HIGH COURT OF AUSTRALIA

FRENCH CJ,
CRENNAN, KIEFEL, GAGELER AND KEANE JJ

ADCO CONSTRUCTIONS PTY LTD APPELLANT

AND

RONALD GOUDAPPEL & ANOR RESPONDENTS

ADCO Constructions Pty Ltd v Goudappel
[2014] HCA 18
16 May 2014
S201/2013

ORDER

1. *Appeal allowed.*

2. *Set aside paragraph 3 of the order of the Court of Appeal of the Supreme Court of New South Wales made on 29 April 2013 and, in its place, order that the question of law referred to the President of the Workers Compensation Commission of New South Wales as amended:*

> *"Do the amendments to Division 4 of Part 3 of the* Workers Compensation Act *1987 introduced by Schedule 2 of the* Workers Compensation Legislation Amendment Act *2012 apply to claims for compensation pursuant to s 66 made on and after 19 June 2012 where a worker has made a claim for compensation of any type in respect of the same injury before 19 June 2012?"*

be answered:

> *"Clause 5(4) of Pt 19H of Sched 6 to the* Workers Compensation Act *1987 (NSW) (introduced by Sched 12 [1] to the* Workers Compensation Legislation Amendment Act *2012 (NSW)) enabled the making of cl 11 of Sched 8 to the*

Workers Compensation Regulation 2010 (NSW) (introduced by Sched 1 [5] to the Workers Compensation Amendment (Transitional) Regulation 2012 (NSW)), with the effect that the amendments to Div 4 of Pt 3 of the Workers Compensation Act *introduced by Sched 2 to the* Workers Compensation Legislation Amendment Act *apply to claims for compensation pursuant to s 66 of the* Workers Compensation Act *made on and after 19 June 2012, where the worker has not made a claim specifically seeking compensation under s 66 or s 67 before 19 June 2012."*

3. Appellant to pay the first respondent's costs in this Court.

On appeal from the Supreme Court of New South Wales

Representation

D F Jackson QC with S L C Flett and W A D Edwards for the appellant (instructed by Moray & Agnew Solicitors)

J B Simpkins SC with E G Romaniuk SC and L G Morgan for the first respondent (instructed by Leitch Hasson Dent Solicitors)

J K Kirk SC with S J Free for the second respondent (instructed by WorkCover Authority of New South Wales)

CATCHWORDS

ADCO Constructions Pty Ltd v Goudappel

Workers compensation – Permanent impairment compensation – Injured worker claimed compensation – Subsequent specific claim for permanent impairment compensation under s 66 of *Workers Compensation Act* 1987 (NSW) ("WCA") – Amendments to WCA limited entitlement to permanent impairment compensation – Savings and transitional provisions of amending Act protected worker's entitlement – Employer claimed protection displaced by transitional regulation made pursuant to amending Act – Whether transitional regulation extinguished worker's entitlement – Whether transitional regulation valid.

Statutory interpretation – Retrospectivity – Henry VIII clause – Savings and transitional provisions.

Words and phrases – "accrued rights", "Henry VIII clause", "permanent impairment compensation", "retrospectivity", "savings and transitional provisions".

Interpretation Act 1987 (NSW), ss 5(2), 30(1)(c).
Workers Compensation Act 1987 (NSW), ss 66, 280, Sched 6, Pts 19H, 20.
Workers Compensation Regulation 2010 (NSW), Sched 8, Pt 1, cl 11.

FRENCH CJ, CRENNAN, KIEFEL AND KEANE JJ.

Introduction

1 In 2012, the *Workers Compensation Act* 1987 (NSW) ("the WCA") was amended by the *Workers Compensation Legislation Amendment Act* 2012 (NSW) ("the Amendment Act"). The Amendment Act limited the lump sum compensation entitlements of workers to those who had suffered injury resulting in permanent impairment exceeding ten percent. Before the Amendment Act, there was no threshold level of permanent impairment. The relevant provisions of the Amendment Act commenced on 27 June 2012. Its savings and transitional provisions protected the entitlements of workers who had claimed lump sum compensation before 19 June 2012. The first respondent, Ronald Goudappel, an employee of the appellant, ADCO Constructions Pty Ltd ("ADCO"), had received an injury at work in April 2010. He made a claim for compensation within two days, which claim, it is now accepted, covered any entitlement to permanent impairment compensation. He was later found to have a permanent impairment assessed at six percent and lodged a specific claim for compensation in respect of that impairment on 20 June 2012.

2 The statutory protection extended to Mr Goudappel's permanent impairment entitlement by the savings and transitional provisions of the Amendment Act was said by ADCO's workers compensation insurer to have been displaced by a transitional regulation made pursuant to those provisions. That regulation extended the disentitling operation of the amendments to claims for compensation made before 19 June 2012, albeit not to a claim that "specifically sought" permanent impairment compensation. The regulation was purportedly made pursuant to a power to make savings and transitional regulations having the effect of amending the WCA[1].

3 The questions in this appeal are whether the regulation would have extinguished Mr Goudappel's entitlement to lump sum compensation and, if so, whether the regulation was valid. The Court of Appeal of the Supreme Court of New South Wales held that the regulation was invalid to the extent that it sought to affect that entitlement prejudicially. For the reasons that follow, the regulation was valid and applied the amendments to extinguish Mr Goudappel's entitlement. The appeal must be allowed.

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1 The regulation-making power fell within the category of a Henry VIII clause, authorising delegated legislation which may be inconsistent with, or amend, the empowering statute.

Factual and procedural background

4 On 17 April 2010, Mr Goudappel, who was then the State Manager for ADCO, suffered injury at work when a bundle of steel purlins fell from a forklift, crushing his left foot and ankle. On 19 April 2010, he made a claim for compensation under the WCA. On 14 July 2011, he was assessed by an orthopaedic surgeon as having a six percent permanent impairment with respect to the injuries he sustained. On 20 June 2012, his solicitors made a claim for lump sum compensation, pursuant to s 66 of the WCA, for $8,250 on the basis of the assessed six percent permanent impairment.

5 ADCO's workers compensation insurer declined liability for lump sum compensation. Mr Goudappel filed an Application to Resolve a Dispute in the Workers Compensation Commission of New South Wales ("the WCC"). A Senior Arbitrator of the WCC, of her own motion, made an Application for Leave to Refer a Question of Law to the President of the WCC, pursuant to s 351(1) of the *Workplace Injury Management and Workers Compensation Act* 1998 (NSW) ("the WIM Act"). The question referred, as reformulated by the President, was:

> "Do the amendments to Division 4 of Part 3 of the *Workers Compensation Act* 1987 introduced by Schedule 2 of the *Workers Compensation Legislation Amendment Act* 2012 apply to claims for compensation pursuant to s 66 made on and after 19 June 2012 where a worker has made a claim for compensation of any type in respect of the same injury before 19 June 2012?"

6 The President, his Honour Judge Keating, granted leave to refer the question of law and answered the question in the affirmative[2]. Mr Goudappel appealed by leave to the Court of Appeal, which allowed the appeal and ordered that the question of law be answered in the negative[3]. On 11 October 2013, ADCO was granted special leave to appeal to this Court against the decision of the Court of Appeal[4]. Special leave was granted on ADCO's undertaking not to seek to disturb any orders as to costs which had been made below and to pay Mr Goudappel's costs of the appeal, including the costs of the application for

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2 *Goudappel v ADCO Constructions Pty Ltd* [2012] NSWWCCPD 60.

3 *Goudappel v ADCO Constructions Pty Ltd* (2013) 11 DDCR 534; [2013] NSWCA 94.

4 [2013] HCATrans 250 (Kiefel and Keane JJ).

special leave. The WorkCover Authority of New South Wales was joined as second respondent in support of ADCO's position.

The statutory entitlement and claim provisions

7 When Mr Goudappel suffered injury in April 2010, he became entitled, pursuant to s 9(1) of the WCA, to receive compensation from his employer in accordance with the Act[5]. Having suffered what was later assessed as a permanent impairment, he acquired an accrued right to lump sum compensation pursuant to s 66(1), which, as it stood prior to the amendments, provided:

> "A worker who receives an injury that results in permanent impairment is entitled to receive from the worker's employer compensation for that permanent impairment as provided by this section. Permanent impairment compensation is in addition to any other compensation under this Act."

If the degree of permanent impairment was not greater than ten percent, the compensation was the product of the percentage degree of permanent impairment and the sum of $1,375[6].

8 Claims for compensation under the WCA were to be made as provided in the WIM Act. The WCA was to be construed as if it formed part of that Act[7]. Claims were required to comply with the applicable WorkCover Guidelines[8], issued pursuant to s 376 of the WIM Act by the WorkCover Authority established by s 14(1) of that Act.

9 The President answered the referred question on the basis that Mr Goudappel had not claimed permanent impairment compensation until 20 June 2012[9]. The Court of Appeal, however, held that none of the provisions of the WIM Act or the WorkCover Guidelines required an injured worker to

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5 *Kraljevich v Lake View and Star Ltd* (1945) 70 CLR 647 at 650–651 per Latham CJ, 652–653 per Dixon J; [1945] HCA 29; *Bresmac Pty Ltd v Starr* (1992) 29 NSWLR 318 at 327 per Priestley JA, 334 per Sheller JA.

6 WCA, s 66(2)(a).

7 WCA, s 2A(2); WIM Act, s 60(2).

8 WIM Act, s 260(1).

9 [2012] NSWWCCPD 60 at [128].

make a separate claim for lump sum compensation[10]. That conclusion was not in issue on this appeal. The consequence for this appeal was that Mr Goudappel's original claim for compensation made on 19 April 2010 can be taken as subsuming a claim for permanent impairment compensation, even though a later claim specifically directed to such compensation was lodged on 20 June 2012. The amendments to the WCA and the transitional regulation therefore fall to be considered and applied on that basis. That does not mean, however, that the original claim could be said to be "a claim that specifically sought compensation under section 66" for the purpose of the disentitling regulation which was in issue in this appeal.

The amendments to the WCA

10 The amendments to the WCA were set out in a number of Schedules to the Amendment Act. Schedule 2, which contained the amendments relating to lump sum compensation, commenced on the date of assent to the Amendment Act, which was 27 June 2012[11]. Schedule 12, which related to savings and transitional provisions, also commenced on that date[12]. Schedule 2 omitted s 66(1) and substituted a new s 66(1), which limited the entitlement to permanent impairment compensation to workers who had received an injury resulting in a degree of permanent impairment greater than ten percent[13]. If applicable to Mr Goudappel's case, the new s 66(1) would have had the effect that he had no entitlement to lump sum compensation for permanent impairment.

11 Mr Goudappel's pre-amendment entitlement was an accrued right within the meaning of s 30(1)(c) of the *Interpretation Act* 1987 (NSW), which, by virtue of s 5(2) of that Act, applies to an Act or instrument except insofar as the contrary intention appears in the *Interpretation Act*, or in the Act or instrument concerned. Section 30(1)(c) provides that the amendment of an Act or statutory rule does not affect any right, privilege, obligation or liability acquired, accrued or incurred under the Act or statutory rule. However, a "contrary intention" was evidenced by the savings and transitional provisions of the WCA as amended and by the regulation made pursuant to those provisions.

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10 (2013) 11 DDCR 534 at 539 [16] per Basten JA, Bathurst CJ agreeing at 536 [1], Beazley P agreeing at 536 [2].

11 Amendment Act, s 2(2)(a).

12 Amendment Act, s 2(2)(h).

13 Amendment Act, Sched 2.1 [5].

12 Schedule 6 to the WCA was entitled "Savings, transitional and other provisions" and divided into Parts. The Amendment Act added a new Pt 19H to Sched 6[14]. Part 19H was entitled "Provisions consequent on enactment of Workers Compensation Legislation Amendment Act 2012". It introduced new savings and transitional provisions into the WCA including, relevantly, cll 3 and 15.

13 Clause 3 provided:

"**Application of amendments generally**

(1) Except as provided by this Part or the regulations, an amendment made by the 2012 amending Act extends to:

(a) an injury received before the commencement of the amendment, and

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

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

(2) An amendment made by the 2012 amending Act does not apply to compensation paid or payable in respect of any period before the commencement of the amendment, except as otherwise provided by this Part."

On its face, cl 3(1) applied the amendments to accrued rights, subject to such exceptions to that application as were provided by Pt 19H or the regulations. One such exception was cl 15 of Pt 19H, which protected claims for lump sum compensation made before 19 June 2012. It provided:

"**Lump sum compensation**

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

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14 Amendment Act, Sched 12 [1]. Schedule 6 was given effect by s 282 of the WCA.

In summary, cl 15 protected entitlements the subject of claims made before 19 June 2012 from the general application of cl 3 and, therefore, from the disentitling effect of the new s 66(1). The Court of Appeal found that, subject to the effect of the challenged regulation, cl 15 protected Mr Goudappel's entitlement to permanent impairment compensation. As noted earlier in these reasons, that conclusion was not in issue on this appeal. The protection provided by cl 15 was, however, liable to be affected by regulation. It is necessary now to refer to the regulation-making powers contained in the WCA as amended.

The regulation-making powers under the WCA

14 Prior to the amendment of the WCA, s 280, which was not affected by the amendments, conferred a general regulation-making power on the Governor in familiar terms[15]. That section continued as the primary source of the regulation-making power under the WCA. It was given a particular content by Pt 20 of Sched 6 to the WCA, as it stood before the Amendment Act. That Part, entitled "Savings and transitional regulations", provided in cl 1(1) that:

> "The regulations may contain provisions of a saving or transitional nature consequent on the enactment of the following Acts:
>
> this Act and the cognate Acts
>
> …"

There followed a list of statutes. The term "cognate Acts" was defined in Pt 1 of Sched 6 by reference to a number of listed Acts.

15 Clauses 1(2) to 1(4) of Pt 20 are material for present purposes. They provided:

> "(2) A provision referred to in subclause (1) may, if the regulations so provide, take effect as from the date of assent to the Act concerned or a later day.

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15 Section 280(1) of the WCA provided that "[t]he 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."

(3) To the extent to which a provision referred to in subclause (1) takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:

(a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication in the Gazette, or

(b) to impose liabilities on any person (other than the State or an authority of the State) in respect of any thing done or omitted to be done before the date of its publication in the Gazette.

(4) A provision referred to in subclause (1) shall, if the regulations so provide, have effect notwithstanding any other clause of this Schedule."

16 Part 20 of Sched 6 to the WCA was amended by the Amendment Act. The amendment extended the application of cl 1(1), with respect to regulations of a "saving or transitional nature", to "any other Act that amends this Act", and so picked up the Amendment Act itself[16]. The power to make regulations containing savings or transitional provisions consequent on the Amendment Act therefore derived from s 280 of the WCA, read with cl 1(1) of Pt 20. That power was effectively expanded by cl 5 of the new Pt 19H of Sched 6 to the WCA. It authorised the making of savings or transitional regulations which were inconsistent with the provisions of Pt 19H and which amended the WCA.

17 Clause 5 provided:

"(1) Regulations under Part 20 of this Schedule that contain provisions of a saving or transitional nature consequent on the enactment of the 2012 amending Act may, if the regulations so provide, take effect as from a date that is earlier than the date of assent to the 2012 amending Act.

(2) Clause 1(3) of Part 20 does not limit the operation of this clause.

(3) A provision referred to in subclause (1) has effect, if the regulations so provide, despite any other provision of this Part.

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16 Amendment Act, Sched 12 [2].

(4) The power in Part 20 to make regulations that contain provisions of a saving or transitional nature consequent on the enactment of the 2012 amending Act extends to authorise the making of regulations whereby the provisions of the Workers Compensation Acts are deemed to be amended in the manner specified in the regulations."

Clause 5(4) underpinned the challenged regulation, which, if valid, was said to displace the protection which cl 15 otherwise accorded to Mr Goudappel's accrued entitlement to permanent impairment compensation under the WCA, as it stood prior to the amendments.

The backdating of regulations — a contextual side issue

18 Clause 1(2) of Pt 20 allowed savings and transitional regulations to be made which would take effect from the date of assent to an Act amending the WCA or a later day. In respect of savings or transitional regulations made consequent on the enactment of the Amendment Act, cl 5(1) of Pt 19H conferred a wider backdating power, authorising the making of such regulations to take effect from a date earlier than the date of assent to the Amendment Act. Plainly, a subset of the regulations which could be made under cl 5(1) were regulations which took effect from the date of assent to the Amendment Act and were thus within the class of regulations that could be made under cl 1(2). The effect of such regulations on existing rights would have been limited by cl 1(3) of Pt 20 but for cl 5(2), which displaced that protective provision. When such a regulation took effect from a date prior to its gazettal, cl 1(3)(a) operated to prevent it from affecting prejudicially the rights of a person which existed before the gazettal date.

19 There was debate in the appeal about the operation of these provisions. However, the disentitling regulation in issue, set out in the next section of these reasons, did not purport to take effect from a date prior to the date of assent to the Amendment Act, nor prior to the date on which it was gazetted. It did purport to affect entitlements which had come into existence before it was made. The operation of the disentitling regulation in that way would not justify its characterisation as a regulation which took effect on a date before its gazettal. Nor do the provisions of cl 5 of Pt 19H require that it be such a regulation before it could affect existing rights. The backdating provisions of cl 1 of Pt 20 and cl 5 of Pt 19H can be put to one side, except to the extent that they are elements of the statutory context in which cl 5(4) is to be understood.

20 The contextual significance of cl 5(2) of Pt 19H, in displacing the protection afforded by cl 1(3) of Pt 20, is that it disclosed a statutory purpose adverse to the application of s 30(1)(c) of the *Interpretation Act* to limit the

regulation-making power with respect to savings and transitional regulations, insofar as they might affect accrued rights.

The disentitling regulation

21 The Workers Compensation Regulation 2010 (NSW) ("the WCR") was amended pursuant to the amended regulation-making power conferred by the WCA. There were two amendments to the WCR. The first, which commenced on 17 September 2012[17], inserted a new Sched 8 into the WCR[18]. It did not purport to affect the lump sum compensation entitlements protected by cl 15 of Pt 19H of Sched 6 to the WCA. However, the second amendment, which commenced on 1 October 2012[19], did affect those entitlements. It inserted[20], at the end of Pt 1 of the new Sched 8, a number of clauses, including cl 11 entitled "Lump sum compensation", which provided:

> "(1) 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 67 of the 1987 Act.
>
> (2) Clause 15 of Part 19H of Schedule 6 to the 1987 Act is to be read subject to subclause (1)."

The new cl 11 of Sched 8 to the WCR was said to have had the effect of removing the protection conferred by cl 15 of Pt 19H of Sched 6 to the WCA with respect to Mr Goudappel's lump sum compensation entitlement. Both the construction and the validity of the regulation are in issue. Before turning to those questions, it is necessary to refer briefly to the decisions of the President of the WCC and of the Court of Appeal.

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17 Workers Compensation Amendment (Miscellaneous) Regulation 2012 (NSW), cl 2.

18 Workers Compensation Amendment (Miscellaneous) Regulation, Sched 1 [3].

19 Workers Compensation Amendment (Transitional) Regulation 2012 (NSW), cl 2.

20 Workers Compensation Amendment (Transitional) Regulation, Sched 1 [5].

The President's decision

22 The President held that cl 15 of Pt 19H of Sched 6 to the WCA would protect a claim for lump sum compensation made on or after 19 June 2012, but not such a claim made before that date[21]. His Honour held that the term "a claim for compensation" in cl 15 was a reference to lump sum compensation and not a reference to compensation used in the wider sense[22]. As Mr Goudappel had made no claim for permanent impairment compensation until after 19 June 2012, he had no entitlement to such compensation[23]. The President therefore answered the question reserved for his consideration in the affirmative[24].

The decision of the Court of Appeal

23 The reasons for judgment of the Court of Appeal were delivered by Basten JA, with whom Bathurst CJ[25] and Beazley P[26] agreed. The argument in that Court had focussed upon the operation of cl 15 of Pt 19H of Sched 6 to the WCA, on which the President's decision turned. The Court held that Mr Goudappel could rely upon the claim he had lodged on 19 April 2010, and that cl 15 did not apply the new s 66 to that claim[27].

24 The Court went on to consider the new transitional regulation, cl 11 of Sched 8 to the WCR. The Court held:

- Clause 1 of Pt 20 of Sched 6 to the WCA does not authorise a regulation which interferes with rights which accrued prior to the date of its publication, whether or not it purported to take effect at an earlier date[28].

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21 [2012] NSWWCCPD 60 at [126].

22 [2012] NSWWCCPD 60 at [161].

23 [2012] NSWWCCPD 60 at [128].

24 [2012] NSWWCCPD 60 at [179].

25 (2013) 11 DDCR 534 at 536 [1].

26 (2013) 11 DDCR 534 at 536 [2].

27 (2013) 11 DDCR 534 at 539 [16].

28 (2013) 11 DDCR 534 at 541 [24].

- Clause 5 of Pt 19H of Sched 6 to the WCA did not expand the power derived from Pt 20 so as to authorise a regulation which extinguishes rights accrued prior to the date of its publication[29].

- Even if it had that effect, it would not affect the outcome in the present case unless it prejudicially affected rights accrued prior to the date on which it commenced. The transitional regulation did not seek to backdate its operation to a point prior to the date of assent to the Amendment Act. Therefore, cl 5(1) was not relevant[30].

- The entitlement to permanent impairment compensation arose at the date of injury[31].

- To the extent that cl 11 sought to prejudicially affect Mr Goudappel's accrued right to permanent impairment compensation, it was beyond power and invalid[32].

The construction of cl 11

25 There is little room for debate about the construction of the new cl 11 of Sched 8 to the WCR and its application to Mr Goudappel's entitlement. It extended the amendments made by Sched 2 to the Amendment Act to a claim for compensation made before 19 June 2012. It therefore extended to such claims the operation of the new s 66(1), with its ten percent permanent impairment threshold. Mr Goudappel's initial claim, which, it was common ground, subsumed his claim for permanent impairment compensation, was made on 19 April 2010. That claim was not "a claim that specifically sought compensation under section 66 … of the 1987 Act" within the meaning of cl 11. As a matter of construction, therefore, cl 11 applied the new s 66(1) to Mr Goudappel's claim and, if valid, extinguished his entitlement. There was no room in the text of cl 11 for a construction that avoided that result.

26 Counsel for Mr Goudappel submitted that the core question relevant to the construction of cl 11 was whether, properly construed, it operated, by

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29 (2013) 11 DDCR 534 at 542 [27]–[28].

30 (2013) 11 DDCR 534 at 542 [28].

31 (2013) 11 DDCR 534 at 543 [32].

32 (2013) 11 DDCR 534 at 543 [33].

retrospective effect, to extinguish the accrued right which Mr Goudappel had to permanent impairment compensation. The characterisation of cl 11 as "retrospective" was something of a distraction, as was the argument about the statutory power to make savings and transitional regulations taking effect prior to their dates of gazettal. The characterisation of cl 11 as "retrospective" is possible only by attributing to "retrospective" the extended meaning referred to by Fullagar J in *Maxwell v Murphy*[33]. As was observed in *Australian Education Union v General Manager of Fair Work Australia*[34]:

> "Interference with existing rights does not make a statute retrospective. Many if not most statutes affect existing rights." (footnote omitted)

27 On the other hand, it can be accepted that the protection of accrued rights provided by s 30(1)(c) of the *Interpretation Act* (read with s 5(2) of that Act) mirrors the common law as enunciated by Dixon CJ in both *Maxwell v Murphy*[35] and *Chang Jeeng v Nuffield (Australia) Pty Ltd*[36]. Referring, in that latter case, to "the rules of interpretation affecting what is so misleadingly called the retrospective operation of statutes", his Honour said:

> "The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events."

28 The submissions on behalf of Mr Goudappel going to the construction of cl 11 did not engage with its text. Instead, it was argued that it was for ADCO to search for express text that displayed an intention to adversely impact on accrued rights. The appropriate enquiry in the construction of delegated legislation is directed to the text, context and purpose of the regulation, the discernment of relevant constructional choices, if they exist, and the determination of the

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33 (1957) 96 CLR 261 at 285; [1957] HCA 7.

34 (2012) 246 CLR 117 at 133 [26] per French CJ, Crennan and Kiefel JJ; [2012] HCA 19.

35 (1957) 96 CLR 261 at 267.

36 (1959) 101 CLR 629 at 637–638 (McTiernan and Windeyer JJ agreeing at 639 and 650); [1959] HCA 40; see also *Kraljevich v Lake View and Star Ltd* (1945) 70 CLR 647 at 652 per Dixon J.

construction that, according to established rules of interpretation, best serves the statutory purpose.

29 It can be accepted, as was put by counsel for Mr Goudappel, that the WCA's remedial character[37] reflects a beneficial purpose which requires a beneficial construction, if open, in favour of the injured worker. But to accept the beneficial purpose of the WCA as a whole does not mean that every provision or amendment to a provision has a beneficial purpose or is to be construed beneficially. The purpose of the provision must be identified. The evident purpose of cl 5 was to expand the regulation-making power so as to allow regulations to be made which could affect pre-existing rights. The purpose of cl 11, made pursuant to cl 5(4), was clear enough. It applied the new s 66 to entitlements to permanent impairment compensation which had not been the subject of a claim made before 19 June 2012 that specifically sought compensation under the old s 66. Its purpose was patently not beneficial.

30 There was no constructional choice which would enable cl 11 to be interpreted so as to avoid its application to Mr Goudappel's entitlement.

Whether cl 11 was within power

31 The regulation-making power under the WCA, as expanded by cl 5(4) of Pt 19H, authorised regulations "whereby the provisions of the Workers Compensation Acts are deemed to be amended in the manner specified in the regulations." It was not disputed in this appeal that such powers, although they have frequently been criticised for good reason[38], lay within the legislative power of the Parliament of New South Wales[39]. The question for decision was whether

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37 See *Bird v The Commonwealth* (1988) 165 CLR 1 at 6 per Mason CJ, Brennan and Toohey JJ, 9 per Deane and Gaudron JJ; [1988] HCA 23, which concerned the provisions of the *Compensation (Commonwealth Government Employees) Act* 1971 (Cth).

38 Criticisms of which there are many examples — the Donoughmore Committee, *Report of the Committee on Ministers' Powers*, (1932) Cmd 4060 at 65 recommended that such clauses "be abandoned in all but the most exceptional cases, and should not be permitted by Parliament except upon special grounds stated in the Ministerial Memorandum attached to the Bill"; see generally Morris, "Henry VIII Clauses: Their Birth, A Late 20th Century Renaissance and a Possible 21st Century Metamorphosis", *The Loophole*, March 2007 at 14.

39 *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 87 ALJR 162 at 168 [18] per

(Footnote continues on next page)

the amended regulation-making power in relation to savings and transitional regulations authorised the new cl 11.

32 Counsel for Mr Goudappel submitted that cl 5(2) of Pt 19H of Sched 6 to the WCA did not authorise regulations to be made affecting "accrued rights for any period of backdating". There was, he argued, no displacement of s 30(1)(c) of the *Interpretation Act*. As already observed, however, the backdating provisions provide a context inimical to that submission. The submission is defeated by the text of cl 5(2) and its evident purpose of displacing the protection of existing rights otherwise effected by cl 1(3) of Pt 20.

33 It was submitted that cl 11 of Sched 8 to the WCR was not a regulation of a savings or transitional character within the meaning of cl 5(1). That submission should not be accepted. The new regulation affected the scope of a statutory savings or transitional provision and shared its character.

34 It was further submitted that cl 5(4) of Pt 19H required a regulation made under the extended power to specify the manner in which the provisions of the WCA were "deemed to be amended". Clause 5(4) thereby imposed, so it was said, a kind of manner and form condition upon the exercise of the extended power. Although it might have been argued that cl 5(4), being a Henry VIII clause, should be construed so as to enhance parliamentary scrutiny by the imposition of a manner and form requirement, the language of the subclause was not adapted to that kind of function. The "manner specified in the regulations" is to be read in this context as a reference to the amendment purportedly effected by the regulation. Clause 5(4) is to be read as giving effect to any such purported amendment to the WCA by regulation falling within the power defined by reference to cl 5 and s 280 of the WCA.

35 Clause 11 of Sched 8 to the WCR is valid.

Conclusion

36 For the preceding reasons, the following orders should be made:

1. Appeal allowed.

French CJ; 293 ALR 450 at 456–457; [2012] HCA 58. A regulation of that kind was upheld in *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73; [1931] HCA 34.

2. Set aside paragraph 3 of the order of the Court of Appeal of the Supreme Court of New South Wales made on 29 April 2013 and, in its place, order that the question of law referred to the President of the Workers Compensation Commission of New South Wales as amended:

> "Do the amendments to Division 4 of Part 3 of the *Workers Compensation Act* 1987 introduced by Schedule 2 of the *Workers Compensation Legislation Amendment Act* 2012 apply to claims for compensation pursuant to s 66 made on and after 19 June 2012 where a worker has made a claim for compensation of any type in respect of the same injury before 19 June 2012?"

be answered:

> "Clause 5(4) of Pt 19H of Sched 6 to the *Workers Compensation Act* 1987 (NSW) (introduced by Sched 12 [1] to the *Workers Compensation Legislation Amendment Act* 2012 (NSW)) enabled the making of cl 11 of Sched 8 to the Workers Compensation Regulation 2010 (NSW) (introduced by Sched 1 [5] to the Workers Compensation Amendment (Transitional) Regulation 2012 (NSW)), with the effect that the amendments to Div 4 of Pt 3 of the *Workers Compensation Act* introduced by Sched 2 to the *Workers Compensation Legislation Amendment Act* apply to claims for compensation pursuant to s 66 of the *Workers Compensation Act* made on and after 19 June 2012, where the worker has not made a claim specifically seeking compensation under s 66 or s 67 before 19 June 2012."

3. Appellant to pay the first respondent's costs in this Court.

GAGELER J.

Introduction

37 Section 280(1) of the *Workers Compensation Act* 1987 (NSW) ("the Act") confers power to make regulations "not inconsistent with [the] Act, for or with respect to any matter that by [the] Act is required or permitted to be prescribed". Section 40 of the *Interpretation Act* 1987 (NSW) ("the Interpretation Act") requires that written notice of all such regulations be tabled in both Houses of Parliament. Section 41 of the Interpretation Act permits the whole or any portion of any such regulation to be disallowed by resolution of either House.

38 Section 282 of the Act gives effect to Sched 6 to the Act. Clause 5 of Pt 19H of Sched 6 to the Act and cl 1 of Pt 20 of Sched 6 to the Act (together, "the empowering provisions"), to which it will be necessary in due course to turn in detail, combine to permit regulations to be made under s 280(1) of the Act "that contain provisions of a saving or transitional nature consequent on the enactment of" the *Workers Compensation Legislation Amendment Act* 2012 (NSW) ("the 2012 amending Act").

39 This appeal, from a decision of the Court of Appeal of the Supreme Court of New South Wales (Bathurst CJ, Beazley P and Basten JA)[40], concerns the validity of cl 11 of Sched 8 to the Workers Compensation Regulation 2010 (NSW) ("the Regulation"), which was inserted by the Workers Compensation Amendment (Transitional) Regulation 2012 (NSW) ("the Transitional Regulation"). The Transitional Regulation was published on the NSW legislation website on 28 September 2012 and was expressed by cl 2 to commence on 1 October 2012.

40 Clause 11 provides that an amendment to s 66 of the Act made by Sched 2 to the 2012 amending Act extends to a claim for compensation made before 19 June 2012 (although not to a claim that specifically sought compensation under s 66 or s 67 of the Act as it existed before the enactment of the 2012 amending Act). It goes on to provide that cl 15 of Pt 19H of Sched 6 to the Act is to be read "subject to" that provision.

41 The background to cl 11 is that, until 27 June 2012, s 66 of the Act conferred an entitlement on an injured worker to receive compensation for permanent impairment irrespective of the injured worker's degree of permanent impairment. Schedule 2 to the 2012 amending Act, which commenced on 27 June 2012, amended s 66 so as to limit the entitlement the section confers to a worker whose degree of permanent impairment is greater than 10%. Clause 3 of Pt 19H of Sched 6 to the Act provides that, "[e]xcept as provided by [that] Part or

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40 *Goudappel v ADCO Constructions Pty Ltd* (2013) 11 DDCR 534.

the regulations", an amendment made by the 2012 amending Act extends to an injury received before the commencement of the amendment as well as to a claim for compensation made before the commencement of the amendment. Clause 15 of Pt 19H, to which cl 11 specifically refers, creates an exception to cl 3 of that Part. Clause 15 provides that the amendment to s 66 made by Sched 2 to the 2012 amending Act extends to a claim for compensation made on or after, but not before, 19 June 2012.

42 The effect of cl 11, if valid, is therefore: to override cl 15 of Pt 19H of Sched 6 to the Act; to remove the entitlement of an injured worker who had made a claim for compensation before 19 June 2012 (but who had not specifically sought compensation under s 66 or s 67) to receive compensation for permanent impairment under s 66 of the Act in the form in which s 66 had existed before the 2012 amending Act; and to substitute an entitlement for such a worker to receive compensation for permanent impairment under s 66 of the Act in the form in which s 66 came to exist after the 2012 amending Act. In so doing, cl 11 leaves the injured worker worse off. But for cl 11, the worker would have been entitled by cl 15 of Pt 19H of Sched 6 to the Act to receive compensation for permanent impairment irrespective of the worker's degree of permanent impairment. By operation of cl 11, the worker is entitled to receive compensation for permanent impairment only if the degree of permanent impairment is greater than 10%.

43 There is no dispute that the empowering provisions permit the making of a regulation containing a provision which has the effect of altering the legal operation of a provision of the Act[41]. The determinative issues in the appeal are the extent to which the empowering provisions on their proper construction permit a provision of that nature to have retrospective operation and whether cl 11 is properly characterised as a provision "of a saving or transitional nature".

Retrospectivity

44 There are two senses in which a provision of a regulation might be said to have retrospective operation[42]. The distinction between them has significance for the operation of ss 30 and 39 of the Interpretation Act, which, like other

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41 Cf *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73; [1931] HCA 34; *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 87 ALJR 162 at 168 [18]; 293 ALR 450 at 456-457; [2012] HCA 58.

42 *The Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 at 309 [57]; [1998] HCA 20, referring to *Coleman v Shell Co of Australia* (1945) 45 SR (NSW) 27 at 30-31.

provisions of the Interpretation Act, apply to all Acts and regulations unless "the contrary intention appears"[43]. The distinction in turn has significance for the construction of the empowering provisions.

45 First, a provision of a regulation might be said to have retrospective operation if, and to the extent that, the provision is taken to have had legal operation at or from a past date. The potential for a provision of a regulation to have retrospective operation in that straightforward temporal sense is constrained by s 39(1)(b) of the Interpretation Act.

46 Section 39(1)(a) of the Interpretation Act provides that a regulation or other statutory rule "shall be published on the NSW legislation website". Section 39(1)(b) provides that the regulation or other statutory rule "commences on the day on which it is so published or, if a later day is specified in the rule for that purpose, on the later day so specified". Section 39(1)(b) as originally enacted used the words "shall take effect". The word "commences" was substituted by amendment in 2009[44] to be consistent with the expression used elsewhere in the Interpretation Act in connection with Acts generally[45]. The word "commences" and the words "shall take effect" have the same meaning: they refer to when legal operation begins[46].

47 By limiting when legal operation can begin to a date on or after the date on which a regulation is published, s 39(1)(b) of the Interpretation Act has the effect of preventing a provision of a regulation from having legal operation at or from a date before the regulation is published. That is to say, it imposes an absolute prohibition against backdating the legal effect of a provision of a regulation[47], applicable to all regulations except in so far as the contrary intention appears in an empowering statute.

48 Secondly, a provision of a regulation might be said to have retrospective operation if, and to the extent that, the regulation operates to alter rights or liabilities which have already come into existence by operation of prior law on past events. The potential for a regulation to have retrospective operation in that

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43 Section 5(2) of the Interpretation Act.

44 Schedule 2.25 [1] to the *Statute Law (Miscellaneous Provisions) Act* 2009 (NSW).

45 Part 3 of the Interpretation Act.

46 Cf *Broadcasting Co of Australia Pty Ltd v The Commonwealth* (1935) 52 CLR 52 at 60; [1935] HCA 3.

47 Pearce and Argument, *Delegated Legislation in Australia*, 4th ed (2012) at 473 [31.7].

substantive sense is affected in part by s 30 of the Interpretation Act and in part by the "general rule of the common law" stated by Dixon CJ in *Maxwell v Murphy*[48].

49 Section 30 of the Interpretation Act applies if, and to the extent that, a provision of a regulation expressly or impliedly alters an Act or statutory rule by "amendment" (changing its legal meaning[49]) or "repeal" (subtracting from the scope of its legal operation[50]). By force of s 30(1)(c), unless the contrary intention appears in the regulation containing the provision effecting the amendment or repeal, such an amendment or repeal does not "affect any right, privilege, obligation or liability acquired, accrued or incurred under the Act or statutory rule". The section is directed to the effect of a valid regulation rather than to the scope of regulation-making power.

50 The general common law rule stated by Dixon CJ in *Maxwell v Murphy* takes over where s 30 of the Interpretation Act leaves off[51]. The rule is that[52]:

> "a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events."

51 The common law rule applies to the construction of an empowering statute as much as to the construction of a regulation. Unless the contrary intention appears with reasonable certainty, the empowering statute is construed so as not to confer power to make regulations which alter existing rights or liabilities. The joint reasons in *Broadcasting Co of Australia Pty Ltd v The Commonwealth*[53] illustrate that proposition. The holding of the majority in *Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co Ltd*[54] does not contradict it. As explained in *Toowoomba Foundry Pty Ltd v The*

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48 (1957) 96 CLR 261 at 267; [1957] HCA 7.

49 *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 564 [46]; [2003] HCA 67.

50 *Mathieson v Burton* (1971) 124 CLR 1 at 12; [1971] HCA 4.

51 *Maxwell v Murphy* (1957) 96 CLR 261 at 266.

52 *Maxwell v Murphy* (1957) 96 CLR 261 at 267.

53 (1935) 52 CLR 52 at 60-61.

54 (1942) 66 CLR 161 at 176, 185, 186; [1942] HCA 23.

Commonwealth[55], that holding turned on s 48(2) of the *Acts Interpretation Act* 1901 (Cth) in the form in which it existed between 1937[56] and 1990[57]. That specific statutory rule of construction did not reflect the common law and has no equivalent in the Interpretation Act.

52 A contrary intention sufficient to displace s 30 of the Interpretation Act must ordinarily appear with the same reasonable certainty as is needed to displace the general common law rule[58]. A contrary intention need not be express and its implication, although sometimes referred to as "necessary implication"[59], has not been confined to those extreme circumstances in which alteration of an existing right or liability "cannot be avoided without doing violence to the language of the enactment"[60]. The cases, rather, demonstrate that a contrary intention will appear with the requisite degree of certainty if it appears "clearly" or "plainly" from the text and context of the provision in question that the provision is designed to operate in a manner which is inconsistent with the maintenance of an existing right or liability[61].

Empowering provisions

53 The empowering provisions are best set out at this point. Clause 1 of Pt 20 of Sched 6 to the Act provides in relevant part:

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55 (1945) 71 CLR 545 at 569, 575; [1945] HCA 15.

56 When inserted by the *Acts Interpretation Act* 1937 (Cth).

57 When repealed and re-enacted in a different form by the *Law and Justice Legislation Amendment Act* 1990 (Cth).

58 *Carr v Finance Corporation of Australia Ltd [No 2]* (1982) 150 CLR 139 at 151-152; [1982] HCA 43.

59 Cf *Rodway v The Queen* (1990) 169 CLR 515 at 518; [1990] HCA 19.

60 Cf *Mathieson v Burton* (1971) 124 CLR 1 at 22, quoting *In re Athlumney; Ex parte Wilson* [1898] 2 QB 547 at 551-552.

61 Eg *Victrawl Pty Ltd v Telstra Corporation Ltd* (1995) 183 CLR 595 at 620-621; [1995] HCA 51; *Attorney-General (Q) v Australian Industrial Relations Commission* (2002) 213 CLR 485 at 492 [6], 494 [14], 505 [52]; [2002] HCA 42; *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 134 [27]; [2012] HCA 19.

"(1) The regulations may contain provisions of a saving or transitional nature consequent on the enactment of ... any ... Act that amends this Act.

(2) A provision referred to in subclause (1) may, if the regulations so provide, take effect as from the date of assent to the Act concerned or a later day.

(3) To the extent to which a provision referred to in subclause (1) takes effect from a date that is earlier than the date of its publication ... the provision does not operate so as:

(a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication ... or

(b) to impose liabilities on any person (other than the State or an authority of the State) in respect of any thing done or omitted to be done before the date of its publication ..."

54 Clause 5 of Pt 19H of Sched 6 provides in full:

"(1) Regulations under Part 20 of this Schedule that contain provisions of a saving or transitional nature consequent on the enactment of the 2012 amending Act may, if the regulations so provide, take effect as from a date that is earlier than the date of assent to the 2012 amending Act.

(2) Clause 1(3) of Part 20 does not limit the operation of this clause.

(3) A provision referred to in subclause (1) has effect, if the regulations so provide, despite any other provision of this Part.

(4) The power in Part 20 to make regulations that contain provisions of a saving or transitional nature consequent on the enactment of the 2012 amending Act extends to authorise the making of regulations whereby the provisions of the Workers Compensation Acts are deemed to be amended in the manner specified in the regulations."

The reference in cl 5(4) to "the Workers Compensation Acts" is to the Act and to the *Workplace Injury Management and Workers Compensation Act* 1998 (NSW)[62].

55 Within the structure of the empowering provisions, it is the opening words of cl 1(1) of Pt 20 of Sched 6 which permit the making under s 280(1) of the Act of a regulation which contains a provision "of a saving or transitional nature" consequent on the enactment of the 2012 amending Act. A provision of such a nature will, by definition, either save a thing so as to remain governed by the Act as it existed before the enactment of the 2012 amending Act or transition the thing so as to be governed by the Act as amended by the 2012 amending Act. The various subclauses of cl 5 of Pt 19H are directed to spelling out the extent of the permissible legal operation of a provision of that nature.

56 Clause 5(1) of Pt 19H is addressed specifically to the temporal operation of the provision. Read against the background of s 39(1)(b) of the Interpretation Act and cl 1(2) of Pt 20, cl 5(1) operates to remove all prohibition against backdating the provision. It specifically allows the provision, if so expressed, to have legal operation at or from any date before the regulation is published.

57 Clause 5(2) of Pt 19H is adjectival to cl 5(1) in that cl 5(2) is addressed solely to the substantive operation of a backdated provision during the period of backdating. Read against the background of s 30(1)(c) of the Interpretation Act and cl 1(3) of Pt 20, cl 5(2) does no more than to ensure that the backdating permitted by cl 5(1) results in the backdated provision being taken to have so operated in accordance with its terms during the period of backdating. It ensures that the provision is taken to have had the backdated operation notwithstanding that the provision in so operating might prejudicially affect rights which a person may have had before the date of publication of the regulation and notwithstanding that the provision in so operating might impose liabilities on a person in respect of things done or omitted to be done before the date of publication.

58 Complementing cll 5(1) and 5(2), but contrasting with the narrower temporal focus of those subclauses, cll 5(3) and 5(4) of Pt 19H are addressed to the substantive operation of a provision of a savings or transitional nature consequent on the enactment of the 2012 amending Act. In referring to "[a] provision referred to" in cl 5(1), cl 5(3) of Pt 19H is in that respect to be read as referring to a provision answering the description in the opening words of cl 5(1). The application of cl 5(3), like the application of cl 5(4), is not dependent on whether or not the provision has been backdated.

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62 Section 3(1AA) of the Act and s 4(1) of the *Workplace Injury Management and Workers Compensation Act* 1998 (NSW).

59 The effect of cl 5(3) of Pt 19H, as foreshadowed in cl 3 of Pt 19H, is that any provision of a savings or transitional nature consequent on the enactment of the 2012 amending Act contained in a regulation made under s 280(1) as permitted by cl 1(1) of Pt 20 can have legal effect to override the operation of any other provision of Pt 19H, including cl 15. The broader and overlapping effect of cl 5(4) of Pt 19H is that any such provision can deem any provision of the Act to be amended in any manner "specified" in the provision: that is to say, in any manner clearly set out in the provision.

60 Clauses 5(3) and 5(4) of Pt 19H so operate to ensure that a provision contained in a regulation which cl 1(1) of Pt 20 of Sched 6 permits to be made under s 280(1) of the Act, being a provision of a savings or transitional nature consequent on the enactment of the 2012 amending Act, is within the permitted subject-matter of regulation-making power (and is not "inconsistent" with the Act within the meaning of s 280(1))[63] notwithstanding that the substantive operation of the provision in accordance with its terms is to override any other provision in Pt 19H or to alter the legal meaning of any provision of the Act.

61 The underlying legislative purpose is evidently to provide a flexible means of making adjustments to the savings and transitional provisions otherwise contained in Pt 19H which does not require those adjustments to be embodied in further amendments to the Act. The flexible means provided is the conferral on the executive of permission to make regulations containing such other provisions of a savings or transitional nature as may be considered by the executive to be appropriate, subject to disallowance of any provision of a regulation so made by resolution of either House of Parliament under s 41 of the Interpretation Act. That parliamentary oversight is facilitated by the requirement of s 40 of the Interpretation Act for written notice of the regulations to be tabled in both Houses of Parliament, and is enhanced by the requirement under s 4 of the *Legislation Review Act* 1987 (NSW) for the existence of a joint committee of members of Parliament (known as the Legislation Review Committee), the functions of which include, under s 9 of that Act, considering all regulations while they are subject to disallowance and considering whether the special attention of Parliament should be drawn to any such regulation on any ground. That parliamentary oversight, together with the scope for judicial review of the exercise of the regulation-making power, diminishes the utility of the pejorative labelling of the empowering provisions as "Henry VIII clauses"[64]. The empowering provisions reflect not a return to the executive autocracy of a Tudor monarch, but the striking of a legislated balance between flexibility and

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63 Cf *Origin Energy LPG Ltd v Bestcare Foods Ltd* [2007] NSWCA 321 at [15].

64 Pearce and Argument, *Delegated Legislation in Australia*, 4th ed (2012) at 22 [1.23].

accountability in the working out of the detail of replacing one modern complex statutory scheme with another[65].

62 In pursuing the purpose of providing a flexible means of making adjustments to the savings and transitional provisions otherwise contained in Pt 19H, each of cll 5(3) and 5(4) of Pt 19H also manifests a sufficiently clear legislative intention that a provision which meets the description to which it refers – a provision of a savings or transitional nature consequent on the enactment of the 2012 amending Act – is to operate in accordance with its terms. This is so even if the provision is inconsistent with the maintenance of a right or liability which had come into existence under the Act before the enactment of the 2012 amending Act and even if that right or liability would have continued to exist by force of another provision of Pt 19H had the regulation containing the provision not been made. The legislative purpose of permitting a regulation of a transitional nature consequent on the enactment of the 2012 amending Act, in addition to a regulation of a saving nature consequent on the enactment of the 2012 amending Act, would be stifled were a provision of a transitional nature to be limited to a provision having no effect on such an existing right or liability. The legislative purpose would also be substantially impeded were the empowering provisions to be construed asymmetrically, to permit alteration of an existing right or liability only if beneficial to a worker.

Characterisation of clause 11

63 Clause 11 of Sched 8 to the Regulation provides for a class of claims, which had been governed by the Act as it existed before the enactment of the 2012 amending Act, to be governed by the Act as amended by the 2012 amending Act. That is sufficient for cl 11 to be characterised as a provision of a transitional nature.

64 As the Transitional Regulation was expressed by cl 2 to come into operation on a date after its publication, cll 5(1) and 5(2) of Pt 19H are not engaged.

65 Clause 11 provides in clear terms that an amendment to s 66 of the Act made by Sched 2 to the 2012 amending Act extends to a claim for compensation made before 19 June 2012. It thereby expresses a contrary intention for the purposes of s 30(1)(c) of the Interpretation Act. Even if cl 11 had not gone on to provide that cl 15 of Pt 19H of Sched 6 to the Act is to be read "subject to" that provision, the substantive provision which cl 11 quite clearly sets out would have

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65 Cf Bottomley, "The Notional Legislator: The Australian Securities and Investments Commission's Role as a Law-Maker", (2011) 39 *Federal Law Review* 1 at 23-24.

been sufficient to engage cl 5(3) to override the operation of cl 15. In going on so to provide, cl 11 also engages cl 5(4) to deem cl 15 to be amended so as to be so overridden.

Conclusion

66 Contrary to the view to which the Court of Appeal was persuaded, cl 11 is within the regulation-making power conferred by s 280(1) of the Act and the empowering provisions.

67 The appeal should be allowed. I agree with the form of order proposed by French CJ, Crennan, Kiefel and Keane JJ.