SUPREME COURT OF QUEENSLAND

CITATION:	*Brew v Followmont Transport P/L* [2005] QCA 245
PARTIES:	**BENJAMIN ANDREW BREW** (plaintiff/appellant/respondent) **v** **FOLLOWMONT TRANSPORT PTY LTD** ACN 010 518 279 (defendant/respondent/applicant)
FILE NO/S:	Appeal No 11329 of 2004 SC No 459 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal Application for Extension of Time
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	15 July 2005
DELIVERED AT:	Brisbane
HEARING DATE:	11 May 2005
JUDGES:	Williams and Jerrard JJA and Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal dismissed** **2. Application for extension of time to cross appeal dismissed** **3. Order the appellant to pay the respondent's costs of the appeal to be assessed on the standard basis**
CATCHWORDS:	ESTOPPEL – ESTOPPEL IN PAIS – THE REPRESENTATION – BY CONDUCT – where it was judicially determined that the appellant's claim was one to which the provisions of the *Motor Accident Insurance Act* 1994 (Qld) ("MAIA") applied – where at beginning of proceedings, the appellant's solicitors formed the erroneous view that the damages claim was subject to the operation of *WorkCover Queensland Act* 1996 (Qld) and consequently failed to give notice to the licensed insurer pursuant to s 37 *MAIA* before expiration of limitation period – where appellant and WorkCover corresponded over a period of months – whether there was conduct by WorkCover before the expiration of the limitation period which caused the appellant to maintain the erroneous assumption that the *Workcover Queensland Act* 1996 (Qld) applied and thereby

act to his detriment

Limitation of Actions Act 1974 (Qld), s 11
Motor Accident Insurance Act 1994 (Qld), s 5, s 37, s 39(5)(c)
WorkCover Queensland Act 1996 (Qld) s 280, s 282, s 285, s 291, s 293, s 294, s 302, s 303, s 308

Commonwealth of Australia v Verwayen (1990) 170 CLR 394, considered
Jamieson v Council of the City of Gold Coast, [2000] QDC 468; DC No 148 of 2000, 1 March 2000, not followed
Wilson v Austral Motors (Qld) Pty Ltd [1983] 2 Qd R 774, cited

COUNSEL: A J Moon for the appellant
R J Douglas SC with K F Holyoak for the respondent

SOLICITORS: Connolly Suthers for the appellant/ respondent
Blake Dawson Waldron for the respondent/applicant

[1] **WILLIAMS JA:** On 18 November 1999 the appellant, Benjamin Andrew Brew, sustained serious personal injuries when he fell asleep at about 4.30 am whilst driving a Daihatsu motor vehicle, registration number 313 ELO, and it collided with a tree. At the time, the appellant was driving that motor vehicle in the course of his employment with the respondent, Followmont Transport Pty Ltd, and the company was the registered owner of the vehicle. Within a few months of the date of the accident the appellant consulted Connolly Suthers, lawyers, with a view to taking steps to recover damages for the personal injuries he had sustained. The instructions given by the appellant asserted negligence by the respondent in that it required him to work excessively long hours without rest breaks and failed to devise a system whereby he was provided with adequate and suitable rest breaks to ensure that he did not become excessively tired or fall asleep while working. The solicitor who handled the matter on behalf of the appellant was experienced in personal injuries matters. He gave consideration to, and discussed with colleagues, whether the claim should be brought pursuant to the provisions of the *WorkCover Queensland Act* 1996 (Qld) ("the Act") or the provisions of the *Motor Accident Insurance Act* 1994 (Qld) ("the MAI Act"). It was decided that the claim should be brought in accordance with the requirements of the Act and in consequence various pre-litigation steps in purported compliance with provisions of the Act were taken in 2002; it will be necessary to detail those steps subsequently.

[2] By letter dated 25 November 2002 the solicitors for WorkCover denied liability under the Act on the basis that the MAI Act applied. The appellant reacted by filing an Originating Application on 29 November 2002 seeking, in broad terms, a declaration that the claim for damages was brought properly pursuant to the provisions of the Act and that the MAI Act did not apply. That application was heard by Cullinane J and on 10 December 2002 he dismissed the application. Essentially he held that the MAI Act and not the Act applied to the appellant's claim. An appeal was lodged and it was heard in this Court on 12 September 2003; for reasons published on 14 November 2003 the appeal was dismissed with costs (*Brew v Workcover Qld* [2003] QCA 504). That decision confirmed that the injury

fell within the wording of s 5(1)(b) of the MAI Act and that the Act had no application to the appellant's claim.

[3] Between the lodging of the Notice of Appeal and its determination the appellant commenced proceedings against the respondent by claim and statement of claim filed 18 June 2003. The statement of claim pleaded the appellant's employment with the respondent, the respondent's ownership of the motor vehicle, the accident referred to above, and particulars of negligence including the matters referred to above.

[4] The defence of the respondent was filed on 17 July 2003. Relevantly it alleged that the proceeding was "incompetent and void for want of compliance" with Division 3 of Part 4 of the MAI Act. Alternatively it alleged that the proceeding was "incompetent and void for want of compliance" with s 302 of the Act. Further, it alleged the proceeding was statute barred by virtue of s 11 of the *Limitation of Actions Act* 1974 (Qld). On the same day the respondent filed an application seeking summary dismissal of the appellant's proceeding on those grounds. The respondent did not proceed with that application pending the determination of the appeal.

[5] After the judgment of the Court of Appeal was handed down the appellant sought by application filed 11 December 2003 a declaration that as a consequence of the conduct of WorkCover the respondent was estopped from denying liability for the appellant's claim for damages for personal injuries pursuant to the provisions of the Act on the basis that the claim was governed by the MAI Act and was not a proper claim for damages within the meaning of the Act. Alternatively the application sought a declaration that as a consequence of WorkCover failing to provide its response pursuant to s 285 of the Act within six months after receiving a complying Notice of Claim for Damages under s 280 of the Act the respondent was estopped from denying liability on the appellant's claim on the basis that the claim was governed by the MAI Act and was not a proper claim for damages within the meaning of the Act.

[6] Before the pending applications brought by each of the appellant and the respondent were heard, further pleadings were delivered in the proceeding. In a reply filed 25 February 2004 the appellant alleged that the respondent was estopped from asserting that the provisions of the MAI Act applied to the proceeding and further asserted that the respondent was estopped from alleging that the appellant had failed to comply with pre-litigation requirements of the Act. The reply particularised conduct which will be hereinafter set out. The reply also attempted to deal with the limitation defence pleaded by the respondent. The appellant relied on a letter of 17 March 2003 seeking to arrange a compulsory conference pursuant to s 293 of the Act which was rejected by WorkCover in a letter of 10 April 2003, and a letter of 22 April 2003 purportedly containing a final offer from the appellant pursuant to s 294 of the Act. It was then pleaded that reliance on s 308 of the Act enabled the appellant to commence proceedings outside the limitation period but within 60 days after the compulsory conference. There was also reliance on an estoppel; it was asserted that in the circumstances the respondent was estopped from relying on s 11 of the *Limitation of Actions Act* 1974 (Qld). The respondent filed a rejoinder on 30 April 2004; the critical allegations contained therein were based on conduct which has been, or will be, particularised in these reasons. There was also a request from

the respondent for further and better particulars of the reply, and such particulars were supplied on 2 June 2004.

[7] It was against that background that the respondent's application of 17 July 2003 and the appellant's application of 11 December 2003 came on for hearing before Jones J on 26 October 2004. For reasons delivered on 26 November 2004 his Honour dismissed the appellant's application filed 11 December 2003, gave judgment for the respondent in the action, and made a consequential order for costs. From those orders the appellant has appealed to this Court.

[8] It is now necessary to set out the conduct relevant to the issue of estoppel. A Notice of Claim for Damages in the form required by s 280 of the Act was signed by the appellant and dated 5 April 2002. The appellant's solicitors forwarded that Notice of Claim for Damages and other documents to WorkCover under cover of a letter dated 11 April 2002. It was agreed that the letter was received by WorkCover on 15 April 2002. The solicitors for WorkCover responded by letter dated 15 May 2002, which relevantly stated:

> "We have now obtained our client's instructions in accordance with s 282 of the *WorkCover Queensland Act*. We note that your client has not annexed his 1996 group certificates, notices of assessment and income tax return nor his 1997 and 1998 group certificates. Pursuant to s 282, in the event that your client holds these documents in his possession and has failed to annexe them, then WorkCover Queensland considers your client's notice of claim for damages to be non-compliant and requires your client to provide copies of those documents. However, should an undertaking be given to provide the above documents within a reasonable period of time, WorkCover Queensland will be prepared to deem your client's notice of claim for damages to be compliant."

[9] That elicited a response from the appellant's solicitors by way of letter dated 16 May 2002; relevantly it said:

> "1. The event giving rise to our client's injuries occurred on 18 November 1999. Consequently our client is not required to provide his 1996 group certificates, notice of assessment and income tax return as that is more than 3 years prior.
>
> 2. Our client does not have and is therefore not able to provide copies of his 1997 and 1998 group certificates. We note you have been provided with copies of income tax returns for those years which contain details of our client's income from employment.
>
> 3. We cannot give an undertaking to provide copies of the 1997 and 1998 group certificates within a reasonable period of time as that would not be of any use to you. What we can tell you is that if copies of the group certificates come to hand, then copies will be provided to you. We do not consider this as likely as our client has undertaken a number of enquiries in an endeavour to locate them without success."

[10] By letter of 23 May 2002 the appellant's solicitors asked for "compliance advice" consequent upon their letter of 16 May 2002. The material response from the solicitors for WorkCover was the letter of 28 May 2002 in these terms:

> "We refer to your facsimile of 23 May 2002 and advise that pursuant to section 282, our client is satisfied that your client's notice of claim for damages complied with section 280 of the WorkCover Queensland Act.
>
> Accordingly, our client's section 285 response is due within six months of today's date.
>
> Kindly advise whether your client is arranging any further medical assessments. In the event that your client will be arranging further medical assessments, we anticipate obtaining our client's instructions to do the same. Alternatively, should your client not be obtaining any further medical assessments, we may be in a position to provide our client's section 285 response earlier than required under the Act."

[11] The next relevant document was the s 285 response from the solicitors for WorkCover, being the letter dated 25 November 2002 and received by the appellant's solicitors the following day. Relevantly it stated:

> "We are instructed to provide the following response pursuant to s 285 . . .
>
> 1. Liability is denied on the basis that:
>
> (a) the claim is governed by the *Motor Accident Insurance Act 1994*; and
>
> (b) by virtue of s 11(2) this is not a proper claim for "*damages*" within the meaning of the Act;
>
> 2. Your client's offer to settle is rejected; and
>
> 3. WorkCover declines to make any offer of settlement.
>
> As this is not a proper claim for "*damages*" under the terms of the Act, you are on notice that if your client continues to require WorkCover to undertake the remaining pre-court procedures set down in the Act, it will seek to recover the costs of doing so from your client."

[12] The appellant responded by a letter dated 27 November 2002 which relevantly stated:

> "We have your letter of 25 November 2002.
>
> We do not accept that letter contains a proper response by your client pursuant to Section 285 . . .
>
> Specifically it is not the case that this claim is governed by the [MAI Act]. We respectfully refer you to section 5(1) of [MAI Act]. Our client does not allege his injuries were caused wholly or partly by a wrongful act or omission in respect of the motor vehicle by a person

> other than himself as required by section 5(1)(b). Our client alleges fault on the part of the employer in requiring him to work excessive hours, and instructing him to complete his delivery run notwithstanding him feeling tired.
>
> We require your client to provide a proper response pursuant to section 285 . . . by 5.00 pm Thursday 28 November 2002, failing which our client will make application to the court for appropriate directions and orders . . . "

[13] As noted previously, the appellant then filed on 29 November the originating application which ultimately led to the Court of Appeal holding that the MAI Act and not the Act governed the claim.

[14] Before considering the merits of the appeal one further matter should be noted. The decision communicated in the letter of 25 November 2002 was based on advice from counsel. That advice was received by the solicitor for WorkCover on 8 November 2002. In accordance with that advice the solicitor for WorkCover prepared a letter to be sent to the solicitor for the appellant in the following terms:

> "We advise that our client's s 285 response will be forwarded to you in the next day or so. However, given certain time constraints, it was felt to be appropriate to put your client on notice that WorkCover believes that your client's claim properly falls within the provisions of the *Motor Accident Insurance Act 1994*.
>
> Accordingly, if your client has not already done so, it would seem appropriate for you to deliver a s 37 notice to the CTP insurer pursuant to s 39(5)(c) of the relevant Act.
>
> We note that there is an impending limitation period, and there is therefore a need, if you have not already done so, to make an application before the expiration of that limitation period.
>
> Accordingly, you are put on notice that WorkCover's s 285 response will contain a denial of liability, based upon the fact that the claim is not one for damages under the 1996 Act, by reason of sub-section 11(2) of the 1996 Act."

[15] The solicitor for WorkCover believed that that letter was sent and it was included in the material before the court. However it could not be proved that the letter was sent, and the respondent accepted the evidence of the solicitor for the appellant that such a letter was never received. The argument before the learned judge at first instance proceeded on the basis that no such letter had been received by the solicitor for the appellant.

[16] Unfortunately when the learned judge at first instance came to prepare his reasons he included a number of references to such a letter. Indeed he set out the contents in full and made the observation that "inaction" after receipt of the letter and before the expiration of the limitation period on 18 November 2002 "precludes any finding of detriment".

[17] Clearly the learned judge at first instance was influenced by that document and was wrong in making that observation when it had been accepted that the letter in question had not been sent. Given that the learned judge at first instance was obviously influenced in arriving at his ultimate conclusion by his belief that that letter had been sent this Court should consider the issue of estoppel uninfluenced by the conclusion reached at first instance.

[18] Although one of the contentions of the appellant is that the learned judge at first instance did not give adequate weight to the evidence of the appellant's solicitor, no significant issues of credibility or fact are involved in the determination of the appeal, and therefore this Court is in as good a position as the learned judge at first instance to determine the questions raised.

[19] It is clear from the affidavits of the solicitor for the appellant and his oral evidence that on receiving instructions from the appellant he directed his mind to which of the statutory insurance schemes regulated the claim. He realised the possibility of the claim being governed by the MAI Act and he obtained details of the licensed insurer under that Act. He discussed the issue with his colleagues and formed the view that the Act governed the claim. In doing so he was aware of the possibility that his opinion was wrong. He was also aware at all material times that there was no obstacle to giving notice complying with all pre-litigation procedures pursuant to each statutory insurance scheme. He was clearly aware, that is he was on notice, from receipt of the letter of 28 May 2002 that WorkCover contended that it had six months from that date to give a notice pursuant to s 285 of the Act. Not to take steps to comply with the pre-litigation procedures prescribed by the MAI Act was the decision of the appellant's solicitor freely made.

[20] It is true, as the appellant's solicitor said in oral evidence, that he assumed on receipt of the letter of 28 May 2002 that WorkCover "took the view that it was a claim" under the Act. He said that once he received "that compliance advice . . . I didn't have any further concerns about" the MAI Act.

[21] Section 280 of the Act relevantly provides:

> "1. Before starting a proceeding in a court for damages, a claimant must give notice under this section within the period of limitation for bringing a proceeding for the damages . . .
>
> . . .
>
> (3) The notice must include the particulars prescribed under a regulation.
>
> . . .
>
> (5) The notice must be verified by statutory declaration.
>
> (6) The notice must be accompanied by a genuine offer of settlement . . .
>
> (7) The notice must be accompanied by the claimant's written authority allowing WorkCover to obtain information . . .

(8) The notice must also be accompanied by copies of all documents supporting the claim including, but not limited to -

. . .

(b) income tax returns, group certificates and other documents for the three years immediately before the injury supporting the claimant's claim for lost earnings or diminution of earning capacity. . ."

[22] Section 282 of the Act then provides for WorkCover's response to the notice given pursuant to s 280. Relevantly for present purposes it provides:

"(2) WorkCover must, within 30 days after receiving the notice, give the claimant written notice -

(a) stating whether WorkCover is satisfied that the notice of claim complies with s 280 (a "complying notice of claim"); and

(b) if WorkCover is not so satisfied - identifying the non compliance and stating whether WorkCover waives compliance with the requirements; and

(c) if WorkCover does not waive compliance with the requirements - allowing the claimant a reasonable period of at least 30 days either to satisfy WorkCover that the claimant has complied with the requirements or to take reasonable action to remedy the non compliance.

(3) If WorkCover is not prepared to waive compliance with the requirements in the first instance, WorkCover must, within 30 days after the end of the period specified in subsection (2)(c), give the claimant written notice stating that -

(a) WorkCover -

(i) is satisfied the claimant has complied with the relevant requirements; or

(ii) is satisfied with the action taken by the claimant to remedy the non compliance; or

(iii) waives the non compliance . . . "

[23] The next relevant provision is s 285 which relevantly provides:

"(2) WorkCover must give the claimant a written notice under subsection (4) within 6 months after -

(a) WorkCover receives a complying notice of claim or waives the claimant's non compliance with the requirements of s 280; or

. . .

(4) The written notice must -

(a) state whether liability in connection with the event to which the claim relates -

(i) is admitted or denied; and

. . .

(b) state whether WorkCover accepts or rejects any offer of settlement that may be made by the claimant; and

. . .

(7) An admission of liability by WorkCover under this section -

(a) is not binding on WorkCover at all if it is later shown at the trial in the proceeding for damages that the claimant has been relevantly guilty of fraud or attempted fraud; and

. . .

(d) does not entitle the claimant to apply for judgment, summary or otherwise, in a court of competent jurisdiction; and

(e) is confined to damages under the claim."

[24] Section 291 effectively provides that if a party fails to comply with any provision of Part 5 (which includes the sections quoted above) a "court may order the party to comply with the provision, and may make consequential or ancillary orders that may be necessary or desirable in the circumstances of the case." Specifically that means that if WorkCover failed to comply with an obligation imposed on it by one of the statutory provisions in question, the consequence is that the claimant, here the appellant, could apply to the court for an order under s 291 directing WorkCover to comply with the provision, or, by relying on s 303 and s 304, could seek an order enabling the appellant to start proceedings notwithstanding the absence of a s 285 response.

[25] In my view there is a clear distinction between the response of WorkCover pursuant to s 282 and that pursuant to s 285. The s 282 response only goes to the issue whether or not the claimant, here the appellant, has complied with the formal requirements of a notice pursuant to s 280. That response must be given within 30 days after receiving the notice and that in many instances would not give WorkCover sufficient time to make full investigations in order to determine its liability pursuant to the Act. In consequence the response pursuant to s 282 can constitute no broader representation than that WorkCover regards the notice as complying with s 280 or otherwise. A s 282 response that the notice is complying cannot, as contended for by the appellant, constitute a representation by WorkCover that the injury referred to in the notice was an injury "subject to the provisions of" the Act.

[26] The only representation with respect to WorkCover's liability is contained in the s 285 notice and that representation is qualified as provided by subsection (7) thereof.

[27] One contentious issue on the hearing of the appeal was whether or not WorkCover's s 285 notice had to be given by 12 October 2002 or by 28 November 2002 or by some date in between. The solicitor for the appellant in his affidavit said that he believed that the s 285 notice was due on 12 October or 28 November 2002 and acted on that assumption. He asserted that the response of WorkCover on 15 May 2002 was a representation that the notice was a complying one when initially given and the six month period provided for by s 285(2) ran from the date it was given.

[28] It is made clear by s 280(8)(b) that to be complying the notice in fact given must be accompanied by group certificates for the three years immediately before the injury supporting the claim for lost earnings. The appellant's notice provided under the cover of the solicitor's letter of 11 April 2002 did not comply with that requirement in that all the required group certificates did not accompany the notice. It is clear from the notice that the appellant was making a claim for lost earnings. Some group certificates were provided pursuant to the obligation imposed by s 280(8), but 1997 and 1998 group certificates were not provided. To the extent that the reasoning of McGill DCJ in *Jamieson v Council of the City of Gold Coast*, [2000] QDC 468; DC No 148 of 2000, 1 March 2000, suggests that a claimant is only under an obligation pursuant to s 280 to see that documents in his possession at the time the notice is given accompany the notice it should not be followed. Documents referred to in s 280(8) must accompany the notice, otherwise it is non-complying; but, of course, WorkCover may waive non-compliance and should do so where a satisfactory explanation for the non-production is given. The initial response from WorkCover dated 15 May 2002 drew attention to the non compliance in this case. Essentially that was a response pursuant to s 282(2)(c) of the Act. On receipt of the letter from the appellant's solicitors of 16 May 2002, including an undertaking to provide copies of the group certificates if they should come to hand, WorkCover was prepared to treat the notice as complying with the requirements of s 280; that was the effect of the letter of 28 May 2002. The notice bearing date 5 April 2002 was deemed to be compliant with s 280 as and from 28 May 2002, and therefore the six month period referred to in s 285(2) ran from that date, being the date of waiver of non-compliance. That was certainly the view of WorkCover because it expressly said so in the letter of 28 May.

[29] In my view in the circumstances of this case the appellant's solicitor had no proper basis for believing that the notice pursuant to s 285 was due by 12 October 2002, or any date earlier than 28 November 2002. Indeed the letter of 27 November contains an acknowledgment by the appellant's solicitor that 28 November was the appropriate date.

[30] WorkCover's s 285(2) notice was due before 28 November 2002 and in fact it was received by the appellant's solicitor on 26 November 2002; therefore it was given within time.

[31] It follows that the alternative basis on which the appellant contended that WorkCover was estopped from denying liability on the appellant's claim on the basis that the claim was governed by the MAI Act and was not a proper claim for damages within the meaning of the Act must fail.

[32] In any event, even if the s 285 notice was due earlier than 26 November 2002, WorkCover's failure to comply with its obligation only entitled the appellant to seek an order pursuant to s 291 of the Act or relief relying on s 303 and s 304. There is no deemed admission of liability by the failure to comply with s 285 by the due date. The appellant was aware that the limitation period expired on 18 November 2002, and if there was a belief that WorkCover failed to give its s 285 notice by the due date urgent steps ought to have been taken to protect the appellant's rights.

[33] It is now necessary to turn to the broader basis on which the appellant submits there was a relevant estoppel.

[34] The appellant's case was put in the following way:

> (a) The appellant acted on the assumption that the Act applied to his claim;
>
> (b) The appellant laboured under that assumption up to the relevant day, being the expiration of the period of limitation, by reason of the conduct, act or omission on the part of WorkCover; and
>
> (c) WorkCover was aware at relevant times, and certainly up to the date when the limitation period expired, that the appellant and his legal advisers were proceeding pursuant to and of the view that the Act was the appropriate legislation governing the claim.

[35] It was then submitted that had the appellant's solicitors been informed by WorkCover prior to the expiration of the limitation period that its position was that the Act did not apply and that the relevant statute was the MAI Act, the appellant "would have been alerted to the possibility that the MAI Act was applicable at least in the opinion of WorkCover". That submission cannot be maintained in the light of the evidence. The clear evidence from the solicitor for the appellant is that he was aware when first instructed of the possibility that the MAI Act applied; because of that there were discussions with colleagues about which of the statutes governed the claim. As the appellant and his legal advisers were at all material times aware of the possibility that the MAI Act applied, it cannot be said that WorkCover failed to alert the appellant's side to that possibility.

[36] Further, the evidence does not support the contention that the appellant laboured under the assumption that the Act applied "by reason of the conduct, act or omission" on the part of WorkCover. After giving the question detailed consideration the solicitor for the appellant concluded that the Act applied and acted on that assumption. The assumption initially was not in any way affected by any conduct, act or omission on the part of WorkCover. At all times it was open to the appellant to comply with pre-litigation steps required by both statutes, and there was no obligation on WorkCover to draw that course of action to the attention of the appellant's legal advisers. For all WorkCover knew, the appellant's solicitor may also have initiated steps to comply with the requirements of the MAI Act.

[37] It can be accepted for present purposes that WorkCover may by its conduct be estopped from denying or asserting a fact relevant to the litigation; so much was said by McPherson J, as his Honour then was, in *Wilson v Austral Motors (Qld) Pty Ltd* [1983] 2 Qd R 774 at 782. The appropriate test to be applied in determining

whether or not a party is estopped is now to be derived from the reasoning of the High Court in *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394. There Mason CJ said at 413:

> "The result is that it should be accepted that there is but one doctrine of estoppel, which provides that a court of common law or equity may do what is required, but not more, to prevent a person who has relied upon an assumption as to a present, past or future state of affairs (including a legal state of affairs), which assumption the party estopped has induced him to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness."

[38] That was expanded upon by Deane J in his reasons; at 444 he relevantly said:

> "The central principle of the doctrine is that the law will not permit an unconscionable - or, more accurately, unconscientious - departure by one party from the subject matter of an assumption which has been adopted by the other party as the basis of some relationship, course of conduct, act or omission which would operate to that other party's detriment if the assumption be not adhered to for the purposes of the litigation.
>
> Since an estoppel will not arise unless the party claiming the benefit of it has adopted the assumption as the basis of action or inaction and thereby placed himself in a position of significant disadvantage if departure from the assumption be permitted, the resolution of an issue of estoppel by conduct will involve an examination of the relevant belief, actions and position of that party.
>
> The question whether such a departure would be unconscionable relates to the conduct of the allegedly estopped party in all the circumstances. That party must have played such a part in the adoption of, or persistence in, the assumption that he would be guilty of unjust and oppressive conduct if he were now to depart from it. The cases indicate four main, but not exhaustive, categories in which an affirmative answer to that question may be justified, namely, where that party . . . knew that the other party laboured under the assumption and refrained from correcting him when it was his duty and conscience to do so."

[39] The evidence in the present case, and a consideration of the provisions of the Act, does not persuade me that WorkCover was under a duty to indicate to the appellant at some earlier point of time than it did that it considered the appellant's claim to be governed by the provisions of the MAI Act and not the Act. As already noted, WorkCover was not to know whether or not the appellant had contemporaneously taken steps to comply with pre-litigation requirements of the MAI Act. Further, WorkCover was not to know that the appellant's solicitor was treating its s 282 response as containing some admission or representation beyond what was necessarily involved in a response pursuant to s 282 of the Act; in other words, WorkCover was not to know that the appellant's solicitor was treating its responses of 15 and 28 May 2002 as an admission or representation that the appellant's claim was validly made pursuant to the provisions of the Act. A consideration of the evidence does not persuade me that WorkCover acted in any way unconscionably in

complying with its statutory obligations in the way in which it did. As already noted, in my view WorkCover had until 28 November 2002 to make its s 285 response and it did so within time.

[40] At all times the appellant, through his solicitor, was aware of the possibility that the MAI Act applied and was aware of the date when the ordinary limitation period for bringing a personal injuries action expired. Acting on a belief, not induced by any representation from WorkCover, that the Act applied to the claim, the appellant, through his solicitor, was content to await the s 285 response outside the limitation period.

[41] In the circumstances no estoppel is created on the evidence.

[42] It also follows that the defences on which the respondent based its application for summary determination of the proceeding are made out and that, applying the appropriate test, the only course open to the learned judge at first instance was to dismiss the proceeding.

[43] The respondent also sought an extension of time within which to appeal the order for costs. At first instance costs were awarded in favour of the respondent on the standard basis. However, through a misunderstanding the respondent was deprived of the opportunity of submitting that costs should be awarded on an indemnity basis. The learned judge at first instance declined to reopen the issue as the appeal had already been lodged; he said it was a matter for this Court. The appellant did not oppose the granting of the extension of time, but forcibly submitted that in the circumstances an order for payment of costs on the standard basis was appropriate. I am not persuaded that in the circumstances the respondent has established a clear basis for concluding that there was an error in the exercise of discretion in awarding costs on the standard basis. For that reason the application for extension of time to cross appeal should be refused.

[44] The orders of the Court should therefore be:

1. Appeal dismissed.
2. Application for extension of time to cross appeal dismissed.
3. Order the appellant to pay the respondent's costs of the appeal to be assessed on the standard basis.

[45] **JERRARD JA:** In this appeal, I have had the benefit of reading the reasons for judgment of Williams JA, and I respectfully agree with those, and with the orders proposed by his Honour. I add that the appellant's solicitor made it clear that he had relied entirely on the content of WorkCover's s 282 response for his opinion that liability had been admitted and that any other steps were unnecessary to protect his client's position.

[46] Sections 280 and 282 are concerned with the provision of requisite information in the prescribed form, and with acknowledging its receipt, not with expressing a judgment on what it is that information establishes, ie whether it proves liability. Section 285 is the section requiring formation of that judgment, and expression of whether liability is admitted or denied.

[47] This was a case of non-complying notice, which non-compliance was quite properly waived. The s 285 answer from WorkCover was accordingly due, by reason of s

285(2)(a) and s 282(3)(a)(iii), by 28 November 2002 and was received in time. The appellant's solicitor had relied on an expectation of its contents, because of the solicitor's incorrect views about the significance of the s 282 response.

[48] The solicitor did not communicate at all to WorkCover the fact of his reliance on his view of its s 282 response, and WorkCover did nothing to induce his belief that the response was an admission of liability.

[49] I agree with Williams JA that WorkCover cannot be held to have necessarily understood that the solicitor would rely on that response as an admission of liability; and accordingly with the orders proposed.

[50] **WILSON JA:** I have read the reasons for judgment of Williams JA. I respectfully concur in those reasons and in the orders his Honour proposes.