IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S CI 2015 4703

BSA LTD — Plaintiff

v

VICTORIAN WORKCOVER AUTHORITY — Defendant

AND BETWEEN

SCI 2015 4777

BSA LTD — Plaintiff

v

VICTORIAN WORKCOVER AUTHORITY — Defendant

JUDGE:	Garde J
WHERE HELD:	Melbourne
DATE OF HEARING:	12 July 2016
DATE OF JUDGMENT:	29 July 2016
CASE MAY BE CITED AS:	BSA Ltd v Victorian WorkCover Authority
MEDIUM NEUTRAL CITATION:	[2016] VSC 435

APPEAL – Nature of appeal to the Supreme Court – De novo appeal or judicial review – Interpretation of grants of jurisdiction to courts – Types of appeals – Importance of the text, scheme and purpose of the statute – Availability of judicial review under *Administrative Law Act 1978* (Vic) – Nature of decision appealed from – Effect of privative clause.

WORKCOVER – Deemed employer – Deemed worker – *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ss 78-79, 81-87, sch 1 cl 9.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	N. T. Robinson QC and C.M. Harris	Aitkin Partners
For the Defendant	K. Walker QC and A. Robertson	Maddocks

HIS HONOUR:

Introduction

1 The plaintiff in each proceeding ('BSA') is a communications and technical services company. It employs contractors to perform works and provide services. The two proceedings arise out of claims made by employees of contractors on the WorkSafe Insurance policy of BSA.

2 In each case, the Victorian WorkCover Authority ('the Authority') has made a written determination that the employee is a 'deemed worker' of BSA, and that BSA is a 'deemed employer' of the employee under s 4(3) and cl 9(1) of sch 1 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ('WIRC Act'). BSA has appealed to the Supreme Court of Victoria under s 85 of the WIRC Act in relation to each determination. The parties disagree as to the nature of an appeal under s 85 of the WIRC Act.

3 On 19 April 2016, Daly AsJ ordered that the following question be tried as a separate question pursuant to r 47.04 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic):

> Is an appeal under s 85 of the *Workplace Injury, Rehabilitation and Compensation Act [2013]* (Vic) against a decision of the Victorian WorkCover Authority an appeal by way of:
>
> (a) a hearing *de novo*; or
>
> (b) a review of the decision; or
>
> (c) some other form of appeal?[1]

Agreed facts

4 The parties are agreed as to the background facts and provided a statement of agreed facts.[2] The statement includes the following:

> 1. [BSA] is an Australian communications and technical services company. It contracted to provide services in respect of the installation, servicing and upgrading of satellite television

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1 Order of the Honourable Associate Justice Daly dated 19 April 2016 in S CI 2015 04703; Order of the Honourable Associate Justice Daly dated 19 April 2016 in S CI 04777.

2 Statement of Agreed Facts filed on 12 July 2016.

communications to Foxtel (amongst other telecommunication providers) (the Telecommunications Services).

2. BSA entered into further contracts with certain other companies, by which those companies agreed to provide the Telecommunications Services and to install and maintain Foxtel services and other works. These included contracts with Cloudless Vision Pty Ltd (Cloudless Vision), a company registered for WorkSafe insurance. Tal Yoresh was the sole director and employee of Cloudless Vision.

3. On 22 December 2014, Mr Yoresh was performing work on behalf of Cloudless Vision pursuant to its contract with BSA. Mr Yoresh was injured.

4. Cloudless Vision was a registered employer and was the employer of Mr Yoresh.

5. The first claim Mr Yoresh made was a claim against the WorkSafe Insurance policy of Cloudless Vision. That claim was rejected by the agent of the VWA.

6. Mr Yoresh subsequently made a claim against the WorkSafe Insurance policy of BSA (the Yoresh Claim).

7. On 11 February 2015, Allianz Australia Workers Compensation (Vic) Ltd, an agent of the Authority, informed BSA that it had accepted the Yoresh Claim. The basis for acceptance was that Mr Yoresh was deemed to be a worker of BSA at the time he suffered a personal injury in the course of his work on 22 December 2014.

8. Following a request for and provision of reasons, BSA objected to the acceptance of the Yoresh Claim.

9. On 13 July 2015, the Authority made a written determination that Mr Yoresh was a "deemed worker" of BSA and BSA was regarded as the correct employer of Mr Yoresh (the Yoresh Determination). The Authority determined that Schedule 1, clause 9(1) of the Workplace Injury Rehabilitation and Compensation Act (the WIRC Act) applied and that Schedule 1, clause 9(2) of the WIRC Act was not applicable as Cloudless Vision was not considered to be carrying on independent trade or business in the relevant period.

10. In the second proceeding, SCI 2015 04777, the VWA made a determination made in relation to Mr Craig Trewhella, an employee of Trew Communications Pty Ltd (Trew). Trew had entered into a services agreement with BSA. Mr Trewhella was injured on 25 November 2014 while performing work for Trew under that agreement.

11. On 5 December 2014 Mr Trewhella claimed against the WorkSafe insurance policy of Trew. The VWA agent rejected that claim.

12. In March 2015 Mr Trewhella claimed against the WorkSafe insurance policy of BSA. This claim was accepted by VWA's agent on the basis that Mr Trewhella was a "deemed worker" of BSA at the time he

suffered a personal injury in the course of his work on 25 November 2014.

13. BSA objected to the acceptance of this claim and on 3 August 2015, VWA, after a review, issued a written determination that Mr Trewhella was a "deemed worker" of BSA and BSA was regarded as the correct employer of Mr Trewhella (the Trewhella Determination).

14. In the Trewhella Determination the Authority determined that Schedule 1, clause 9(1) of the WIRC Act applied and that Schedule 1, clause 9(2) of the WIRC Act was not applicable as Trew was not considered to be carrying on independent trade or business in the relevant period.

15. BSA has now filed an appeal under s 85 of the WIRC Act in relation to the Yoresh Determination and a separate appeal in relation to the Trew Determination. The parties disagree as to the nature of an appeal under s 85.[3]

Relevant statutory provisions

5 Schedule 1 of the WIRC Act contains provisions which deem specified persons to be workers or in other cases, employers. Clause 9 of sch 1 concerns the employees of contractors and provides:

> (1) This clause applies if—
>
> (a) an entity (the principal), in the course of, and for the purposes of, a trade or business carried on by the entity, enters into a contractual arrangement with another entity (the contractor) for the provision by the contractor of services (not being transport services within the meaning of clause 8) to the principal for reward in respect of a relevant period; and
>
> (b) the provision of the services by the contractor under the contractual arrangement is not ancillary to the provision of materials or equipment by the contractor to the principal under the contractual arrangement; and
>
> (c) at least 80 per cent of those services are, or are to be, pursuant to the contractual arrangement, provided by the same individual ("the individual") being—
>
> (i) the contractor; or
>
> (ii) if the contractor is a partnership, an individual member of the partnership; or
>
> (iii) if the contractor is a body corporate—a member, director, shareholder or employee of the body

[3] Ibid pp 1-3.

corporate; or

(iv) if the contractor is the trustee of a trust—a person who may benefit under that trust or is an employee of the trustee; and

(d) the gross income of the contractor that is, or is to be, derived from the provision of the services pursuant to the contractual arrangement is, or is to be, at least 80 per cent of the total gross income of the contractor earned from services of the same class provided by or on behalf of the contractor in the relevant period.

(2) This clause does not apply in respect of a contractual arrangement if the Authority determines that, in providing services to the principal, the contractor is carrying on an independent trade or business.

(3) The Authority may make guidelines as to the circumstances in which it may determine that a contractor, in providing services to a principal, is carrying on an independent trade or business.

(4) The Authority must ensure that guidelines made under subclause (3) are published and are generally available.

(5) If subclause (1) applies—

(a) the individual is deemed to be a worker in respect of the relevant period; and

(b) the principal is deemed to be the employer of the individual in respect of the relevant period; and

(c) the total amount paid or payable by the principal to the contractor under the contractual arrangement, less—

(i) the applicable prescribed percentage (if any); or

(ii) if there is no applicable prescribed percentage, the part of that total amount not attributable to the provision of labour—

is deemed to be remuneration.

(6) In this clause—

"principal" includes a group, or one or more members of a group, within the meaning of section 431;

"relevant period", in relation to services provided under a contractual arrangement referred to in subclause (1), means—

(a) the financial year in which those services are, or are to be, provided; or

(b) if those services are, or are to be, provided in 2 consecutive financial years—

(i) the 12 month period beginning on the date on which those services are first provided pursuant to the contractual arrangement; or

(ii) the 12 month period ending on the date on which those services cease, or are to cease, to be provided;

"services" includes results (whether goods or services) of work performed.

6 Clause 10 of sch 1 outlines how the amount of remuneration payable under cl 9 by the principal for a deemed worker is calculated:

(1) If—

(a) a person (the principal) enters into a contract with a body corporate (the contractor) under which the contractor agrees to provide services to the principal; and

(b) the contractor engages an individual to perform work for the purposes of the contract; and

(c) the individual engaged is deemed under clause 9 to be a worker employed by the principal—

the amount of remuneration is the total amount paid or payable by the principal to the contractor under the contract, less—

(d) the applicable prescribed percentage; or

(e) if there is no applicable prescribed percentage, the part of that total amount not attributable to the provision of labour.

(2) If subclause (1) applies, an amount paid or payable by a contractor within the meaning of subclause (1) to an individual engaged by the contractor to perform work for the principal within the meaning of subclause (1) is not remuneration.

7 Clause 11 provides for claims made by a deemed worker under cl 9 to be made against the principal:

If an individual referred to in clause 9(1)(c)(iii) or (iv)—

(a) is deemed under clause 9(5) to be a worker employed by the principal; and

(b) makes a claim for compensation under this Act in relation to an injury arising out of, or in the course, of being so employed—

the claim must be made against the principal within the meaning of clause 9.

8 Division 4 of Part 3 of the WIRC Act deals with 'Claims Management – Employer

objection'. Section 77 contains a flow chart of the employer objection process. This illustrates how an employer may appeal to the Supreme Court against a notice of decision made by the Authority under s 81.

9 Sections 78-79, 81-84 of the WIRC Act deal with internal review by the Authority following objection by a claimed employer:

> 78 **Employer may request reasons for decision on a claim**
>
> (1) If the Authority has given notice to a worker or claimant of its decision to accept, or to reject a claim for compensation—
>
> (a) in the form of weekly payments; or
>
> (b) under Division 5 of Part 5 of this Act or section 98C or 98E of the Accident Compensation Act 1985 ; or
>
> (c) in respect of the death of a worker—
>
> the employer may, in writing, request the Authority to provide a written statement of the reasons for its decision.
>
> (2) The Authority must, within 28 days after receiving a request under subsection (1), comply with the request.
>
> (3) No proceedings may be brought against the Authority in respect of any question or other matter arising under this section.
>
> 79 **Objection by employer in respect of liability**
>
> (1) If the Authority, by written notice, accepts a claim for compensation in respect of an injury or death under this Act or the Accident Compensation Act 1985 , the employer may lodge an objection with the Authority in respect of the decision to accept the claim if the employer considers that—
>
> (a) the alleged worker is not a worker within the meaning of this Act or the *Accident Compensation Act* 1985 ; or
>
> (b) the employer was not the correct employer of the worker at the time of the injury or death.
>
> (2) An objection lodged by an employer under subsection (1) must—
>
> (a) be in writing in a form approved by the Authority; and
>
> (b) state the grounds on which the objection is made and review by the Authority is sought; and
>
> (c) attach any document relevant to the objection and

review; and

(d) unless section 80 applies, be lodged within 60 days of receipt by the employer of the decision of the Authority to accept the claim for compensation in respect of which the employer is making the objection.

(3) An objection is taken to be lodged with the Authority when the objection is received by the Authority.

(4) An objection made by a claimed employer under this Division in respect of a claim does not affect existing liabilities the employer may have under this Act or the *Accident Compensation Act 1985* .

...

81 **Authority may refuse to review a decision to which a claimed employer has objected**

(1) The Authority may decline to conduct a review if—

(a) the lodged objection is in respect of a decision to accept a claim for compensation that has been reviewed by the Authority on a prior occasion and the claimed employer—

(i) has been provided with the Authority's written reasons for the decision following that review; and

(ii) has not provided the Authority with any new relevant information in, or with, the lodged objection; or

(b) the Authority considers that the lodged objection is misconceived or lacking in substance.

(2) If the Authority declines to conduct a review of a decision under subsection (1), the Authority must notify the claimed employer of the Authority's decision, in writing, within 28 days of receiving the lodged objection.

82 **Withdrawal of lodged objection**

A claimed employer may, in writing, withdraw a lodged objection at any time before the Authority has made a decision under section 84.

83 **Request for information and suspension of review**

(1) The Authority may, by written notice given to a claimed employer, request the claimed employer to provide information relevant to the review of the lodged objection within the period specified in the notice, not being less than 28 days after the notice is given.

(2) If a claimed employer fails to comply with a notice given under subsection (1), the Authority may suspend consideration of the lodged objection and review.

(3) If the Authority suspends consideration of a lodged objection and review under subsection (2), the Authority must give the claimed employer written notice of the suspension which states the following—

(a) that the suspension takes effect on service of the notice;

(b) that the review has been suspended pending the provision of the information relevant to the review that the Authority has requested;

(c) the details of the requested information;

(d) that the review will remain suspended until the earlier of—

(i) the period of suspension specified in the notice is complete; or

(ii) the claimed employer provides the Authority with the requested information.

(4) If the claimed employer does not provide the Authority with the information requested by the Authority by the completion of the stated period of suspension in the notice of suspension, the claimed employer is deemed to have withdrawn the lodged objection.

(5) If a claimed employer is deemed to have had a lodged objection withdrawn under subsection (4), the claimed employer may again lodge an objection in respect of the same decision that was the subject of the deemed withdrawn lodged objection.

(6) An objection lodged under subsection (5) will not be accepted by the Authority unless the objection—

(a) is made within 28 days of the date the lodged objection was deemed to be withdrawn under subsection (4); and

(b) is accompanied by the information specified in the notice of suspension.

(7) If—

(a) the objection of a claimed employer is deemed to be withdrawn under subsection (4); and

(b) the claimed employer fails to lodge the objection again in accordance with subsection (6)—

the decision of the Authority to accept the claim for

compensation against the claimed employer is deemed to be confirmed.

(8) Proceedings to seek review of a deemed confirmation under subsection (7) must not be brought, whether against the Authority or otherwise.

84 **Decision following review**

(1) The Authority must, after reviewing an objection lodged under section 79—

(a) confirm the decision of the Authority to accept the claim for compensation against the claimed employer; or

(b) set aside the decision of the Authority to accept the claim for compensation against the claimed employer and, subject to subsection (4), cease any payments of compensation being made arising from the Authority's original decision to accept the claim.

(2) A decision made under subsection (1) must—

(a) be in writing and set out the Authority's reasons for the decision; and

(b) be provided to the claimed employer—

(i) within 90 days of the Authority receiving the lodged objection; or

(ii) more than 90 days after the Authority receives the objection if the Authority gives the claimed employer written notice within the period specified in subparagraph (i) specifying—

(A) that the Authority is extending the period to provide the Authority's decision to a day specified in the notice; and

(B) the reasons for the extension.

(3) If the Authority fails to provide the claimed employer with its decision under subsection (1) within the period set out in subsection (2)(b), the Authority is deemed to have confirmed the decision to accept the claim for compensation against the claimed employer.

(4) If the worker has been receiving payments of compensation under a claim before the Authority sets aside the decision to accept the claim under subsection (1)(b), the Authority must give the worker 28 days written notice before ceasing to make payments.

(5) If the Authority sets aside the decision to accept the claim under subsection (1)(b) and the worker subsequently makes a claim against an employer that is not the claimed employer in respect of the injury that was the subject of the set aside claim—

(a) the first entitlement period and the second entitlement period within the meaning of section 152; and

(b) the enhancement period within the meaning of section 157—

must be calculated from the date of the first claim the worker made in respect of the injury the subject of the claim which was set aside.

10 Sections 85-88 of the WIRC Act deal with appeals to the Supreme Court following internal review by the Authority:

85 **Appeals**

(1) Despite anything to the contrary in section 264(1), if a claimed employer—

(a) has received notice that the Authority has declined to consider the objection and conduct a review under section 81; or

(b) is not satisfied with the decision made by the Authority under section 84 (including a deemed decision under that section)—

the claimed employer may appeal against that decision to the Supreme Court.

(2) An appeal under subsection (1), other than an appeal in respect of a deemed decision, must be made within 60 days of the claimed employer receiving notice of the Authority's decision.

(3) An appeal made in respect of a deemed decision under section 84(3) must be made within 60 days of the decision being deemed.

86 **Grounds of appeal**

On an appeal—

(a) the claimed employer's case is limited to the grounds of the objection under section 79; and

(b) the Authority's case is limited to the grounds on which the Authority made a decision under section 84—

unless the Supreme Court otherwise orders.

87 **Hearing of appeal by Supreme Court**

(1) On the hearing of an appeal by the Supreme Court, the Court may—

(a) make any order the Court thinks fit; and

(b) by order confirm, reduce or vary the decision of the Authority under section 84.

(2) If the Supreme Court determines—

(a) the alleged worker is not a worker within the meaning of this Act or the Accident Compensation Act 1985 ; or

(b) the claimed employer was not the correct employer of the worker at the time of the relevant injury or death—

payments of compensation being made to the alleged worker must cease on the earlier of—

(c) 28 days after the date of the Court's determination; or

(d) a date, after the date of the Court's determination, determined by the Authority.

88 **Costs of worker**

If the worker is joined as a party to proceedings commenced by the claimed employer under section 85, unless the Supreme Court otherwise determines, the Authority is liable for any reasonable legal costs incurred by the worker consequent on the worker being joined to those proceedings.

Recent decisions concerning the nature of appeals

11 In *United Petroleum Pty Ltd v Victorian WorkCover Authority*,[4] Osborn J was called on to determine the nature of an employer's right of appeal against a WorkCover Industry Classification under the previous Act.[5] Osborn J held that the appeal was an appeal de novo.[6] In so doing, his Honour outlined many of the relevant principles to be applied when the Court is required to determine the character of its own appeal jurisdiction.[7]

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4 ('*United Petroleum*') [2011] VSC 570.
5 The *Accident Compensation (WorkCover Insurance) Act 1993* (Vic) s 36J ('the previous Act').
6 *United Petroleum* [2011] VSC 570 [112].
7 Ibid [7]-[16].

12 In *Mould v Commissioner of State Revenue*,[8] Ginnane J considered a land tax assessment concerning the eligibility of an estate for a primary production exemption. His Honour held that the nature of an appeal will often be determined by a consideration of the character of the decision or judgment against which the appeal is brought.[9] The question was whether the taxpayer had established the matters entitling him to claim the exemption; there was no state of mind or discretion involved in the Commissioner's determination.[10] Whether land tax was payable depended on the application of statutory criteria which did not involve any individual satisfaction or exercise of discretion on the part of the Commissioner.[11] Accordingly, the appeal was held to be an appeal de novo.[12]

13 By contrast, in *Conte Mechanical and Electrical Services Pty Ltd v Commissioner of State Revenue*,[13] Pagone J held that an appeal to the Supreme Court against the determination of objections by the Commissioner of State Revenue under payroll taxation legislation[14] was confined to legal error.[15]

14 These decisions highlight the principles to be considered when the nature of an appeal to the Court is left unspecified in the statute conferring jurisdiction. The text, statutory scheme and purpose of the statute conferring the jurisdiction are of paramount importance.

Authority's submissions

15 The main submissions made by the Authority are in summary:

(1) The statutory text favours the conclusion that the right of appeal granted by s 85 is by way of judicial review. It is not expressed to be an appeal de novo. Section 85 can be contrasted with s 485 where the appeal to the Supreme

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8 [2014] VSC 268.
9 Ibid [35].
10 Ibid [47].
11 Ibid.
12 Ibid [41].
13 ('*Conte*') [2011] VSC 104.
14 The *Taxation Administration Act 1997* (Vic) s 106.
15 *Conte* [2011] VSC 104 [2]-[4].

Court is specified as a de novo appeal.[16]

(2) Section 86 confines the claimed employer's appeal to the grounds of objection under s 79, and confines the Authority's case to the grounds on which it made a decision under s 84. This suggests that the appeal is not a de novo appeal.[17]

(3) The scheme and purpose of the WIRC Act involve a dichotomy between decisions of the Authority that turn on jurisdictional facts and decisions that turn on the Authority's determination. The dichotomy would be rendered otiose if decisions of the Authority are subject to a de novo hearing in which the Supreme Court substitutes its determination for that of the Authority.[18]

(4) The decision of Osborn J in *United Petroleum*[19] should be distinguished as it is based on different legislative provisions and different extrinsic materials.[20]

(5) Clause 9(2) of sch 1 requires the Authority to make a determination as to whether, in providing services to the principal, the contractor is carrying on 'an independent trade or business'. This is effectively a decision which requires the Commissioner to be 'satisfied' as to whether the contractor is carrying on an independent trade or business.[21]

(6) Even if there is a presumption that appeals from an administrative decision to the Court are appeals by way of de novo hearing, in this case the terms of the statute indicate otherwise.[22]

(7) The absence of an express power to receive fresh evidence in an appeal under s 85 indicates that the appeal is by way of judicial review.[23]

(8) A claimed employer has the benefit of an internal review process within the

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16 Defendant's outline of submissions on the separate question dated 25 May 2016 (Defendant's outline of submissions') [36]-[37].
17 Ibid [42].
18 Ibid [36].
19 [2011] VSC 570.
20 Defendant's outline of submissions [35].
21 Ibid [45]-[46].
22 Ibid [36].
23 Ibid [40].

Authority. Such an application is made to a new decision-maker within the Authority, and the employer is afforded procedural fairness.[24]

(9) If claimed employers have a right of hearing de novo, the Authority would be affected in its commercial position. It would be required to pay the costs of joined workers, and workers might have to participate in the legal proceedings by giving evidence and appearing as a witnesses.[25]

16 These submissions were all opposed by BSA which contended that the appeal was an appeal de novo.

The interpretation of legislative provisions conferring jurisdiction

17 The provisions that are to be interpreted confer jurisdiction on a court. The important starting point in construing provisions that confer jurisdiction on a court is stated by Gaudron J in *Knight v FP Special Assets Ltd*,[26] and was applied by the High Court in *Mansfield v Director of Public Prosecutions for Western Australia*:[27]

> It is contrary to long-established principle and wholly inappropriate that the grant of power to a Court including a conferral of jurisdiction should be construed as subject to a limitation not appearing in the words of that grant [cases cited]. Save for a qualification which I shall later mention, the grant of power should be construed in accordance with ordinary principles and, thus, the words used should be given their full meaning unless there is something to indicate to the contrary. Powers conferred on a court are powers which must be exercised judicially and in accordance with legal principle. This consideration leads to the qualification to which I earlier referred. The necessity for the power to be exercised judicially tends in favour of the most liberal construction, for it denies the validity of considerations which might limit a grant of power to some different body, including, for example, that the power might be exercised arbitrarily or capriciously or to work oppression or abuse.[28]

18 This is consistent with the principle stated by the High Court in the earlier decision of *David Grant & Co Pty Ltd v Westpac Banking Corporation*:[29]

> As a general precept, it is in appropriate to read provisions which confer

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24 Ibid [54].
25 Ibid [59].
26 (1992) 174 CLR 178.
27 (2006) 226 CLR 486.
28 Ibid [10], quoting *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, 205.
29 (1995) 184 CLR 265.

> jurisdiction or grant powers to a court by the making of implications or imposition of limitations not found in the express words of the legislative provision.[30]

19 A similar statement of principle is found in the decision of the High Court in *Oshlack v Richmond River Council*:[31]

> The provisions of s 69 of the Court Act which confer upon the Court the discretion exercised by the primary judge attract the application of the general proposition that it is inappropriate to read a provision conferring jurisdiction or granting powers to a court by making conditions or imposing limitations which are not found in the words used. The necessity for the exercise of the jurisdiction or power by a court favours a liberal construction. Considerations which might limit the construction of such a grant to some different body do not apply.[32]

20 These principles have been followed and applied in numerous decisions concerning the grant of jurisdiction to courts.[33]

Kinds of appeal

21 In *Walsh v Law Society (NSW)*,[34] the plurality of the High Court observed:

> An appeal is a creation of statute. There are various forms of appeal. Accordingly, it is always important, where a process called "appeal" is invoked, to identify the character of the appeal and the duties and powers of the court or tribunal conducting it.[35]

22 The six forms of appeal are listed in *Turnbull v NSW Medical Board*:[36]

(1) appeals to supervisory jurisdiction;

(2) appeals on questions of law only;

(3) appeals after a trial before judge and jury;

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30 Ibid 275-276.

31 (1998) 193 CLR 72.

32 Ibid [21] (citations omitted).

33 See for example: *Aussie Vic Plant Hire Pty Ltd v Esanda Corporation Limited* (2007) 212 FLR 56 [33]-[34]; *Speirs v Industrial Relations Commissioner of NSW* [2011] NSWCA 206 [89]; *Klerck v Sierocki* [2014] QCA 355 [12]-[13]; *Gallo v Department of Environment and Resources Management (No 2)* [2014] QLAC 11 [131]-[132]; *Michelotti v Roads Corporation* [2009] VSC 195 [24]; *Collection Point Pty Ltd v Cornwalls Lawyer Pty Ltd* [2012] VSC 492 [93].

34 (1999) 198 CLR 73.

35 Ibid [50] (citations omitted).

36 [1976] 2 NSWLR 281.

(4) appeals from a judge in the strict sense;

(5) appeals from a judge by way of rehearing; and

(6) appeals involving a hearing de novo.[37]

23 In *Fox v Percy*,[38] the plurality of the High Court referred to the types of appeal defined by Mason J in *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd*:[39]

> (i) an appeal stricto sensu, where the issue below was right on the material before the trial court;
>
> (ii) an appeal by rehearing on the evidence before the trial court;
>
> (iii) an appeal by way of rehearing on that evidence supplemented by such further evidence as the appellate court admits under a statutory power to do so; and
>
> (iv) an appeal by way of a hearing de novo.[40]

24 In *Dwyer v Calco Timbers Pty Ltd*,[41] a proceeding also arising from accident compensation legislation, the High Court said that these categories are not a closed class.[42] Particular legislative measures may use the term 'appeal' to identify a wholly novel procedure or one which is a variant of one or more of those described.[43] The Court added that 'it is the proper construction of the terms of any particular statutory grant of a right of appeal which determines its nature'.[44]

Decision and reasons

25 I am of the view that the right of appeal granted by s 85 of the WIRC Act is an appeal de novo. There are strong indications that this is the legislature's intention in the relevant provisions of the WIRC Act. In addition, this interpretation is more likely to result in fair and just decision-making and outcomes. My reasons for this view are:

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37 Ibid 297-298.
38 (2003) 214 CLR 118.
39 (1976) 135 CLR 616.
40 *Fox v Percy* (2003) 214 CLR 118 [20], referencing *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616, 619-622.
41 (2008) 234 CLR 124.
42 Ibid [2].
43 Ibid.
44 Ibid. See also *Aussie Vic Plant Hire Pty Ltd v Esanda Corporation Ltd* (2007) 212 FLR 56 [30].

(1) Although not absolute, there is a presumption that appeals from an administrative decision-maker are appeals by way of hearing do novo.[45] While the nature of an appeal right conferred is a matter of statutory construction, the presumption and the characteristics of the body appealed from are nevertheless relevant considerations.[46]

(2) Again while not absolute, the privative clause in s 78(3) of the WIRC Act also points to the existence of a merits appeal by excluding proceedings in respect of questions under s 78 that would otherwise be available.[47]

(3) The right of appeal given by s 85 is not constrained by any express limitation as to its character or nature, and is not expressed to be an appeal on a question of law.

(4) If ss 85-87 of the WIRC Act did not exist, a claimed employer would be entitled to judicial review of the Authority's decisions under ordinary principles of administrative law and under s 7 of the *Administrative Law Act 1978* (Vic). Available relief would extend to all types of prerogative relief, injunctive relief to restrain the implementation of a decision, or a declaration of invalidity. This was not disputed by the Authority. It is hard to see any real purpose or utility underlying ss 85-87 if these provisions are confined to the already available right of judicial review.

(5) Liability under cl 9 of sch 1 of the WIRC Act is dependent on proof of the factual matters set out in cl 9(1). Clause 9(2) then provides that cl 9 does not apply in respect of a contractual arrangement 'if the Authority determines that, in providing services to the principal, the contractor is carrying on an independent trade or business'. Contrary to the submission of the Authority, cl 9(2) is not akin to a provision which involves individual satisfaction by the

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45 *United Petroleum* [2011] VSC 570 [49]-[53] referring to *Re Coldham; Ex parte Brideson [No 2]* (1990) 170 CLR 267, 273; *Ex parte Australian Sporting Club Ltd; Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616, 621; *Clarke & Walker Pty Ltd v Secretary Department of Industrial Relations* (1985) 3 NSWLR 685, 692.

46 Ibid.

47 See *United Petroleum* [2011] VSC 570 [98]-[99].

Authority that a contractor is carrying on an independent trade or business. This is because a determination as to whether, in providing services to a principal, the contractor is carrying on an independent trade or business is dependent on objectively determined matters of fact having regard to the guidelines made under cl 9(3).[48] These matters of fact are eminently capable of determination by a Court. The determination of such matters does not involve a discretionary judgment nor is it akin to a statutory requirement that a particular matter be to the satisfaction of the Authority.

(6) The text in subcls 9(3) and (4) supports the contention that the question posed by subcl 9(2) involves a determination of objective matters of fact. Subclause 9(3) empowers the Authority to make guidelines as to the circumstances in which a determination may be made. Subclause 9(4) requires that the guidelines be published and generally available. Guidelines are non-binding in their character but nonetheless assist in the objective determination of whether the contractor is carrying on an independent trade or business. Use of guidelines by the Court is not inconsistent with an appeal de novo. The adoption of policies to assist administrative decision making has long been encouraged.[49]

(7) BSA strongly relies on considerations of fairness and justice. The Authority says that it determines whether BSA is a deemed employer, and whether the claimed employees were deemed workers. Were the appeal confined to jurisdictional review, BSA would have no opportunity of independent merits review of the decision. Moreover, while the Authority is obliged to observe procedural fairness during the internal review process contemplated by s 84, there would be no merits review at all by a court or a tribunal.

(8) The risk of injustice or unfairness to the claimed employer is exacerbated by

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48 See WorkSafe Victoria, *Contractor Guideline: General contractor provisions and rules for incorporated contractors* (undated) WorkSafe Victoria, <https://www.worksafe.vic.gov.au/__data/assets/pdf.../Contractor-Guideline-2015.pdf> p 2.

49 See for example *Re Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 640.

the fact that the facts and circumstances relating to the issues described in cls 9(1) and (2) may well be outside the knowledge or control of the claimed employer. Indeed, a claimed employer may not, and in all probability would not, know the factual circumstances relating to the contractor's business, the customers of the contractor, the monetary value or volume of the services provided to different customers, or have information relating to the gross income of the contractor. In many circumstances, the claimed employer would not be able to put a case to the Authority concerning a contractor's separate business, or the circumstances of an employee of the contractor. It may be essential for the claimed employer to have available the compulsory processes of the Court including discovery, the power of subpoena, and the ability to call witnesses as to issues of disputed fact if the interests of justice are to be served. The Court has power to receive fresh evidence on a de novo appeal and does not require express statutory authorisation to this effect.

(9) Given the character of cl 9 where persons who are not in fact employers of workers are deemed to be employers, and workers who are not in fact employees are deemed to be employees, its operation is quintessentially appropriate for merits review by a court. It is hard to imagine that Parliament intended the factual difficulties and legal complexities of cl 9 to be left solely for administrative decision-making subject only to judicial review.

(10) There are textual indications in ss 86 and 87 that support the view that the appeal contemplated by those provisions is a de novo appeal on the merits. While s 86 confines the claimed employer's case to the grounds of objection under s 79, and the Authority's case to the grounds on which the Authority made a decision under s 84, it confers on the Supreme Court the power to 'otherwise order'. Such a power is likely to be exercised by the Court to ensure that justice is rendered in the individual situation and is more consistent with a de novo appeal than an appeal by way of judicial review.

(11) Similarly, the orders that the Court can make under subs 87(1)(a) and (b) are

wide and include 'any order that the Court thinks fit' and the power by order to confirm, reduce or vary the decision of the Authority under s 84. These powers are entirely appropriate for a de novo appeal.[50]

(12) Section 88 provides that if a worker is joined to proceedings commenced by the claimed employer under s 85, unless the Supreme Court otherwise determines, the Authority is liable for any reasonable legal costs incurred by the worker consequent upon the worker being joined to those proceedings. This provision is an indication that more is contemplated in an appeal to the Supreme Court than judicial review of the Authority's determination. Clearly, there would be little reason to join the worker as a party to proceedings between the claimed employer and the Authority if the proceedings were by way of judicial review. There would be no utility in the joinder. A worker might elect to submit to the jurisdiction and await the result. The position is entirely different in a de novo appeal. The worker would be a competent and compellable witness whose evidence could be significant and probative.

(13) The existence of an express reference to a de novo appeal in s 485, and the absence of such a reference in s 85, is not submitted by the Authority to be decisive, and is not decisive. The task remains in the absence of any express legislative direction in s 85, to determine the nature of the appeal to the Supreme Court conferred by that provision.

(14) Although it is not for this court to form any view as to the nature of the right of appeal from decisions made under the clauses in sch 1 other than cl 9, nothing in the balance of sch 1 was adverted to by the Authority that would point against a de novo appeal to the court.

(15) The requirement that the employer continue to pay the premium assessed means that the Authority is not by reason of potential delay prejudiced in its

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50 See: *Coal & Allied Operation Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 [15]; *United Petroleum* [2011] VSC 570 [76]-[77].

commercial position.[51]

(16) The references in extrinsic material such as the Explanatory Memorandum to the Workplace Injury Rehabilitation and Compensation Bill 2011 ('the Bill') are indecisive and give little assistance. This includes the reference in cl 78 of the Explanatory Memorandum to the provision by the Bill of 'other avenues for review of decisions of the Authority to accept or reject claims under this Division'. This statement is consistent with either a de novo merits review or judicial review.

Conclusion

26 For the reasons that I have given, I am of the view that s 85 of the WIRC Act provides for a de novo merits appeal to the Supreme Court.

27 The separate question raised for determination by me in each proceeding will be answered:

> The appeal under s 85 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) against a decision of the Victorian WorkCover Authority is an appeal by way of a hearing de novo.

CERTIFICATE

I certify that this and the 20 preceding pages are a true copy of the reasons for Judgment of Garde J of the Supreme Court of Victoria delivered on 29 July 2016.

DATED this twenty ninth day of July 2016.

Sara Kingston

SUPREME COURT OF VICTORIA Associate of a Judge of the Court

Associate

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51 See *United Petroleum* [2011] VSC 570 [104]-[106].