SUPREME COURT OF QUEENSLAND

CITATION:	*Wallaby Grip (BAE) Pty Limited (in liq) & Anor v WorkCover Queensland; CSR Limited v WorkCover Queensland* [2022] QCA 204
PARTIES:	**In Appeal No 558 of 2022:** **WALLABY GRIP (BAE) PTY LIMITED (in liquidation)** ACN 008 453 325 (first appellant) **WALLABY GRIP (NSW) PTY LTD (in liquidation)** ACN 000 141 819 (second appellant) **v** **WORKCOVER QUEENSLAND** (respondent) **In Appeal No 561 of 2022:** **CSR LIMITED** ACN 000 001 276 (appellant) **v** **WORKCOVER QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 558 of 2022 Appeal No 561 of 2022 SC No 2110 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane – [2021] QSC 332 (Burns J)
DELIVERED ON:	21 October 2022
DELIVERED AT:	Brisbane
HEARING DATE:	19 May 2022
JUDGES:	Morrison and Mullins JJA and Kelly J
ORDERS:	**In Appeal No 558 of 2022:** **1. The appeal is dismissed.** **2. The appellants pay the respondent's costs of and incidental to the appeal.** **In Appeal No 561 of 2022:** **1. The appeal is dismissed.**

2. The appellant pay the respondent's costs of and incidental to the appeal.

CATCHWORDS: WORKERS' COMPENSATION – ALTERNATIVE RIGHTS AGAINST EMPLOYER AND/OR THIRD PARTIES AND CONSEQUENCES THEREOF – RIGHTS OF AND AGAINST THIRD PARTIES – RIGHT OF INDEMNITY OR CONTRIBUTION FROM THIRD PARTY – OTHER MATTERS – where the respondent is the statutory insurer for workers' compensation in Queensland – where the respondent paid compensation to an injured worker – where the worker filed a claim and statement of claim against the Wallaby Grip Appellants in the District Court – where that claim was never served and is now stale – where the worker never commenced proceedings against the other appellant, CSR – where the respondent now claims in the Supreme Court an indemnity under s 207B(8) of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) from each of the appellants in respect of the compensation paid – where that section provides for an indemnity "if a person who has received compensation has not recovered, or taken proceedings to recover, damages" – where the appellants filed separate applications to strike out the respondent's statement of claim or for summary judgment – where the primary judge dismissed those applications – where the appellants contend that the primary judge ought to have found that the respondent was unable to claim the indemnity because the worker had taken proceedings to recover damages for his injury from a person other than his employer by commencing proceedings in the District Court – where CSR further contends that when the worker commenced proceedings in the District Court, the respondent's cause of action was lost against any alleged wrongdoer – whether the respondent had "taken proceedings to recover, damages" for the injury

Acts Interpretation Act 1954 (Qld), s 14A
Rules of the Supreme Court (Qld), O 2 r 1.1
Uniform Civil Procedure Rules 1999 (Qld), r 8
WorkCover Queensland Act 1996 (Qld), s 278
Workers' Compensation Act 1916 (Qld), cl 24, cl 24A
Workers' Compensation Act 1990 (Qld), s 10.8, s 11.4
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 207B, s 275

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; [2009] HCA 41, cited
Australand Corporation (Qld) Pty Ltd v Johnson [2008] 1 Qd R 203; [2007] QCA 302, cited
Certain Lloyd's Underwriters v Cross (2012) 248 CLR 378; [2012] HCA 56, cited
Esber v The Commonwealth (1992) 174 CLR 430; [1992] HCA 20, cited

Free Lanka Insurance Co Ltd v Ranasinghe [1964] AC 541, cited
Kathleen Investments (Aust) Ltd v Australian Atomic Energy Commission (1977) 139 CLR 117; [1977] HCA 55, cited
Laurie v Carroll (1958) 98 CLR 310; [1958] HCA 4, cited
Mikasa (NSW) Pty Ltd v Festival Stores (1972) 127 CLR 617; [1972] HCA 69, cited
OV and OW v Members of the Board of Wesley Mission Council (2010) 79 NSWLR 606; [2010] NSWCA 155, cited
Perrett v Robinson [1985] 1 Qd R 83, cited
Smith v Pacific Trading Enterprises [1999] NSWSC 333, cited
Smith v Shilkin (No 2) [2019] NSWSC 969, cited
State of Queensland v Seltsam Pty Limited (2019) 2 QR 495; [2019] QCA 248, cited
Suntory (Aust) Pty Ltd v Federal Commissioner of Taxation (2009) 177 FCR 140; [2009] FCAFC 80, cited
Tickle Industries Pty Ltd v Hann (1974) 130 CLR 321; [1974] HCA 5, applied
WorkCover Queensland v Amaca Pty Ltd (2010) 241 CLR 420; [2010] HCA 34, considered
WorkCover Queensland v Amaca Pty Ltd [2013] 2 Qd R 276; [2012] QCA 240, considered
WorkCover Queensland v Seltsam Pty Ltd (2001) 53 NSWLR 518; [2001] NSWCA 457, considered
Workers' Compensation Board of Queensland v The Nominal Defendant (Queensland) [1989] 1 Qd R 356, cited

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SOLICITORS: Zambra Legal for the first and second appellants in Appeal No 558 of 2022
Edmondson Legal for the appellant in Appeal No 561 of 2022
BT Lawyers for the respondent in each Appeal

[1] **MORRISON JA:** I agree with Kelly J.

[2] **MULLINS JA:** I agree with Kelly J.

[3] **KELLY J:** The respondent, WorkCover Queensland, is the statutory insurer for workers' compensation in Queensland ("the insurer"). It paid compensation to an injured worker ("Mr Maguire") for which it now claims an indemnity under paragraph (a) of s 207B(8) of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) ("the Act"). The indemnity is claimed in a Supreme Court proceeding brought against the three appellants, Wallaby Grip (BAE) Pty Ltd (in liquidation) and Wallaby Grip (NSW) Pty Ltd (in liquidation) (collectively, "the Wallaby Grip appellants") and CSR Limited ("CSR"). Prior to the Supreme Court proceeding, Mr Maguire had filed a claim and statement of claim in the District Court seeking damages against the Wallaby Grip appellants and Amaca Pty Ltd, formerly James

Hardie & Co Pty Ltd. CSR was not named as a defendant. The District Court claim and statement of claim were not served and are now stale.

[4] In the Supreme Court proceeding, the appellants filed separate applications to strike out the insurer's statement of claim or for summary judgment and now appeal from the dismissal of those applications. The appellants contend that the primary judge ought to have found that, on the proper construction of the Act, the insurer was not entitled to claim the indemnity because Mr Maguire had "taken proceedings to recover, damages for [his] injury from another person other than [his] employer" within the meaning of that language as it appears in the chapeau to s 207B(8) of the Act. As put by the Wallaby Grip appellants, at the point when Mr Maguire commenced the District Court proceeding, "[the insurer's] cause of action under s 207B(8) was lost".[1] CSR further argues that, at that same point in time, the insurer's cause of action was lost against any alleged wrongdoer because "[i]t does not matter that the person whom the insurer seeks to pursue pursuant to the right of indemnity is different to the person whom the worker has taken proceedings against".[2]

Factual background

[5] Mr Maguire developed malignment mesothelioma which was attributed to his having inhaled asbestos dust and fibres during his employment in the period between 1972 and 1981. He had relevantly worked between 1972 and 1974 at a Gladstone smelter and from 1974 until 1981 at the Gladstone Power Station. The asbestos dust and fibres were said to have emanated from products manufactured, supplied or installed by the appellants.

[6] On 2 June 2015, Mr Maguire lodged an application with the insurer for compensation in respect of his disease. On 27 July 2015, he started the District Court proceeding by filing the claim and statement of claim. The District Court proceeding was not served, became stale and the claim was not renewed.

[7] On 13 August 2015, the insurer accepted Mr Maguire's claim and paid him $761,627.00 by way of compensation. In August 2015, the insurer notified the appellants of its intention to claim the indemnity in respect of the compensation paid to the worker. On 27 February 2019, the insurer started the Supreme Court proceeding. The appellants subsequently filed their applications to strike out the statement of claim or for summary judgment.

S. 207B of the Act

[8] The insurer claims an entitlement to the indemnity created by para (a) of s 207B(8). That provision forms part of a suite of provisions contained within s 207B which are concerned with an insurer's rights to recoup compensation paid for an injury to a worker. The section, in its entirety, provides as follows:

> "**207B Insurer's charge on damages for compensation paid**
>
> (1) This section applies to—
>
> (a) an injury sustained by a worker in circumstances creating—

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1 Wallaby Grip appellants' Outline of Argument [4].

2 CSR's Amended Submissions [28].

(i) an entitlement to compensation; and

(ii) a legal liability in the worker's employer, or other person, to pay damages for the injury, independently of this Act; and

(b) damages that an employer is not indemnified against under this Act.

(2) An amount paid as compensation to a person for an injury, to which there is an entitlement to payment of damages at a time or for a period before the person becomes entitled to payment of damages by an employer or another person, is a first charge on any amount of damages recovered by the person to the extent of the amount paid as compensation to the person.

(3) Subsection (2) applies to compensation paid under chapter 4A only if the damages include treatment, care and support damages.

(4) An employer or other person from whom the damages are recoverable must pay the insurer the amount of the first charge or, if the damages are not more than the amount of the first charge, the whole of the damages.

(5) Payment to the insurer under subsection (4), to the extent of the payment, satisfies the liability of the employer or other person for payment of the damages.

(6) A person can not settle, for a sum less than the amount that is a first charge on damages under subsection (2), a claim for damages had by the person independently of this Act for an injury to which there is an entitlement to payment of damages without the insurer's written consent.

(7) If, without the insurer's consent, a settlement mentioned in subsection (6) is made, then to the extent that the damages recovered are insufficient to meet all payments due to the insurer under this section—

(a) the insurer is entitled to be indemnified by the employer or other person who is required by the settlement to pay the damages; and

(b) to that end, the insurer is subrogated to the rights of the person who has sought the damages, as if the settlement had not been made.

(8) If a person who has received compensation has not recovered, or taken proceedings to recover, damages for the injury from another person, other than the worker's employer—

(a) the insurer is entitled to be indemnified for the amount of the compensation by the other person to the extent of that person's liability for the damages, so far as the amount of damages payable for the injury by that person extends; and

(b) to that end, the insurer is subrogated to the rights of the person for the injury.

(9) Payment made as indemnity under subsection (8), to the extent of the payment, satisfies the person's liability on a judgment for damages for the injury.

(10) In addition to all rights of action had by the insurer to give effect to its right to indemnity under this section, all questions about the right and the amount of the indemnity may, in default of agreement, be decided by an industrial magistrate if all persons affected by the indemnity consent.

(11) In this section—

damages includes damages under a legal liability existing independently of this Act, whether or not within the meaning of section 10."

[9] In the present case, it is accepted that s 207B applies because the requirements of paras (a) and (b) of s 207B(1) were satisfied.

The primary judge's Reasons

[10] The primary judge reviewed the relevant content of workers' compensation legislation dating back to 1916 and observed that a provision in the form of s 207B(8) had first appeared in the *Workers' Compensation Act 1990* (Qld) ("the 1990 Act") and was continued in the *WorkCover Queensland Act 1996* (Qld) ("the 1996 Act"), the predecessor to the Act. The primary judge identified the policy of s 207B(8) as being " … to ensure that an insurer who has paid statutory compensation to an injured employee where the injury, although occurring in the course of employment, was caused by a wrongful act or omission of another person is entitled to be indemnified against the payment of that compensation by the other person".[3] In this regard his Honour relied upon statements made by Barwick CJ in *Tickle Industries Pty Ltd v Hann*[4] and the High Court in *WorkCover Queensland v Amaca Pty Ltd*.[5]

[11] The Reasons noted that the issue for decision involved the proper construction of s 207B(8) and "even more narrowly than that, the meaning to be ascribed to the words … **has not recovered, or taken proceedings to recover, damages** …" (original emphasis).[6] The primary judge characterised the appellants' construction of s 207B(8) as being "entirely literal".[7] His Honour did not accept the suggested literal meaning as reflecting the true meaning of the statutory language and adopted a purposive approach to determining the meaning of that language. In adopting that approach, his Honour had regard to the historical evolution of the provision and the explanatory notes for the Bills relevant to the 1990 Act and the 1996 Act.

[12] The primary judge observed that the introduction, by the 1990 Act, of the words "or taken proceedings to recover, damages", meant that where the worker had taken

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3 Reasons [19].
4 (1974) 130 CLR 321, 326.
5 (2010) 241 CLR 420, 432 [27].
6 Reasons [13].
7 Ibid [29].

such proceedings, the insurer was now required to await the outcome of that proceeding.[8] His Honour reasoned that the only logical reason for the introduction of those words was to prevent a duplication of proceedings arising out of the insurer's pursuit of its indemnity at the same time as the worker pursued damages.[9]

[13] The essential passage of the Reasons may then be set out as follows:

> "Here, the mischief to which s 207B … is directed and the purpose of the statute is not advanced by interpreting subsection (8) in such a way that the insurer's rights are removed when the worker starts, but does not pursue, a recovery proceeding. Instead, the words in the chapeau, 'has not recovered, or taken proceedings to recover, damages' constitute a temporal limitation on the insurer's entitlement to indemnification with the effect that the insurer is required to stay its hand for so long as there exists a proceeding by the compensated worker in which the recovery of damages is in prospect and over which a charge could attach under s 207B(2) …. Such a proceeding must necessarily be one that retains, as its active purpose, the exercise by the worker of his or her right to pursue damages against another person, other than his or her employer. Construed in this way, the rights of the insurer to indemnification will be suspended for so long as there is a proceeding on foot which retains that active purpose. Where, for example, the worker has commenced a proceeding but, by the time the indemnity is claimed, the proceeding has been abandoned, it could not be said that the worker has taken proceedings to recover damages in the sense required by the provision. Any such proceeding would by then be devoid of the purpose which the provision explicitly requires i.e., to recover damages."[10]

[14] Of this construction, his Honour observed:[11]

> "It is true that the construction I have arrived at is not 'contemplated' by an 'ordinary reading' of the provision but I have taken a purposive approach to determining the meaning of the words used and … the temporal limitation introduced by those words."

[15] The effect of this reasoning was that, as the District Court proceeding had not been served and was stale, it did not have as its active purpose the exercise of a right to pursue damages. Mr Maguire then had "not taken proceedings to recover, damages" within the meaning of s 207B(8).

The issues raised on appeal

[16] The appeal is concerned with the proper construction of s 207B(8). The ground of appeal is that the primary judge should have found that Mr Maguire had "taken proceedings to recover damages" for his injury. CSR makes the additional contention that Mr Maguire had "taken proceedings to recover damages" for his

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8 Ibid [28].
9 Ibid [28].
10 Ibid [32].
11 Ibid [34].

injury from "another person" meaning that any claim for indemnity against CSR was bound to fail.

[17] The Wallaby Grip appellants submitted that "there is nothing in the context of s 207B(8) that means what is the literal meaning of the provision is not the actual meaning." The language chosen by the Parliament was said to be "clear enough" meaning that a person has "taken proceedings" if a proceeding has been filed in the Court's registry. The further submission made was that, if a worker has taken proceedings to recover damages then the cause of action under s 207B(8) is lost forever and the insurer is thereafter limited to a charge on the fruits, if any, of the worker's proceeding to recover damages.

[18] The Wallaby Grip appellants emphasised that their suggested literal interpretation of the provision also reflected the purpose of the Act. They contended that the primary judge incorrectly identified the statutory purpose as being to ensure that an insurer who has paid statutory compensation to an injured employee was entitled to be indemnified against the payment of that compensation. They argued that the insurer is only to be indemnified if the particular circumstances identified by the statute are established. It was submitted that the purpose of the statutory provision was to create certainty and to prevent collateral proceedings. Where the worker had commenced proceedings, those objects were said to be served by then limiting the insurer's rights to an indemnity that "could only be enforced as a charge on such damages as came to be recovered."

[19] CSR's arguments on appeal addressed the proper construction of the expression "has taken proceedings" but also the further question as to whether proceedings taken against one wrongdoer necessarily defeated the right of indemnity against any other wrongdoer. On the primary issue, CSR's submissions essentially reflected, and were consistent with, the arguments advanced by the Wallaby Grip appellants. One particular matter emphasised by CSR was that the judgment of Barwick CJ in *Tickle* concerned a different statutory framework. Notably, that framework did not contain the critical language now under consideration "not… taken proceedings to recover, damages". On the further question, CSR submitted where the worker had taken proceedings against "another person" in respect of "the injury", the insurer could not claim the statutory indemnity against any wrongdoer, regardless of whether the worker had taken proceedings against that wrongdoer.

[20] The insurer filed a notice of contention which seeks to uphold the primary judge's decision on the ground that, where Mr Maguire had filed but not served proceedings, he had "not recovered damages" for his injury which meant that the insurer was entitled to claim the indemnity. The premise of this contention was that the first limb of the chapeau to s 207B(8) "has not recovered damages" is an alternative to the second limb "has not … taken proceedings to recover, damages".

Consideration

[21] The relevant principles of statutory interpretation were not in dispute.

[22] In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*,[12] the joint judgment said:

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12 (2009) 239 CLR 27, 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."

[23] In *Certain Lloyd's Underwriters v Cross*,[13] the joint judgment said:

> "The context and purpose of a provision are important to its proper construction because, as the plurality said in *Project Blue Sky Inc v Australian Broadcasting Authority*, '[t]he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of *all* the provisions of the statute' (emphasis added). That is, statutory construction requires deciding what is the legal meaning of the relevant provision 'by reference to the language of the instrument viewed as a whole', and 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'.
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> Determination of the purpose of a statute or of particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. … '[T]he duty of a court is to give the words of a statutory provision the meaning that the legislature *is taken to have intended* them to have' (emphasis added)."

[24] It is also relevant to note that s 14A of the *Acts Interpretation Act 1954* (Qld) provides that, when interpreting a provision, the interpretation that will best achieve the purpose of the Act is to be preferred.

[25] Before turning to consider the meaning of the words "not… taken proceedings to recover, damages" as they appear in s 207B(8), it is convenient to set out some matters of historical context as well as some relevant matters that have been settled by authority in relation to the operation of the provision.

[26] Under clause 24 of the schedule to the *Workers' Compensation Act 1916* (Qld) ("the 1916 Act"), where the injury for which compensation was payable was caused in circumstances creating a legal liability in "some other person" to pay damages in respect of the injury, the worker could take proceedings against that person to recover damages and apply for compensation, but the worker was not entitled to do both. If the worker received compensation, the insurer was entitled to be indemnified by the person liable to pay the damages.[14]

[27] In 1954, the 1916 Act was amended to insert a provision that applied where a worker had received compensation but had not "recovered any damages" from the

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13 (2012) 248 CLR 378, 389-390 [24]-[25] (French CJ and Hayne J).

14 *Workers' Compensation Act 1916* (Qld) sch clause 24.

employer or any "other person legally liable [for]" the damages.[15] In that case, the insurer was entitled to be "indemnified by that employer or other person to the extent of his liability".[16] From the time of this 1954 amendment until the 1990 Act, where a compensated worker had not recovered any damages from the employer or any other person liable to pay damages with respect to the worker's injury, the insurer was entitled to be indemnified by the employer or other person to the extent of the compensation paid. The insurer could commence a proceeding against another person for indemnity unless the compensated worker had already done so and recovered damages. The insurer was not obliged to wait until the outcome of any proceeding commenced by the worker before seeking the indemnity.

[28] A provision containing the words "taken proceedings to recover, damages" first appeared in the 1990 Act.[17]

[29] The second reading speech for the Bill for the 1990 Act described the Bill as providing for an "overhaul" of the 1916 Act. In *WorkCover Queensland v Seltsam Pty Ltd*,[18] Young CJ in Eq said of that use of the word "overhaul", "there is perhaps some significance in that word". In my view, any significance in that word should not be overstated. The reference to an "overhaul" was made in the context that the existing Act required "restructuring so that it [could] be presented in a more logical and readable manner".[19] More importantly, the second reading speech noted that the principles on which the existing legislation was based "are generally sound."[20] The Bill had been prepared as the result of a consultative process that was described as having been of "great assistance in the development of the proposed legislation".[21] Of that consultative process, the second reading speech observed:

> "[i]t is significant that the great majority of respondents were generally supportive of the current Act and did not suggest radical change".[22]

[30] That the 1990 Act was not intended to effect any radical departure from the existing policy of the 1916 Act was made clear by the following passage in the second reading speech:

> "This Bill retains the philosophy of the current Act and implements the Government's central objectives in regard to workers' compensation in Queensland. Those objectives are –
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> to meet the needs of employers, employees and the community for an equitable, stable and economically viable system of workers' compensation;
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> …
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> to retain a fully-funded scheme administered by a single insurer; and

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15 *Workers' Compensation Acts Amendment Act 1954* (Qld) which inserted clause 24A.
16 Clause 24A(3).
17 s 10.8.
18 (2001) 53 NSWLR 518, 521 [10].
19 Queensland, *Parliamentary Debates*, Legislative Assembly, 8 November 1990, 4732 (N Warburton, Minister for Employment, Training and Industrial Relations).
20 Ibid.
21 Ibid.
22 Ibid.

to provide a modern, restructured Act that is easily understood".[23]

[31] The relevant provision of the 1990 Act, s 10.8(3), was in these terms:

> "If a person to whom or on whose account compensation under this Act is paid in respect of an injury to which this section applies has not recovered, or taken proceedings to recover, damages in respect of the injury from a person other than the worker's employer, the Board is entitled to be indemnified for the amount of such compensation by such last-mentioned person to the extent of such person's liability for such damages, so far as the amount of damages payable in respect of the injury by such person extends and, to that end, the Board is hereby subrogated to the rights of the first-mentioned person in respect of the injury".

[32] In relation to this provision, the Explanatory Notes for the Bill for the 1990 Act relevantly said:

> "Clause 10.8 specifies that:
>
> - any compensation paid to a worker shall become [a] first charge against any damages settlement;
> - if a claimant does not exercise the right to claim damages, then the Board is entitled to rights of subrogation;
> - a worker shall not settle a claim for damages for less than the amount paid in compensation, without the consent of the Board."

[33] It may be observed that a novel aspect of this provision was its introduction of the words "taken proceedings to recover, damages". However, there was another novel aspect, namely that, for a limited purpose described as being "to that end", the insurer was now to be subrogated to the rights of the injured worker.

[34] The 1990 Act was replaced by the 1996 Act, s 278(7) of which provided as follows:

> "If a person who has received compensation has not recovered, or taken proceedings to recover, damages for the injury from another person, other than the worker's employer –
>
> 1. [the insurer] is entitled to be indemnified for the amount of the compensation by the other person to the extent of that person's liability for the damages, so far as the amount of damages payable for the injury by that person extends; and
> 2. to that end, [the insurer] is subrogated to the rights of the person for the injury."

[35] The Explanatory Notes for the Bill for the 1996 Act relevantly included the following commentary about section 278:

> "**[The insurer's] charge on damages for compensation paid**
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> *Clause 278* replaces section 190 of the *Workers' Compensation Act 1990* and has not changed except for being updated according to

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23 Ibid 4733.

> current drafting practice and to include a different meaning of damages, than that in chapter 1, for use in this section only.
>
> In a situation where the worker's employer is not indemnified by this legislation or another person has a legal liability to pay damages for the injury independently of this legislation, this clause ensures that [the insurer] can recover any workers' compensation paid from damages awarded as a first charge. Any question relating to indemnity can be decided by an industrial magistrate if both parties agree.
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> An example of the application of this clause would be where a worker is injured in a work related motor vehicle accident and receives workers' compensation benefits for this injury. If damages are payable by the driver of an insured motor vehicle, the amount of workers' compensation paid must be deducted by the motor vehicle insurer and paid to [the insurer], prior to paying any other party's charges or the worker their settlement.
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> It also allows [the insurer] to take an action to recover compensation paid directly from the employer or other person if the person to whom compensation was paid has not taken, or does not intend to take, any action to recover the amount of compensation paid or has recovered insufficient damages to reimburse the compensation to [the insurer]. Recovery of the total amount of workers' compensation paid by [the insurer] satisfies the person's liability for damages."

[36] The relevant provision, s 207B(8) of the Act, and provisions in similar form, have been considered by the High Court[24] and intermediate Courts of Appeal.[25] The following principles concerning the operation of the provisions can be distilled from the authorities:

1. Section 207B applies, as is made clear by sub-section (1), where a worker sustains an injury in circumstances creating both an entitlement to statutory compensation under the Act and a legal liability to pay damages independently of the Act on the part of the worker's employer or other person and where those damages are not indemnified against under the Act.[26] The section then confers upon the insurer, rights of recoupment for the compensation paid in certain specified events.[27]

2. Paragraph (a) of s 207B(8) creates a cause of action vested in the insurer, which is separate to, and independent of, the cause of action vested in the worker.[28]

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24 *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420.

25 Most relevantly in *Esso Australia Ltd v Victorian WorkCover Authority* (2000) 1 VR 246; *WorkCover Queensland v Seltsam Pty Ltd* (2001) 53 NSWLR 518, *WorkCover Queensland v Amaca Pty Ltd* [2013] 2 Qd R 276 and *State of Queensland v Seltsam Pty Limited* (2019) 2 QR 495.

26 *WorkCover Queensland v Amaca Pty Ltd* [2013] 2 Qd R 276, 294 [38].

27 Ibid.

28 *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420, 429 [14], 430 [18]-[19] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

3. Two matters are contemplated by paragraph (a) of s 207B(8), the insurer's "right of indemnity" and the "scope of that indemnity".[29] The latter matter is a reference to "the quantum of the right of indemnity"[30] or "the amount payable under the indemnity".[31]

4. Whilst the insurer's right of indemnity is distinct from the worker's cause of action, the scope of the indemnity is tied to the worker's cause of action.[32] Where the provision speaks of the indemnity being "to the extent of that person's liability for the damages", the reference to "that person" is to the wrongdoer from whom the insurer seeks recovery under the indemnity.[33] The reference to the wrongdoer's "liability for the damages" is a reference to the wrongdoer's liability for the injury suffered by the worker, being the "person who has received compensation".[34]

5. Section 207B contemplates the existence of "a liability" in the wrongdoer from whom the insurer seeks to recover under the indemnity, not a remedy. As is made clear by the language of s 207B(1), the section applies to an injury sustained by a worker in circumstances creating a legal liability in the worker's employer or other person to pay damages for the injury. The right of indemnity exists so long as the wrongdoer had legal responsibility for the injury or death at some point in time.[35] The section "supposes a legal responsibility in another person for the compensable injury or death".[36] There is no requirement that "the liability" be continuing or persisting.[37]

6. The insurer's right of indemnity extends only up to the amount for which the third-party wrongdoer would be liable to the worker.[38] However, the provision does not limit the indemnity to the amount that would have been received by the person to whom compensation has been paid had they, or their personal representative upon their death, brought an action.[39] Hence, there is an important distinction between the "liability for damages" and "the damages that would be payable upon a person, or their estate, bringing an action".[40]

7. The statutory indemnity is a *sui generis* cause of action and whilst one of its elements is the liability of the wrongdoer to the injured worker, the cause of action is not in respect of the acts or omissions in that liability.[41] The liability, which is an ingredient of the statutory cause of action for the indemnity,[42] is a notional liability which has regard to "limitations *on the liability* of the wrongdoer *to the person* who received compensation".[43] That

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29 Ibid 430 [20].
30 Ibid 431 [24].
31 Ibid.
32 Ibid 430 [21].
33 Ibid.
34 Ibid 430-1 [21].
35 Ibid 433 [28].
36 *Tickle Industries Pty Ltd v Hann* (1974) 130 CLR 321, 333; *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420, 432-3 [28].
37 Ibid.
38 *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420, 434 [32].
39 Ibid 432 [26], 439 [51].
40 Ibid 439 [51].
41 *State of Queensland v Seltsam Pty Limited* (2019) 2 QR 495, 503 [17].
42 *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420, 439 [53].
43 Ibid 432 [26].

notional liability takes into account all limitations at common law or under statute "on that liability" but does not involve an assessment of the amount of damages that would have been recovered in a hypothetical action brought by the worker or the worker's estate.[44]

8. As the insurer's cause of action is separate and independent of the worker's cause of action, the insurer is allowed to pursue its cause of action after the worker's death or despite the worker's cause of action being time barred.[45] The time bar in the worker's action is not annexed by statute to the right of indemnity.[46] A general limitation, such as a time bar, on the worker's personal action does not affect "the liability" of the wrongdoer but rather acts as a bar when pleaded to any remedy which the worker or worker's estate might seek when bringing an action for damages in respect of that liability.[47]

9. The insurer's right of indemnity is a right to sue on the indemnity in the insurer's own name.[48]

10. The subrogation introduced by the 1990 Act (now recognised in para (b) of s 207B(8)) is ancillary to the insurer's right of indemnity. It is a limited subrogation, not to the worker's action, but to the rights of the worker to the extent that those rights are necessary to aid the insurer's indemnity.[49]

[37] Having set out that historical context and those settled principles, the material language of the provision can now be considered.

[38] The critical words in the chapeau to s 207B(8) are "not… taken proceedings to recover, damages". I do not read the expression "taken proceedings" as being a literal reference to the mere filing of an originating process. As will now be apparent, the expression "taken proceedings" was first introduced by s 10.8(3) of the 1990 Act. At that time, the *Rules of the Supreme Court* (Qld) provided that causes and matters might be "commenced" by filing an originating process.[50] The *Uniform Civil Procedure Rules* now provide that "[a] proceeding starts when the originating process is issued by the court".[51] The provision under consideration does not refer to proceedings as having been "commenced" or "started" but rather as having been "taken". Elsewhere within the 1990 Act as it was enacted, there were separate and distinct references to proceedings being "taken" and "commenced". Notably, whilst s 11.4(2) of the 1990 Act provided that a proceeding in respect of an offence under the Act was to be "taken" in a summary way before an Industrial Magistrate, s 11.4(3) provided that such a proceeding might be "commenced" within one year following the commission of the offence or within six months after the commission of the offence came to the knowledge of the General Manager, whichever period was longer. Further, elsewhere in the Act, s 275 specifically refers to "starting a proceeding". All of this indicates that the language "taken proceedings" as it appears in s 207B(8) is not to be taken as a literal reference to "commencing" or "starting" proceedings.

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44 Ibid 440 [52].
45 Ibid 430 [19].
46 Ibid 433 [30].
47 Ibid 434 [31].
48 *WorkCover Queensland v Seltsam Pty Ltd* (2001) 53 NSWLR 518, 523 [21].
49 Ibid 524 [30]; *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420, 429 [16].
50 Order 2 Rule 1(1) of the *Rules of the Supreme Court* (Qld).
51 *Uniform Civil Procedure Rules 1999* (Qld) r 8(1).

[39] A plain meaning of "to take" includes "to conduct"[52], "to use"[53], "to get the use of",[54] "to make use of",[55] "to avail oneself of"[56] and "to have recourse to".[57] Further, s 207B(8) contemplates not just a proceeding being "taken" but a proceeding being taken "to recover damages". Damages are a remedy only able to be provided by a court possessed of jurisdiction. The mere filing of the originating process does not establish the court's jurisdiction to award damages, a further step being required, namely, the service of the originating process.

[40] In *Laurie v Carroll*,[58] the joint judgment observed:

> "'The root principle of the English law about jurisdiction is that the judges stand in the place of the Sovereign in whose name they administer justice, and that therefore whoever is served with the King's writ and can be compelled consequently to submit to the decree made, is a person over whom the Courts have jurisdiction', per Viscount Haldane: *John Russell & Co Ltd v Cayzer, Irvine & Co Ltd*. Holmes J regarded the principle as based upon the capacity to exert actual power … The defendant must be amenable or answerable to the command of the writ. … 'The service of the writ, or something equivalent thereto, is absolutely essential as the foundation of the court's jurisdiction. …. Hence, in an action *in personam*, the rules as to the legal service of a writ define the limits of the court's jurisdiction…': *Dicey – Conflict of Laws*, 6th ed. (1949), p. 172."

[41] In *Perrett v Robinson*,[59] Connolly J, with reference to this passage of the joint judgment in *Laurie v Carroll*, said:[60]

> "It is unquestionably the general rule that the Court has jurisdiction in an action *in personam* if the originating process is served on the defendant within the jurisdiction."

[42] A person is not properly described as having taken or as taking, in the sense of using, proceedings to recover damages, at any time before the originating process is served and jurisdiction is thereby conferred upon the court. Service of the originating process has been described as a step "in the prosecution of" proceedings.[61] It is not until a proceeding has been served that a person may properly be described as having "availed oneself of" the jurisdiction of the court to award damages. Once the proceeding claiming damages is served, it may properly be described as a proceeding which is being used to recover damages.

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52 *The Australian Oxford Dictionary* (2nd ed, 2004) 'take' (def 28); *The Macquarie Dictionary* (8th ed, 2020) 'take' (def 19).

53 *The Australian Oxford Dictionary* (2nd ed, 2004) 'take' (def 4).

54 *The Australian Oxford Dictionary* (2nd ed, 2004) 'take' (def 3).

55 *The Australian Oxford Dictionary* (2nd ed, 2004) 'take' (def 9).

56 *The Australian Oxford Dictionary* (2nd ed, 2004]) 'take' (def 4); *The Macquarie Dictionary* (8th ed, 2020) 'take' (def 31).

57 *The Macquarie Dictionary* (8th ed, 2020) 'take' (def 17).

58 (1958) 98 CLR 310, 323-4 (Dixon CJ, Williams and Webb JJ).

59 [1985] 1 Qd R 83.

60 [1985] 1 Qd R 83, 84; see also 89 (McPherson J).

61 *Smith v Pacific Trading Enterprises* [1999] NSWSC 333 [41]; *Smith v Shilkin (No 2)* [2019] NSWSC 969 [193].

[43] It is also noteworthy that "taken" as it appears in s 207B(8) is in the form of the past participle, being a form of the verb "take".[62] Past participles are often not strictly used in the past tense, can be neutral in temporal meaning[63] and can contemplate something that is presently occurring and continuing.[64] When regard is had to the purpose of the Act and the rights of subrogation conferred by paragraph (b) of s 207B(8), matters to which I will shortly turn, I consider that "taken" is intended to refer to an existing state of affairs, namely a proceeding that is being taken, in the sense of being used, to recover damages. A proceeding claiming damages which has been served will meet that description for so long as it remains subject to the court's supervisory jurisdiction and has not been determined by judgment, dismissed by another form of order or discontinued. With respect to the reasoning of the primary judge, I do not consider that the statutory language requires any inquiry as to the active purpose of a proceeding.

[44] The construction I have preferred is consistent with the purpose of s 207B(8).

[45] In *WorkCover Queensland v Amaca Pty Ltd*,[65] the High Court observed that the policy of the Act "indicates that [the insurer] is entitled to be indemnified for moneys if paid in compensation…". In *Tickle*, Barwick CJ made a similar observation about the policy of the statute there under consideration, the *Workmen's Compensation Act 1949-1968* (NT).[66] The Chief Justice was concerned to note that this evident policy was longstanding and consistently apparent in the development of workers' compensation legislation in Australia.[67] Whilst the policy recognises the insurer's entitlement, the entitlement is not absolute. In *WorkCover Queensland v Amaca Pty Ltd*,[68] Gotterson JA noted that s 207B confers upon the insurer rights of recoupment for the compensation paid in certain specified events. The indemnity is one of the rights of recoupment. The events applicable to recoupment by way of the indemnity are specified in s 207B(8).

[46] CSR sought to distinguish the observations of Barwick CJ in *Tickle* on the grounds that those observations concerned a statutory regime which did not include a provision expressed in similar language to s 207B(8). However, it is clear that well prior to the 1990 Act's introduction of a provision with similar language to s 207B(8), the independence of the statutory cause of action given to an insurer was well recognised. Hence, in *WorkCover Queensland v Amaca Pty Ltd*,[69] the High Court cited authorities, including *Tickle* and another dating back to the early 20th century, in support of the independence of an insurer's statutory cause of action.[70] Further, the High Court made clear in *WorkCover Queensland v Amaca* that it would be inconsistent with the policy of the Act to construe it as providing for the

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62 Rodney Huddleston and Geoffrey Pullum, *The Cambridge Grammar of the English Language*, (Cambridge University Press, 2002) 50.

63 *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR 617, 661 (Stephen J); *Kathleen Investments (Australia) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117, 159 (Murphy J); *OV and OW v Members of the Board of Wesley Mission Council* (2010) 79 NSWLR 606, 617 [35]-[36] (Basten JA and Handley AJA), 610-11 [9] (Allsop P).

64 *Suntory (Aust) Pty Ltd v Federal Commissioner of Taxation* (2009) 177 FCR 140, 149 [37] (Finn, Emmett and Stone JJ).

65 (2010) 241 CLR 420, 438 [48].

66 *Tickle Industries Pty Ltd v Hann* (1974) 130 CLR 321, 326.

67 Ibid 328, 331.

68 [2013] 2 Qd R 276, 294 [38].

69 (2010) 241 CLR 420, 430 [19].

70 *Smith's Dock Co v John Readhead & Sons* [1912] 2 KB 323, 327.

existence of a right of indemnity and then denying recovery under that indemnity on the footing that had the person who received compensation brought an action it would have been time barred.[71] This observation was a strong endorsement of Barwick CJ's essential reasoning in *Tickle* to the effect that "…the right to indemnity… was a right of the compensating [insurer], in no sense in the control of the injured employee or of his dependants",[72] that "the right of the [insurer] is regarded as independent of the action or inaction of the employee"[73] and that it was "necessarily just that the employee shall not be able to defeat [the insurer's] right of recovery."[74] In *Workers' Compensation Board of Queensland v The Nominal Defendant (Queensland)*,[75] Connolly J encapsulated Barwick CJ's reasoning in *Tickle* in the following terms:

> "An essential feature of the reasoning is that the employee is not to be able to defeat the right to indemnity by his own action or inaction. The right to indemnity is independent of the action or inaction of the employee and is a right directly against the wrongdoer."

[47] It is consistent with the policy of the Act that no action or inaction by the person to whom compensation has been paid (such as taking proceedings to recover damages for a separate cause of action or failing to take such a proceeding) should extinguish or defeat the insurer's statutory right to indemnity.[76]

[48] The construction I have preferred, which reads "has … taken proceedings to recover, damages" as referencing an existing proceeding that is being used by the person who received compensation to recover damages, means that, for so long as that state of affairs exists, the insurer may not pursue the statutory right of indemnity. The mere fact that a person who has received compensation has taken proceedings to recover damages does not extinguish or defeat the insurer's right of indemnity. Rather, that proceedings are not being used to recover damages, is a condition of the enforcement of the right or a contingency upon which the right is dependent.[77] In *Tickle*, Barwick CJ spoke in terms of the insurer's right being "conditioned".[78] A right subject to this type of condition or contingency may still properly be described as an accrued right.[79]

[49] If, in any case, a person to whom compensation has been paid takes proceedings to recover damages, the insurer's entitlement to be indemnified will await the determination of that person's proceeding. If damages are awarded in that proceeding, the amount of compensation becomes a first charge on the award. If, however, no remedy is awarded in that proceeding because, for example, a time bar is successfully raised by way of defence or the proceeding is dismissed for want of prosecution, the insurer would remain entitled to claim under the indemnity following the determination or dismissal of the proceeding. In such a case, the determination or dismissal of the proceeding does not affect "the liability" of the

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71 *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420, 433 [29].
72 *Tickle Industries Pty Ltd v Hann* (1974) 130 CLR 321, 327.
73 *Tickle Industries Pty Ltd v Hann* (1974) 130 CLR 321, 327-8.
74 *Tickle Industries Pty Ltd v Hann* (1974) 130 CLR 321, 326-327.
75 [1989] 1 Qd R 356, 358.
76 *Tickle Industries Pty Ltd v Hann* (1974) 130 CLR 321, 328.
77 *Australand Corporation (Qld) Pty Ltd v Johnson* [2008] 1 Qd R 203, 251 [133] (Keane JA).
78 *Tickle Industries Pty Ltd v Hann* (1974) 130 CLR 321, 330, 334.
79 *Australand Corporation (Qld) Pty Ltd v Johnson* [2008] 1 Qd R 203, 251 [133] (Keane JA); *Free Lanka Insurance Co Ltd v Ranasinghe* [1964] AC 541, 552; *Esber v The Commonwealth* (1992) 174 CLR 430, 440.

wrongdoer for the purpose of the insurer's separate and independent claim to indemnity.

[50] That the insurer might have to await the determination of a worker's action is not unusual in the historical context of workers' compensation legislation.[80] Here, there is a further relevant consideration. The subrogation which now appears in paragraph (b) of s 207B(8) was first introduced by the 1990 Act in a provision which also introduced the words "not … taken proceedings to recover, damages". The precise nature and extent of the subrogation contemplated by paragraph (b) of s 207B(8) remains unsettled and this present case does not provide a proper vehicle for determining that controversy.[81] What is settled is that paragraph (b) of s 207B(8) provides a limited, ancillary subrogation to the rights of the person to whom compensation has been paid to the extent necessary to aid the statutory indemnity.[82] The subrogation, albeit ancillary and limited, is to the rights of that person. If that person is using proceedings to recover damages, the conduct of those proceedings may involve the exercise of rights to which the insurer would be subrogated in aid of the indemnity. It is understandable that the pursuit of the indemnity, aided by that subrogation, should have to await the determination of those proceedings.

[51] CSR's further argument was premised on the success of the appellants' primary argument. As the primary argument has failed, it is not necessary to express any view about the further argument.

[52] The notice of contention was directed to the syntax of s 207B(8) and placed particular significance on the word "or" as it appeared in the chapeau. In the context of this provision, the word "or" appears as "a logically negated or".[83] Hence, the chapeau should be read "has not recovered and has not taken proceedings to recover". The interpretation suggested by the notice of contention would leave no sensible intended operation for the words "taken proceedings to recover, damages". The interpretation would also contemplate the insurer being subrogated to the rights of a person where that person was using proceedings to recover damages. In my view, that contemplated circumstance is not consistent with the intended operation of the provision.

[53] The orders that should be made in appeal 558 of 2022 are these:

1. The appeal is dismissed.

2. The appellants pay the respondent's costs of and incidental to the appeal.

[54] The orders that should be made in appeal 561 of 2022 are these:

1. The appeal is dismissed.

2. The appellant pay the respondent's costs of and incidental to the appeal.

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80 *Tickle Industries Pty Ltd v Hann* (1974) 130 CLR 321, 329.

81 *WorkCover Queensland v Seltsam Pty Ltd* (2001) 53 NSWLR 518, 522-524; *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420, 430 [18].

82 *WorkCover Queensland v Seltsam Pty Ltd* (2001) 53 NSWLR 518, 522-524; *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420, 429 [16].

83 Rodney Huddleston and Geoffrey Pullum, *The Cambridge Grammar of the English Language*, (Cambridge University Press, 2002) 1296.