by the grant of leave may be commenced. It says nothing whatever about pending *applications* for leave to commence proceedings for damages. Nor does it contain any statement that the two classes of proceedings identified in s 32(7) are the only proceedings to which the former provisions of s 93D continue to apply. Nor does s 32(7) contain any statement that it applies despite anything in any other statute.

16 Accordingly, s 32(7) did not effect an implied repeal of either s 37(1) or s 37(2) of the *Interpretation Act*.

17 It follows that s 37 of the *Interpretation Act* entitled Mr Dossett to proceed with his pending application for leave which continues to be governed by the former provisions of s 93D of the *Workers' Compensation and Rehabilitation Act* 1981. The Full Court of the Supreme Court of Western Australia and the District Court erred in concluding that the District Court had no power to give leave to Mr Dossett to commence proceedings for damages under the repealed s 93D.

Order

18 The appeal should be allowed. Orders should be made in the form proposed by Gummow, Hayne and Heydon JJ.

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7 *Butler v Attorney-General (Vict)* (1961) 106 CLR 268 at 275.

19 GUMMOW, HAYNE AND HEYDON JJ. This appeal from the Full Court of the Supreme Court of Western Australia[8] turns upon questions of construction of s 32(7) of the *Workers' Compensation and Rehabilitation Amendment Act* 1999 (WA) ("the 1999 Act") and its relationship to the general savings provisions found in s 37 of the *Interpretation Act* 1984 (WA) ("the Interpretation Act").

20 The appellant contends that, on 2 December 1996, he suffered an injury to his cervical spine and both shoulders as a result of an incident during the course of his employment by the respondent. At the material time, the appellant was operating a front end loader in order to chip out limestone at the Moore River Limestone Quarry. The blade on the front wheels dug into stone causing the front end loader to bounce up and down and the appellant to strike his head on the roof of that vehicle.

21 In respect of this injury, the common law of tort gave the appellant well established rights. Those rights were not thereafter to be abrogated by statutory intervention in the absence of clear words or a necessary implication to that effect[9]. At the time the appellant sustained his injury, there had been a partial legislative inroad. As the law then stood, leave of the District Court of Western Australia was required for the commencement by the appellant of proceedings at common law to recover damages for personal injury. That requirement was imposed by s 93D(4) of the *Workers' Compensation and Rehabilitation Act* 1981 (WA) ("the Workers' Compensation Act"). The outcome on the present appeal turns upon the question as to whether a subsequently enacted and more restrictive legislative regime applies to the appellant's common law rights.

22 On 1 July 1998, by originating summons filed in the District Court, the appellant sought leave pursuant to s 93D(5) of the Workers' Compensation Act to commence proceedings at common law for damages for personal injury. Section 93D had been added to the Workers' Compensation Act by s 4 of the *Workers' Compensation and Rehabilitation Amendment Act* 1993 (WA) ("the 1993 Act"). Section 4(3) of the 1993 Act inserted in Pt IV of the Workers' Compensation Act a new Div 2 (ss 93A-93F), headed "Constraints on awards of common law damages". The new Division applied to the award of damages independently of that statute against the employer of a worker where the

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8 *Dossett v TKJ Nominees Pty Ltd* [2001] WASCA 179.

9 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 77 ALJR 40 at 43 [11], 49 [43], 61 [111], 65-66 [132]; 192 ALR 561 at 565, 573, 590, 596.

disability of the worker was caused by the negligence or other tort of the employer (s 93B).

23 Section 93C, which was not thereafter repealed or amended, stated:

> "If this Division applies a court is not to award damages to a person contrary to this Division."

Section 93D provided that damages might only be awarded in the case of a person such as the appellant if there was a "serious disability" (s 93D(1)). Moreover, proceedings in which damages were sought were "not to be commenced without the leave of the District Court" (s 93D(4)). The District Court was obliged to grant that leave if one or more of three conditions specified in pars (a), (b) and (c) of s 93D(5) were met. The conditions were concerned with the degree of the disability suffered (pars (a), (b)) and the likely amount of future pecuniary loss (par (c)).

24 The originating summons seeking leave from the District Court was served on 12 May 1999 and an affidavit in support of the application was sworn and filed on 14 September 1999. On 15 September 1999, the application was listed for hearing on 8 October 1999. However, in the interval between those two dates, a significant legislative step was taken.

25 On 5 October 1999, the 1999 Act received the Royal Assent. Section 2 of that statute provided that s 32 thereof came into operation on that day. Section 32 of the 1999 Act made a number of changes to the Workers' Compensation Act further restricting the award of damages and related matters; it also contained savings and transitional provisions. Section 32(5) stated that ss 93D, 93E and 93F of the Workers' Compensation Act "are repealed" and that the sections set out thereunder and numbered as ss 93D, 93E, 93F and 93G "are substituted". Section 32(7) read:

> "The amended provisions do not affect the awarding of damages in proceedings –
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> (a) commenced before the assent day; or
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> (b) for the commencement of which the District Court gave leave under the former provisions before the assent day,
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> and the former provisions continue to apply in relation to those proceedings."

26 The phrase "assent day" was defined in s 32(6) as meaning the day of receipt of the Royal Assent. The phrase "former provisions" was defined as

meaning Pt IV Div 2 of the Workers' Compensation Act before amendment by s 32 of the 1999 Act, and "amended provisions" as meaning Pt IV Div 2 as amended by s 32 of the 1999 Act. That Division had included s 93D.

27 The District Court decided that it lacked power to grant leave to the appellant, thereby making it unnecessary to consider the merits of the application had the former provisions of s 93D applied. The originating summons was dismissed.

28 Pursuant to a grant of leave by the Full Court (Kennedy, Murray and Parker JJ), the appellant appealed to the Full Court (Anderson and Scott JJ, Stein AJ). The Full Court dismissed the appeal.

29 An appeal also had been taken to a differently constituted Full Court in the matter of *Toolan v Metropolitan (Perth) Passenger Transport Trust*[10]. That was an appeal from a decision of the District Court refusing leave to commence proceedings for damages at common law for personal injury. The decision refusing leave had been given on 20 May 1999, that is to say, before the commencement of the 1999 Act, but the critical factors were those expressed by Malcolm CJ[11]:

> "In my opinion, s 37(1)(c) [of the Interpretation Act] protects the right of an appeal from a refusal of leave under the repeal provisions where the appeal has been commenced and was pending as at 5 October 1999. The right of appeal to the Full Court by leave of the Supreme Court or a judge existed at that date by virtue of the provisions of s 79(1)(b) of the *District Court of Western Australia Act* [1969 (WA)]. Leave to appeal had been duly obtained and the appeal commenced by notice of appeal dated 11 June 1999. Section 37(1)(f) of the [Interpretation Act] provides that the repeal of the former provision does not affect any 'legal proceeding or remedy' in respect of any such right. Finally, s 37(1) concludes by providing that any such legal proceeding may be continued 'as if the repealing law had not been passed or made'. This clearly has the effect that an appeal pending under the repealed law is required to be heard and determined under the repealed law in the same way as if it had not in fact been repealed."

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10 (2001) 25 WAR 1.

11 (2001) 25 WAR 1 at 8-9.

30 His Honour also referred to s 32(7) of the 1999 Act, saying that there was no inconsistency between its provisions and those of s 37 of the Interpretation Act. He added[12]:

> "The result is, where no relevant proceedings are pending as at 5 October 1999, then, irrespective of the date of the accident or the date upon which the injury or disability occurred, the [1999 Act] applies, unless one or other of the saving provisions in s 37(2) applies. In my view, in a case where one or other of the saving provisions applies, the intention of the legislation on its proper construction is that pending proceedings are subject to the statutory regime as it was prior to the amendment."

31 The decision in *Toolan* was given whilst the Full Court had the present matter under reservation. The outcome in *Toolan* appears to have turned upon the pendency on 5 October 1999 of the Full Court appeal under the relevant legislation providing for District Court appeals. Nevertheless, in the present matter, the Full Court treated *Toolan* as "sufficient authority" to govern the result[13]. Scott J (with whom Anderson J and Stein AJ agreed) said that, because the appellant had not had his application for leave determined by the District Court before 5 October 1999, he was precluded thereafter from obtaining leave. This was so "notwithstanding the provisions of s 37(1) of the [Interpretation Act], which would not have the effect of preserving [his] position even although [the application] for leave [was] lodged before that date"[14]. That reasoning should not be accepted and the appeal to this Court should be allowed.

32 In this Court, the appellant draws attention to the provisions of s 37(2) of the Interpretation Act. This states:

> "The inclusion in the repealing provisions of an enactment of any express saving with respect to the repeals effected thereby shall not be taken to prejudice the operation of this section with respect to the effect of those repeals."

The appellant submits that it follows from the application of the specific provision in s 37(2) of the Interpretation Act that the limited savings provisions in s 32(7) of the 1999 Act do not exhaustively deal with his position. He contends that there is left untouched whatever advantage he otherwise obtains by

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12 (2001) 25 WAR 1 at 9.

13 [2001] WASCA 179 at [30].

14 [2001] WASCA 179 at [30].

the operation of s 37(1) of the Interpretation Act. That submission should be accepted.

33 Section 37, like provisions enacted in other Australian jurisdictions[15], draws upon the general savings provision made in the United Kingdom by s 38(2) of the *Interpretation Act* 1889 (UK). The legislation in Victoria and Tasmania[16] requires that the contrary intention appear or be provided "expressly", and that in Queensland and the Northern Territory[17] does not qualify its operation by any reference to contrary intention. However, none of the other Australian legislation contains any analogue to the strengthening of s 37(1) of the Western Australian statute by the detailed provision of s 37(2).

34 The appellant relies in particular upon pars (b), (c) and (f) of s 37(1) of the Interpretation Act. These state:

> "Where a written law repeals an enactment, the repeal does not, unless the contrary intention appears –
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> ...
>
> (b) affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;
>
> (c) affect any right, interest, title, power or privilege created, acquired, accrued, established or exercisable or any status or capacity existing prior to the repeal;
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> ...
>
> (f) affect any investigation, legal proceeding or remedy in respect of any such right, interest, title, power, privilege, status, capacity, duty, obligation, liability, burden of proof, penalty or forfeiture,

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15 *Acts Interpretation Act* 1901 (Cth), s 8; *Acts Interpretation Act* 1915 (SA), s 16; *Acts Interpretation Act* 1931 (Tas), s 16; *Acts Interpretation Act* 1954 (Q), s 20; *Interpretation of Legislation Act* 1984 (Vic), s 14; *Interpretation Act* 1987 (NSW), s 30; *Legislation Act* 2001 (ACT), s 84; *Interpretation Act* 1978 (NT), s 12.

16 *Interpretation of Legislation Act* 1984 (Vic), s 14; *Acts Interpretation Act* 1931 (Tas), s 16.

17 *Acts Interpretation Act* 1954 (Q), s 20; *Interpretation Act* 1978 (NT), s 12.

> and any such investigation, legal proceeding or remedy may be instituted, continued, or enforced, and any such penalty or forfeiture may be imposed and enforced as if the repealing written law had not been passed or made."

35 In argument in this Court the respondent properly made an important concession. This was to the effect that, in the events that had happened (in particular, the suffering by the appellant of his injury on 2 December 1996 and the pendency of his leave application to the District Court), at the critical date of 5 October 1999, when s 32(5) of the 1999 Act came into effect and, in its terms, repealed s 93D of the Workers' Compensation Act, the situation of the appellant answered the terms of one or more of pars (b), (c) and (f) of s 37(1) of the Interpretation Act.

36 However, the respondent submitted that the appellant's reliance upon s 37(1) to preserve his pending application for leave must fail at the threshold. This was said to be by reason of the requirement in the opening words of s 37(1) that there be a "repeal" of the enactment in question, namely s 93D, which had entitled the appellant to a grant of leave upon satisfying the District Court of any of the three matters specified in s 93D(5). There was said to have been no "repeal", in the sense required by the Interpretation Act provision, by the operation of s 32(5) of the 1999 Act. This was because that provision had gone on to "substitute" other provisions in Pt IV Div 2 of the Workers' Compensation Act.

37 There is no substance in that submission. Section 37 is found in Pt V (ss 33-39) of the Interpretation Act. Section 35 states:

> "Where a written law repeals an enactment and substitutes provisions for the enactment repealed, the repealed enactment remains in operation until the substituted provisions come into operation."

There thus is evident in Pt V a distinction between a repeal and a repeal accompanied by the substitution of provisions for those repealed. In either case, there is a "repeal" to which s 37 applies.

38 Reference also may be made to s 33. This provides:

> "Where a written law which has been amended by any other written law is repealed, such repeal shall include the repeal of all those provisions of such other written law by which the first-mentioned written law was amended."

39 The respondent fixed upon the definitions in s 5 of the Interpretation Act of "amend" and "repeal". The term "amend", used, for example, in s 33, is defined as meaning:

> "replace, substitute, in whole or in part, add to or vary, and the doing of any 2 or more of such things simultaneously or by the same written law".

The term "repeal" is defined as including "rescind, revoke, cancel, or delete". Nothing in the definitions requires any contrary construction of s 37(1) of the Interpretation Act to that which would apply the sub-section to the repeal of s 93D accompanied by the substitution of other provisions.

40 Contrary to the respondent's submissions, the provisions of s 93C, which were not amended by the 1999 Act, neither require nor permit the conclusion for which the respondent contends. To provide, as s 93C does, that, if the relevant Division of the Workers' Compensation Act applies, "a court is not to award damages to a person" contrary to that Division provides no answer to the question whether regard must be had to the terms of the Workers' Compensation Act as it stood before the 1999 Act or to the terms of the statute as it stood after the 1999 Act. That question is to be answered by reference to the operation which is to be given to the relevant provisions of both the 1999 Act and the Interpretation Act.

41 The respondent also relied upon the statement in s 37(1) of the Interpretation Act that it operates "unless the contrary intention appears". Such a contrary intention was said to appear in s 32(7) of the 1999 Act. The text of that sub-section is set out earlier in these reasons. It identifies two categories of proceeding in which the awarding of damages is not affected by the substituted provisions.

42 However, the phrase "unless the contrary intention appears" in s 37(1) of the Interpretation Act must be read with the statement in s 37(2) of that statute. That operates to the effect that the inclusion of an express saving such as that in s 32(7) of the 1999 Act is not to be taken to prejudice any additional operation of the Interpretation Act upon the repeal otherwise effected by s 32 of the 1999 Act.

43 Therefore it becomes necessary for the respondent to demonstrate that the 1999 Act wrought a repeal *pro tanto* of s 37(2) of the Interpretation Act. Plainly the terms of s 32 of the 1999 Act do not state that there is any repeal of this nature. The question then becomes one of an implied repeal. That was described by Fullagar J in *Butler v Attorney-General (Vict)*[18] as "a comparatively rare

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18 (1961) 106 CLR 268 at 275.

phenomenon". His Honour added[19] that it had been said again and again that a repeal of this nature would not be held to have been effected "unless actual contrariety is clearly apparent". That statement has been applied in subsequent decisions of this Court[20].

44 No such actual contrariety clearly appears from the terms of s 32(7) of the 1999 Act. There is not, for example, a statement that the two classes of proceedings identified in s 32(7) are the only proceedings in which the former provisions may continue to apply, or a statement that the sub-section applies despite anything in any other statute.

45 The result is that the former provisions in s 93D continued to apply to the pending application by the appellant and that the District Court therefore erred in dismissing the application on the ground that it lacked the necessary power to grant leave.

46 The appeal should be allowed with costs. The orders of the Full Court of the Supreme Court of Western Australia should be set aside. In place thereof it should be ordered that the appeal to that Court should be allowed with costs, the orders of the District Court should be set aside and the application for leave should be remitted to the District Court for determination according to law. The grant of leave to appeal to the Full Court dealt with the costs of that application by treating them as costs in the appeal to the Full Court. The costs order now made with respect to the Full Court appeal will pick up the earlier order and there is no occasion to amend that order.

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19 (1961) 106 CLR 268 at 275.

20 *South Australia v Tanner* (1989) 166 CLR 161 at 171; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 375 [67]; *Shergold v Tanner* (2002) 209 CLR 126 at 136-137 [34]-[35].

47 KIRBY J. This is another dispute over statutory interpretation. It presents the type of problem about which judges of this Court[21] and other appellate courts[22] not infrequently differ. Such differences arise out of the margin for judgment inherent in the task.

48 Although, in the result, there is unanimity in this Court (thereby reversing the unanimous decision of the Full Court of the Supreme Court of Western Australia[23]), the argument in favour of the decision now reversed was not an insubstantial one. The answer to the puzzle is not found only, or even mainly, in an analysis of the statutory language. It is found by considering that language in the broader context of legal principle and policy.

49 It is increasingly accepted that, in contested matters of statutory interpretation, there will often be persuasive arguments in favour of competing conclusions[24]. In the end, a legal system endorses one interpretation as the correct or preferable construction. That is then identified as the only one applicable to the contested words. However, it is rare that words themselves, alone, yield the preferred outcome[25]. If such disputes are to depend upon considerations more substantial than the identity of the decision-makers and their place in the judicial hierarchy, it is important that a court such as this should acknowledge the problematic nature of the task and seek to identify clearly the considerations that have led it to its conclusion[26]. To say this does not mean

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21 *Continental Liqueurs Pty Ltd v G F Heublein and Bro Inc* (1960) 103 CLR 422 at 426-427 per Kitto J reversed in this respect: *G F Heublein and Bro Inc v Continental Liqueurs Pty Ltd* (1962) 109 CLR 153 at 160-162; *Esber v The Commonwealth* (1992) 174 CLR 430 at 440-441 per Mason CJ, Deane, Toohey and Gaudron JJ and at 452 per Brennan J (diss).

22 *Musgrove v Minister for Transport* [2000] WASCA 232 per Ipp J, Wallwork J; Kennedy J dissenting.

23 *Dossett v TKJ Nominees Pty Ltd* [2001] WASCA 179 per Scott J; Anderson J and Stein AJ concurring.

24 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 77 ALJR 1515 at 1524 [42] per McHugh J; 200 ALR 157 at 168.

25 cf *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1034 [95]; 197 ALR 297 at 317.

26 *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [66]; 197 ALR 297 at 310.

delving into psychological considerations and other like mysteries[27]. However, it does mean approaching the task of construction from a perspective that is broader than the examination of the words of the statute, armed with a dictionary or two[28]. The importance of context for the derivation of meaning has been emphasised by this Court both in relation to statutory construction[29] and the ascertainment of the meaning of private instruments[30]. I approach the present appeal with that instruction in mind.

50 In explaining why I have concluded that the Full Court erred in this case, I will start with a number of general propositions. After identifying what I see as the strongest arguments in favour of the conclusion that the Full Court reached, I will list those considerations that have brought me to the opposite outcome.

The relevant facts

51 The facts are stated in the other reasons and were not in doubt[31]. Mr Bradley Dossett (the appellant) was injured in December 1996. On 1 July 1998, in accordance with the law then applicable in Western Australia, he applied to the District Court of that State for leave to proceed at common law against his employer, TKJ Nominees Pty Ltd (the respondent). To that extent, the appellant had invoked the judicial branch of government for a determination of his entitlements. In the normal course of events, he was entitled to expect that his claim against the respondent, which pre-existed his invocation of the jurisdiction of the District Court, would be determined, according to law, by that court whose jurisdiction and powers he had engaged.

52 In accordance with the then procedure, the appellant's originating summons was listed for hearing before a Registrar of the District Court on 8 October 1999. That hearing was adjourned to a special appointment before a

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27 *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [66]; 197 ALR 297 at 310.

28 *Attorney-General (WA) v Marquet* [2003] HCA 67 at [186]; Mason, "Changing the Law in a Changing Society", (1993) 67 *Australian Law Journal* 568 at 569. See also Young, "Recent Cases: Statutory Construction", (1993) 67 *Australian Law Journal* 555 at 556.

29 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

30 *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 76 ALJR 436 at 441 [19], 449-450 [70]-[72]; 186 ALR 289 at 296, 307-308.

31 Reasons of McHugh J at [2]-[4]; reasons of Gummow, Hayne and Heydon JJ ("joint reasons") at [20]-[28].

Registrar. Eventually, a hearing date was fixed for 19 January 2000. On that day, the appellant's originating summons was dismissed by the District Court on the basis of the legislation now under consideration. That decision was affirmed on the appeal from which, by special leave, the further appeal now comes to this Court.

The constitutional setting

53 The task of a court in a case such as the present is to give effect to the law applicable to the foregoing facts. By the law, I mean both the statute law and the common law of Australia understood as the background against which the relevant Acts were enacted.

54 Statute law and the common law must always conform to constitutional requirements[32]. Here, the proceedings between the parties had been commenced before a court which was a part of the independent and integrated judicature of the nation[33]. The constitutional setting is therefore not irrelevant[34]. Having invoked the courts, the appellant would usually be entitled to expect that his rights would not be altered whilst his application to the courts was pending, awaiting determination[35]. Where changes are effected in ways that have an impact upon already accrued legal rights, privileges and entitlements, statutory exceptions are commonly made to exclude those that are the subject of pending proceedings[36]. Subject to the Constitution[37], supervening legislation may alter the rights of parties whose suits are awaiting judicial determination. So much was not contested. But when this occurs, it is not unusual for Australian courts to

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32 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-566.

33 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 115-118, 137-139.

34 cf *British American Tobacco Australia Ltd v Western Australia* (2003) 77 ALJR 1566; 200 ALR 403.

35 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 104-106; cf *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 390-391.

36 See the instances cited in *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 391.

37 cf *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 304-305, 314.

say (in part defensive of their own constitutional position and function) that such legislation must be clear[38].

55 A foundation for this approach is what Barwick CJ described in *Geraldton Building Co Pty Ltd v May*[39] as the "credit" that courts give to legislatures that, by their enactments, they intend to do justice to all affected parties. The presumption against the deprivation of rights without very clear language is not adopted by courts to frustrate the will of Parliament. It is based instead on a presupposition respectful of Parliament's presumed desire to act fairly and justly in respect of the accrued rights of those who are subject to its laws[40].

Statutory purpose and statutory language

56 I shall return to the last-mentioned presumption because, in the end, it is critical for my resolution of the arguments of the parties in this appeal. However, first, it is essential to make a number of additional points concerning the role of a court.

57 The starting point for the ascertainment of the respective rights and duties of the parties is the legislation itself. Where there is applicable legislation, the starting point for legal analysis is the text of the legislation[41]. Its language is examined to ascertain the purpose of Parliament in enacting it[42]. This follows from the primacy in our legal system of the written law and the binding force of such law under the Constitution. The parliamentary purpose is ultimately to be derived from the statutory language[43]. If there is discordancy between that

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38 cf *Toolan v Metropolitan (Perth) Passenger Transport Trust* (2001) 25 WAR 1 at 22 [65] per Parker J.

39 (1977) 136 CLR 379 at 387. See also *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [69]; 197 ALR 297 at 311.

40 *Potter v Minahan* (1908) 7 CLR 277 at 304; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 93; *Bropho v Western Australia* (1990) 171 CLR 1 at 18; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 28; *Coco v The Queen* (1994) 179 CLR 427 at 435-438; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 381 [89]; *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 328 [121]; *Attorney-General (WA) v Marquet* [2003] HCA 67 at [163]-[164].

41 eg *Conway v The Queen* (2002) 209 CLR 203 at 227 [65].

42 *Bropho v Western Australia* (1990) 171 CLR 1 at 20 applying *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424.

43 cf *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518.

language and any contextual materials, it is the language that prevails. This is because of the democratic legitimacy of the language based on the fact that it has been endorsed by law-makers accountable to the electors[44].

58 In the present appeal, there are three relevant Acts. The first is the *Workers' Compensation and Rehabilitation Act* 1981 (WA) ("the Workers' Compensation Act"). The second is the *Workers' Compensation and Rehabilitation Amendment Act* 1999 (WA) ("the 1999 Act"). The third is the *Interpretation Act* 1984 (WA) ("the Interpretation Act"). The solution to the problem in the appeal only emerges from an appreciation of the operation of those Acts upon the comparatively simple facts of the appellant's case. Common law rules, judicial remarks, ministerial statements and contextual considerations may prove useful, depending on the application of the three statutes. But the starting point was, and is, the analysis of what those statutes enact as law.

59 The relevant provisions of the Workers' Compensation Act, the 1999 Act, and the Interpretation Act are set out in the other reasons[45]. It is the Workers' Compensation Act that contains special conditions and burdens on the prosecution of a claim to enforce the appellant's alleged entitlements against his employer at common law. In the absence of valid legislation and subject to applicable limitation provisions and provisions governing the jurisdiction and powers of the courts[46], such entitlements could be enforced by an action at law. Nothing in the Workers' Compensation Act, either before or after the 1999 Act, abolished the appellant's common law rights. All that happened was that the enforcement of those rights was made the subject of procedural conditions. Conditions were applicable both before and after the 1999 Act.

60 At all times relevant to the appellant's action, s 93C of the Workers' Compensation Act stated:

> "If this Division applies a court is not to award damages to a person contrary to this Division."

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44 *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [68]; 197 ALR 297 at 310; *Australian Communication Exchange Ltd v Deputy Commissioner of Taxation* (2003) 77 ALJR 1806 at 1816 [59]; 201 ALR 271 at 285; *Attorney-General (WA) v Marquet* [2003] HCA 67 at [133], [145]-[148].

45 Reasons of McHugh J at [2]-[3], [6]-[7]; joint reasons at [23], [25]-[26], [32], [34].

46 Such as *Supreme Court Act* 1935 (WA) and *District Court of Western Australia Act* 1969 (WA): see *Toolan v Metropolitan (Perth) Passenger Transport Trust* (2001) 25 WAR 1 at 19 [52].

That provision appears in a Division of the Workers' Compensation Act titled: "Constraints on awards of common law damages". The provision was within the constitutional powers of the Parliament of Western Australia. It was binding on the courts in this case. Parliament intended it to be complied with.

61 The procedural condition imposed on the appellant at the time his common law cause of action accrued was that stated in s 93D of the Workers' Compensation Act, as then applicable. Proceedings in the District Court were not to be commenced "without the leave of the District Court"[47]. Provision was then made to govern the grant of such leave. Relevantly, a judicial determination was required that "the worker is likely to have future pecuniary loss resulting from the disability of an amount that is at least equal to the prescribed amount"[48]. That was the procedural gateway through which the appellant had to pass before being entitled to commence proceedings for which damages are sought in the District Court. Leave was essential to the commencement of proceedings. Before the 1999 Act took effect, the appellant commenced proceedings to secure such leave.

62 The "assent day" for the purposes of the 1999 Act was 5 October 1999. Under the new regime commencing from that day, new requirements governed the award of damages in proceedings against an employer. Transitional provisions, specially enacted by s 32(7) of the 1999 Act, specified savings.

63 Because the particularity of s 32(7) is central to the respondent's argument, I will set it out:

> "The amended provisions do not affect the awarding of damages in proceedings –
>
> (a) commenced before the assent day; or
>
> (b) for the commencement of which the District Court gave leave under the former provisions before the assent day,
>
> and the former provisions continue to apply in relation to those proceedings."

Arguments in favour of the respondent

64 *Particularity of the provision*: In effect, the respondent argued that the transitional provisions in s 32(7) of the 1999 Act represented such a *particular*

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47 Workers' Compensation Act, s 93D(4).

48 Workers' Compensation Act, s 93D(5)(c).

enactment for the saving of current proceedings in the District Court that they expelled the *general* savings provisions of the Interpretation Act[49] and any principles of the common law that might otherwise have applied to save the appellant's pending proceedings.

65 In support of the contention that the language of s 32(7) of the 1999 Act excluded the survival of the appellant's application for leave, which was pending on the assent day, the following considerations need to be noticed.

66 *Express exceptions*: First, there is the fact that Parliament has addressed with exactness "proceedings" of the kind in question at different points in the course of their resolution in the District Court. Parliament could be taken to know that, on and after the assent day, there would be proceedings, like those of the appellant, that were awaiting determination of applications for leave but were not yet resolved. Yet only two exceptions to the operation of the 1999 Act were permitted. Each involved "proceedings" that had advanced further towards decision than the appellant's had. Either such proceedings had been commenced (and thus by hypothesis had already secured the requisite leave) or, although leave had been granted, the commencement of the proceedings had not actually occurred before the assent day. Arguably, this high particularity excluded proceedings that did not qualify on either of the specified grounds. Upon this view, as the appellant's proceedings failed to meet the procedural condition superimposed by the 1999 Act, his claim for damages was subject to the new requirements for the award of damages.

67 *Ministerial statement*: Secondly, to demonstrate that this was the "intention" of Parliament in so providing, the respondent tendered an extract from the record of debates in the Legislative Assembly of Western Australia[50]. According to this, the then Minister for Labour Relations (Mrs Edwardes) made a statement to the Assembly which, she said, was designed "to remove any doubts about the transitional provisions contained in sections 32(7) and 32(8) of the [1999 Act]". The Minister explained that, because there had been no opposition to the Bill when originally introduced, "clarification on the transitional provisions was not read into *Hansard*" at that time. She stated that it was "prudent to place on the record a clarification of their meaning" in light of comments that had since

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49 Interpretation Act, ss 37(1) and (2). See reasons of McHugh J at [6]-[7]; joint reasons at [32], [34].

50 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 October 1999 at 2456.

been made. She said that the Bill closely reflected a recommendation of a general review of common law actions[51] which had preceded the legislation.

68 In response to a suggestion by lawyers "that if an application were made prior to assent, workers may seek damages under the old common law provisions", the Minister stated that "[c]learly this is not the intent of the amendment Act". She said that the wording of s 32(7) of the 1999 Act was "clear". She stated that "[t]he new common law provisions do not affect the awarding of damages only if the proceedings have commenced or leave of the District Court was granted before the assent day".

69 Although these remarks are not part of a Second Reading Speech and are not therefore available under the Interpretation Act[52] as extrinsic material to assist in interpretation of the Act, the respondent submitted that the Minister's speech was admissible as "relevant material in any official record of proceedings in either House of Parliament"[53] or under the common law. Accordingly, it should be received to indicate the Minister's understanding of the purpose of Parliament[54]. Certainly, no Member of Parliament took objection at the time the Minister made her statement or thereafter.

70 *The assent day*: Thirdly, the particularity of the "assent day" was arguably another indication of a purpose of Parliament in introducing, even at the cost of some arbitrariness, an incontestable precondition that would clarify the rights of workers and obligations of employers where the worker was claiming common law damages against an employer at the time the 1999 Act took effect. Unless the worker had commenced the proceedings before the assent day (or at least had obtained leave to do so before that date), the worker was not entitled to commence any such proceedings thereafter and the court could not award damages contrary to such requirement (s 93C). Whatever individual injustice that might cause in a particular case, it at least had the merit of clarity. It was therefore the obligation of courts to give it effect. It was no part of the function of courts to frustrate the clearly expressed wishes of a Parliament acting within

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51 Great Britain, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (Chairman: Lord Pearson), (1978), Cmnd 7054-I, vol 1 at 169.

52 Interpretation Act, s 19(2)(f).

53 Interpretation Act, s 19(2)(h).

54 As distinct from the subjective belief of the Minister, which is irrelevant: see *Attorney-General (WA) v Marquet* [2003] HCA 67 at [134].

its constitutional mandate[55]. In such a case, any suggestions of unfairness must be addressed through the democratic process to the Parliament concerned[56]. Courts must resist any temptation to correct such perceived injustices. To attempt to do so takes the judiciary beyond its legitimate function[57].

71 *Contemporary caps and restrictions*: Fourthly, in so far as suggested injustice to individuals such as the appellant was concerned, provisions of the kind introduced by the 1999 Act must arguably now be viewed against a background of many similar attempts by legislatures in Australia to abolish, restrict, and impose caps on, entitlements at common law with the object of ensuring that such entitlements are economically affordable[58]. No court, surveying the scene of common law actions in Australia, could be unaware of the fact that provisions such as those introduced by the 1999 Act represent a comparatively common legislative response, designed to restrict damages and ensure the availability of insurance cover at reasonable rates[59].

72 Once it is accepted that legislation of such a kind is now a common feature of the law, the desirability of clear provisions to govern entitlements during the transition is plain. Employers and insurers will need to calculate risks, to estimate residual claims and to close files by reference to transparent criteria of liability. Such considerations lend strength to the respondent's argument that s 32(7) of the 1999 Act was intended to cover the universe of pending common law proceedings by employees. Other proceedings that had not progressed as far as a grant of leave were, on this hypothesis, excluded from continuation. The files were closed.

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55 *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [68]; 197 ALR 297 at 310.

56 *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 406; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 427 [61].

57 *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1033 [91]; 197 ALR 297 at 316; *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 427 [61], 430-432 [70]-[77].

58 *Victims Compensation Fund Corporation v Brown* (2003) 77 ALJR 1797 at 1802 [26]; 201 ALR 260 at 266-267.

59 See Australia, *Review of the Law of Negligence: Final Report* (Chairman: Justice David Ipp), (2002); cf *Victims Compensation Fund Corporation v Brown* (2003) 77 ALJR 1797 at 1803 [29]; 201 ALR 260 at 268.

73 *A "contrary intention"*: Fifthly, no general provision of the Interpretation Act could breathe life into a claim for damages that, in effect, had been terminated by the imposition of a procedural requirement with which the appellant did not comply. Section 37 of the Interpretation Act states that general savings provisions have the specified consequences "unless the contrary intention appears"[60]. Therefore, if, as the respondent submitted, the "contrary intention" appeared sufficiently from the particularity of s 32(7) of the 1999 Act, the disqualification envisaged in the Interpretation Act was engaged. The *general* savings could have no operation to cut away the clearly stated "intention" of Parliament in enacting, as it did, the *special* provisions in the 1999 Act[61]. The object of Interpretation Acts is to ensure that the purpose of the relevant Parliament, properly ascertained, is given effect. It is not to defeat obedience to that purpose where it is clear.

74 *An analogous precedent*: Sixthly, to the suggestion that this approach was unduly rigid, insensitive to the decisions of this Court protective of pending proceedings already before courts and tribunals, the respondent pointed to *G F Heublein and Bro Inc v Continental Liqueurs Pty Ltd*[62]. There a Full Court reversed a decision of Kitto J, who had decided at first instance a somewhat analogous point[63]. In that case, express provision had been made by the *Trade Marks Act* 1955 (Cth) when it repealed the *Trade Marks Act* 1905 (Cth), in respect of applications that had been lodged under the repealed Act and were pending when the 1955 Act came into operation. Kitto J had concluded that s 8 of the *Acts Interpretation Act* 1901 (Cth) saved the pending application. This was so notwithstanding the content of the special transitional provisions contained in the 1955 Act. However, Dixon CJ, Taylor and Windeyer JJ, in the Full Court, concluded differently[64]:

> "Close consideration of the special provisions of s 5 induces us to think that the express provision which it makes with respect of applications pending under the earlier Act must be read as exhaustive and that there is, therefore, no room for the application of s 8 of the *Acts Interpretation Act*, even if it were otherwise possible to bring the case within its terms."

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60 Interpretation Act, s 37(1).

61 cf *Sin Poh Amalgamated (HK) Ltd v Attorney-General of Hong Kong* [1965] 1 WLR 62 at 67 (PC); [1965] 1 All ER 225 at 228; cf *Musgrove v Minister for Transport* [2000] WASCA 232 at [6], [8] per Kennedy J (diss).

62 (1962) 109 CLR 153.

63 *Continental Liqueurs Pty Ltd v G F Heublein and Bro Inc* (1960) 103 CLR 422.

64 (1962) 109 CLR 153 at 161-162.

75 The respondent urged upon us a similar approach to the special provisions enacted in relation to pending proceedings here where the plaintiff had not yet procured leave to proceed in the District Court. In such a case a single, simple rule applied: no leave; no continuation of the proceedings.

Arguments in favour of the appellant

76 *Express and other savings*: The foregoing arguments have force. For me, this is not an open and shut case. Nevertheless, for a number of reasons, I prefer the conclusion that the appellant's common law cause of action survives.

77 First, the starting point is an appreciation of the language of the amending Act in so far as it affects the rights of a person in the position of the appellant. By s 32(7) of the 1999 Act, Parliament has not stated that the *only* proceedings that are saved by the transitional provisions are those identified[65]. Whilst that consequence is an available construction of the purpose of sub-s (7), it is not the only one. The sub-section can be construed as identifying two categories of proceedings for which *express* savings are enacted. They are those that are most clearly saved, being, in each case, proceedings for which leave to proceed has already been granted by the District Court.

78 However, such clear cases are not the only ones that present with strong features suggesting continuance of pending proceedings. In *Toolan v Metropolitan (Perth) Passenger Transport Trust*[66], the Full Court of the Supreme Court of Western Australia considered a case in which leave had been refused by the District Court but, in the Full Court's opinion, wrongly so. This presented the issue of what should occur once the Full Court substituted its order providing leave, although doing so on a date after the assent day. The Full Court divided on how this problem should be solved. The circumstances disclosed in *Toolan* reveal the difficulty of applying justly the arbitrary approach postulated by the respondent and endorsed in the present case by another Full Court. On the respondent's argument concerning the benefits of simplicity and clarity in ascertaining entitlements to continue proceedings by reference *only* to the stage plaintiffs have reached at the assent day, the plaintiff's claim to continue his proceedings in *Toolan* should likewise have been rejected. At least that would follow unless the ingenious remedy proposed by Wheeler J, involving an

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65 cf *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 275-276; *Landsal Pty Ltd (In liq) v REI Building Society* (1993) 41 FCR 421 at 427.

66 (2001) 25 WAR 1.

antedated appellate order, was to provide the solution to that problem[67]. That would not be a solution available in the present case.

79 *Presumed survival of rights*: Secondly, a provision such as s 32(7) is not to be read in isolation. It needs to be understood both in the context of common law principle and the general savings provisions enacted in the Interpretation Act.

80 So far as common law principle is concerned, it is a strong assumption of the operation of legislation that amendments to a statute will ordinarily be construed as having a prospective operation only. At least they normally do so far as they purport to affect individual rights and privileges[68]. Generally speaking, it is presumed that legislation does not have a retrospective operation on rights without clear provision to that effect. Where the rights are merely procedural, a different presumption will sometimes be given effect. But in the instant case, the suggested interposition of an abolition of the entitlement to seek the District Court's approval to commence proceedings of a claim at common law, can hardly be described as procedural only[69]. If the respondent's argument is good, the combined operation of s 93C of the Workers' Compensation Act and the transitional provisions in s 32(7) of the 1999 Act would effectively destroy the entitlement of the appellant to enforce his rights. Such a procedural burden would be fatal. For the transitional provisions to have that effect, a clear indication of the legislative purpose would be required.

81 *Absence of express abolition*: Thirdly, such a clear indication could have been expressed by Parliament in various ways. Thus, Parliament might have expressly stated that common law rights that existed at the assent day but which had not been the subject of a grant of leave to proceed, were thereby "abolished". Or it might have stated that s 32(7) of the 1999 Act took effect "notwithstanding any provisions of any other law, written or unwritten". Or it might have said that proceedings could continue "in and only in" those cases commenced as specified by s 32(7). Such means of clarifying a purpose to terminate the appellant's rights were not enlisted. The legislation must be read accordingly.

82 *Interpretation Act, s 37(2)*: Fourthly, there is a further consideration special to the law of Western Australia. By s 37(2) of the Interpretation Act, the Parliament of that State has enacted a unique indication of its special purpose to

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67 (2001) 25 WAR 1 at 29-30 [89]-[92].

68 *Maxwell v Murphy* (1957) 96 CLR 261 at 267; *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at 194.

69 *Maxwell v Murphy* (1957) 96 CLR 261 at 277; cf *Republic of Costa Rica v Erlanger* (1876) 3 Ch D 62.

apply the general savings provisions to a repeal, notwithstanding the fact that particular legislation may also contain express savings provisions[70].

83 The respondent immediately perceived the danger presented to its arguments by the terms of s 37(2) of the Interpretation Act. It endeavoured to avoid that danger by contending that the provisions of the 1999 Act were not "repealing provisions" but were, instead, in the Western Australian context, "amendments" to which s 37(2) had no application. I agree that this argument should be rejected[71]. The new provisions of the 1999 Act replaced the earlier law, which thereafter had no operation. Accordingly, s 37(2) of the Interpretation Act applies. It affords an indication that the language of s 32(7) of the 1999 Act is not to be taken "to prejudice the operation of this section", that is, s 37(1) of the Interpretation Act. That being the case, s 37(1) must be read in conjunction with the amendment effected in 1999. As pointed out in the other reasons[72], this conclusion is reinforced by the terms of s 35 of the Interpretation Act, which make it clear the substituted enactment is to be characterised as a repeal[73].

84 The inclusion of the particular provisions in s 32(7) of the 1999 Act did not therefore give rise to the "contrary intention" referred to in s 37(1) of the Interpretation Act. In terms of s 37(1) of the Interpretation Act, the "right", "interest", "title", "power" or "privilege" of the appellant to pursue his common law claim by way of the pending application for leave in the District Court survived the repealing force of the amending Act of 1999. True, s 32(7) of the 1999 Act did not make specific reference to this saving. But neither did that sub-section expressly remove the saving effected by other legislation that gave recognition to a deep-seated common law principle.

85 *Abolition and accountability*: Fifthly, in this Court the requirement that legislation having the propounded effect of abolishing individual rights must be clear and unambiguous is a longstanding and important one[74]. It applies to a right, such as the common law right of the appellant to damages, notwithstanding

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70 The terms of s 37(2) are set out in the reasons of McHugh J at [7]. See also joint reasons at [32].

71 Reasons of McHugh J at [8]-[9]; joint reasons at [37].

72 Reasons of McHugh J at [9]; joint reasons at [37].

73 cf *Attorney-General (WA) v Marquet* [2003] HCA 67 at [127], [135]-[136].

74 *Potter v Minahan* (1908) 7 CLR 277 at 304; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 93; *Attorney-General (WA) v Marquet* [2003] HCA 67 at [163].

that such right has been made conditional upon fulfilment of procedural requirements[75]. Although the principle has a long history, it is probably fair to say that it has been applied more rigorously by the Court in recent years. An illustration is *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*[76]. There, this Court unanimously held that general provisions of the *Trade Practices Act* 1974 (Cth) did not abrogate important common law rights, privileges and immunities in the absence of clear words or necessary implications to that effect[77].

86 The greater insistence by the Court upon the application of this principle of late can probably be explained by reference to the growth of legislation in recent times. It may also be affected by enlarged appreciation of the importance of fundamental human rights that shape contemporary understandings of Australian law[78]. In many cases, but particularly in recent years, this Court has insisted upon this principle[79]. It lessens the risk of the abolition of the rights of individuals by oversight, accident or mistake[80]. To that extent, the courts act in a role "auxiliary to Parliament and defensive of basic rights"[81]. In many areas of the law, not least in amendments to and repeal of legislation, it is easy to abolish established rights without intending to do so.

87 The statement by the Minister to the Western Australian Parliament, made after the enactment of the 1999 Act (assuming that it was admissible and relevant

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75 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and the Western Lands Act* (1988) 14 NSWLR 685 at 696 per Hope JA.

76 (2002) 77 ALJR 40; 192 ALR 561.

77 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 77 ALJR 40 at 43 [11], 49 [43], 57 [88], 65-66 [132]; 192 ALR 561 at 565, 573, 584, 596.

78 cf *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42; *Attorney-General (WA) v Marquet* [2003] HCA 67 at [180].

79 eg *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523; *Coco v The Queen* (1994) 179 CLR 427 at 435-438.

80 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 77 ALJR 40 at 59-60 [104]-[105]; 192 ALR 561 at 588.

81 *Yuill v Corporate Affairs Commission (NSW)* (1990) 20 NSWLR 386 at 403-404. See also *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 415-416 [30]-[31], 430 [71]-[72].

in this appeal), scarcely represented the kind of considered adoption by Parliament of a law abolishing established rights and privileges that can be expected where law-makers set out to take away such legal entitlements. Further, as mentioned in *Daniels Corporation*[82], those who set out to abolish existing rights are obliged to face the consequences of what they have done. In the modern processes of democratic government they are required to assume political accountability for their actions[83].

Conclusion: pending claims preserved

88 The result is that the Workers' Compensation Act, read with the Interpretation Act and in the context of the longstanding principles of the common law, preserves otherwise valid proceedings commenced in the District Court before the assent day. It does so where such proceedings have been commenced for the purpose of securing the decision of that court on whether to grant or refuse leave to a party to commence an affected common law action in that court. This is not a surprising outcome. When the jurisdiction and power of the independent courts of Australia are invoked by anyone in this country, it requires a clear and valid law to deprive that person of the right to have a decision on that claim. Instead of a clear law, the most that the respondent could point to was an ambiguous, non-exhaustive provision that did not have the effect claimed.

Orders

89 The appeal should be allowed. The consequent orders proposed in the joint reasons should be made.

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82 (2002) 77 ALJR 40; 192 ALR 561.

83 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 77 ALJR 40 at 60 [106]; 192 ALR 561 at 588-589; *Plaintiff S157/2002 v Commonwealth* (2003) 77 ALJR 454 at 462 [30]; 195 ALR 24 at 34; *Attorney-General (WA) v Marquet* [2003] HCA 67 at [164], [180] each citing *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131 per Lord Hoffmann. See also *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 at 615 [44].