

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Wicks v Workers' Compensation Regulator (No. 2)* [2021] QIRC 112

PARTIES: **Wicks, Helen**
(Appellant)

v

Workers' Compensation Regulator
(Respondent)

CASE NO.: WC/2020/4

PROCEEDING: Application in existing proceedings

DELIVERED ON: 1 April 2021

HEARING DATE: On the papers

MEMBER: Merrell DP

DATES OF WRITTEN SUBMISSIONS: Appellant's and Respondent's written submissions filed on 22 January 2021

ORDER: **The Respondent pays the Appellant's costs fixed in the sum of \$248.70.**

CATCHWORDS: COSTS - application in existing proceedings by the Respondent to dismiss worker's appeal - Respondent's application in existing proceedings dismissed - decision about costs - whether the Commission has power, pursuant to s 536 or s 545 of the *Industrial Relations Act 2016*, to award costs in relation to an application in existing proceedings in an appeal under the *Workers' Compensation and Rehabilitation Act 2003* - whether Commission has power, pursuant to s 558(3) of the *Workers' Compensation and Rehabilitation Act 2003* or s 132(1) of the *Workers' Compensation and Rehabilitation Regulation 2014*, to award costs in relation to an application in existing proceedings in an appeal under the *Workers' Compensation and Rehabilitation Act 2003* - order as to costs made

LEGISLATION: *Acts Interpretation Act 1954*, s 36 and sch 1

Fair Work Act 2009, s 570

Industrial Relations Act 1999, s 326

Industrial Relations Act 2016, s 448, s 536, s 541, s 545, s 548, s 553, s 558 and sch 2

Industrial Relations (Tribunals) Rules 2011, r 70 and r 226

Statutory Instruments Act 1992, s 4, s 14(1) and sch 1

Uniform Civil Procedure (Fees) Regulation 2019, sch 2, pt 2 and pt 3

Uniform Civil Procedure Rules 1999, r 693 and sch 2, pt 2, scale C

WorkCover Queensland Act 1996, s 506

WorkCover Queensland Regulation 1997, s 75

Workers' Compensation Act 1990, s 98

Workers' Compensation and Rehabilitation Act 2003, s 131, s 548A, s 552, s 552A, s 554, s 555, s 556, s 557, s 558, s 560A, s 561 and s 563

Workers' Compensation and Rehabilitation Regulation 2003, s 113

Workers' Compensation and Rehabilitation Regulation 2014, s 132

Workers' Compensation Regulation 1992, s 31

CASES:

Brisbane City Council v Gillow & Simon Blackwood (Workers' Compensation Regulator) [2016] ICQ 007; (2016) 255 IR 268

Canton v Workers' Compensation Regulator [2019] QIRC 145

Certain Lloyd's Underwriters v Cross [2012] HCA 56; (2012) 248 CLR 378

Church v (Simon Blackwood) Workers'

Compensation Regulator [2015] ICQ 031;
(2015) 252 IR 461

Commissioner of Police of New South Wales v Eaton [2013] HCA 2; (2013) 252 CLR 1

Ellis v Workers' Compensation Regulator
[2020] QIRC 201

Gambaro v Workers' Compensation Regulator
[2017] ICQ 005

Hooyer v Workers' Compensation Regulator
[2020] QIRC 163

Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No. 3)
[2001] QCA 191; [2003] 1 Qd R 26

Kim v Workers' Compensation Regulator [2019]
ICQ 14

Kujawa v Workers' Compensation Regulator
[2020] QIRC 179

Melbourne Stadiums Ltd v Sautner [2015]
FCAFC 20; (2015) 317 ALR 665

Northern Territory v Sangare [2019] HCA 25;
(2019) 265 CLR 164

Project Blue Sky Inc. v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355

R v A2 [2019] HCA 35; (2019) ALJR 1106

Re Feez Ruthning's Bill Of Costs (1989) 1 Qd R
55

Re JJT; ex parte Victorian Legal Aid [1998]
HCA 44; (1998) 195 CLR 184

Smith v R [1994] HCA 60; (1994) 181 CLR 338

Truffet v Workers' Compensation Regulator
[2020] ICQ 13

VCB National Services Pty Ltd v True Feelings Pty Ltd [2004] QIC 56; (2004) 177 QGIG 28

Wicks v Workers' Compensation Regulator
[2021] QIRC 001

APPEARANCES:

Ms H. Blattman of Counsel directly instructed
by Ms K. Bednarek of the Workers'
Compensation Regulator

Mr J. Shepley of Counsel directly instructed by
Ms H. Wicks

Reasons for Decision

Introduction

- [1] By decision dated 4 January 2021, I dismissed the Regulator's application in existing proceedings filed on 8 June 2020 ('the Regulator's application') which sought to dismiss Ms Wicks' appeal under the *Workers' Compensation and Rehabilitation Act 2003* ('the WCR Act').¹ The basis for the Regulator's application was that Ms Wicks' relevant application for compensation was not valid and enforceable pursuant to s 131(1) of the WCR Act. I also made an order that the parties were to file written submissions in relation to costs. Both parties have made submissions about the costs of the Regulator's application.
- [2] Ms Wicks submitted that, by my earlier decision, I decided that the Regulator was to pay Ms Wicks' costs and that the only issue was '... how those fees would be calculated.'
- [3] I made no such decision and I made no such order.
- [4] The only order I made in relation to costs was that the parties were to file submissions. As a consequence, Ms Wicks' submissions only go to the amount of costs that she claims the Regulator should be ordered to pay her.
- [5] The questions that presently require determination are whether I have a power to make an order as to costs following on from the dismissal of the Regulator's application, and if so, whether I should make such an order.
- [6] For the reasons that follow, I am of the view that I do have the power to order that the Regulator pays Ms Wicks' costs and that such an order should be made.

Does the Commission have a power to make an order for costs in relation to the dismissal of the Regulator's application?

- [7] The power to order costs against a party to proceedings in court is always referable to a statutory provision because the common law did not sanction the giving of costs between parties.² The source of the power to award costs must therefore be found in legislation.³

¹ *Wicks v Workers' Compensation Regulator* [2021] QIRC 001.

² *Re Feez Ruthning's Bill Of Costs* (1989) 1 Qd R 55, 90 (McPherson J).

[8] The Regulator identifies s 558 of the WCR Act and s 132 of the *Workers' Compensation and Rehabilitation Regulation 2014* ('the WC Regulation') as potential sources of statutory power for the Commission to award costs in the present matter.

[9] Section 558 of the WCR Act provides:

558 Powers of appeal body

- (1) In deciding an appeal, the appeal body may-
 - (a) confirm the decision; or
 - (b) vary the decision; or
 - (c) set aside the decision and substitute another decision; or
 - (d) set aside the decision and return the matter to the respondent with the directions the appeal body considers appropriate.
- (2) If the appeal body acts under subsection (1)(b) or (c), the decision is taken for this Act, other than this part, to be the decision of the insurer.
- (3) Costs of the hearing are in the appeal body's discretion, except to the extent provided under a regulation.

[10] Section 132 of the WC Regulation provides:

132 Costs-proceeding before industrial magistrate or industrial commission

- (1) A decision to award costs of a proceeding heard by an industrial magistrate or the industrial commission is at the discretion of the magistrate or commission.
- (2) If the magistrate or commission awards costs-
 - (a) costs in relation to counsel's or solicitor's fees are as under the *Uniform Civil Procedure Rules 1999*, schedule 2, part 2, scale C; and
 - (b) costs in relation to witnesses' fees and expenses are as under the *Uniform Civil Procedure (Fees) Regulation 2019*, part 3; and
 - (c) costs in relation to bailiff's fees are as under the *Uniform Civil Procedure (Fees) Regulation 2019*, schedule 2, part 2.
- (3) The magistrate or commission may allow costs up to 1.5 times the amounts provided for under subsection (2)(a), in total or in relation to any item, if the magistrate or commission is satisfied the amounts are inadequate having regard to-
 - (a) the work involved; or
 - (b) the importance, difficulty or complexity of the matter to which the proceeding relates.

[11] The Regulator also identified s 536(h) of the *Industrial Relations Act 2016* ('the IR Act') and s 545 of the IR Act as potential sources of power to make an order for costs.

[12] In considering whether or not I have the power to make an order for costs in relation to the dismissal of the Regulator's application, it is first necessary to consider whether such power exists under the provisions of the IR Act as identified by the Regulator.

Section 536 and s 545 of the Industrial Relations Act 2016

[13] Section 536 of the IR Act provides:

536 Interlocutory proceedings

³ *Re JJT; ex parte Victorian Legal Aid* [1998] HCA 44; (1998) 195 CLR 184 (*Re JJT*), [41] (Kirby J).

For conducting proceedings under this Act or another Act, the court, commission or registrar may make orders or give directions the court, commission or registrar considers just and necessary in relation to interlocutory matters to be taken before the hearing of the proceedings, including matters about the following-

- (a) naming and joinder of parties;
- (b) persons to be served with notice of proceedings;
- (c) calling of persons to attend in proceedings;
- (d) particulars of the claims of the parties;
- (e) the issues to be referred to the court or commission;
- (f) admissions, discovery, interrogatories or inspection of documents or property;
- (g) examination of witnesses;
- (h) costs of the interlocutory proceedings;
- (i) place, time and mode of hearing of the cause.

[14] Assuming that s 536 of the IR Act applies to appeals under ch 13, pt 3, div 1 of the WCR Act, the Regulator submits⁴ that s 536(h) should be read subject to the specific restriction on the awarding of costs 'in relation to a proceeding' imposed in s 545 of the IR Act because the presumed intention of Parliament was that the specific provision, s 545 of the IR Act, prevailed over the general provision in s 536(h).

[15] The predecessor of s 536, s 326 of the *Industrial Relations Act 1999* ('the 1999 Act'), was considered by the Industrial Court of Queensland ('the Court') in *VCB National Services Pty Ltd v True Feelings Pty Ltd*.⁵

[16] At first instance, the respondent, pursuant to s 326(h) of the 1999 Act, was successful in obtaining a costs order in its favour at a directions hearing. No interlocutory application was made. The appellant appealed against the costs order. In setting aside the costs order, President Hall held:

The Commission dealt with the application for costs on the assumption that s. 326(h) of the Act was a grant of power to award costs in interlocutory proceedings. The submissions at first instance encouraged the assumption, on the appeal counsel for the appellant challenges the assumption. In my view counsel is entitled to challenge the assumption. There is no issue of fact or discretion to bind the appellant to its argument at first instance. The argument is all about statutory construction.

...

I have emphasised the words "orders" and "considers just and necessary" because counsel for the appellant emphasises these words and submits that in interlocutory proceedings, the Commission

⁴ Citing *Smith v R* [1994] HCA 60; (1994) 181 CLR 338 ('*Smith*') 348 (Mason CJ, Dawson, Gaudron and McHugh JJ).

⁵ [2004] QIC 56; (2004) 177 QGIG 28. At that time, s 326 of the *Industrial Relations Act 1999* provided:

326 Interlocutory proceedings

In an industrial cause, the president, commission or registrar may make orders, or give directions, the president, commission or registrar considers just and necessary in relation to interlocutory proceedings to be taken before the hearing of the cause, including proceedings about-

- (a) naming and joinder of parties; or
- (b) persons to be served with notice of proceedings; or
- (c) calling of persons to attend in proceedings; or
- (d) particulars of the claims of the parties; or
- (e) the issues to be referred to in the court or commission; or
- (f) admissions, discovery, interrogatories or inspection of documents or property; or
- (g) examination of witnesses; or
- (h) costs of the interlocutory proceedings; or
- (i) place, time and mode of hearing of the cause.

may make such orders as it "considers just and necessary" about any of the matters at paragraphs (a) to (i).

In my view the section cannot be read in that way. Paragraphs (a) to (i) are but an inclusive (and not exhaustive) list of examples of the matters upon which interlocutory proceedings may touch. The power vested by s. 326(h) of the Act is a power to give orders and directions considered necessary and just to facilitate the conduct of interlocutory proceedings to be taken before the hearing of the cause. It does not follow that costs may not be awarded in respect of interlocutory proceedings. An interlocutory application is an application within the meaning of s. 335, compare *Seair Trading Co Pty Ltd v Lewin and Ors* (2000) 165 QGIG 789. But, as in any other case under s. 335, costs may be awarded only where the interlocutory application was made vexatiously or without reasonable cause (by s. 335(1)(b) reinstatement cases are special cases).

Here, of course, there was no interlocutory application. The Commission acted on its own motion. This [sic] being no interlocutory application, there was no power to award costs. I may add that it is because the costs power at s. 335 is limited to applications made "vexatiously or without reasonable cause" that s. 326(h) refers to matters relating to the interlocutory whilst the other paragraphs refer to matters relating to the cause. Very often, issues about vexation or reasonableness will be dealt with (perhaps in writing) after the decision upon the interlocutory application is known.

- [17] On this authority, s 536 of the IR Act relevantly confers discretion on the Commission, for proceedings under the IR Act or another Act, to make orders and directions the Commission considers just and necessary in relation to interlocutory matters to be taken before the hearing of the proceedings. The matters referred to in paragraphs (a) to (i) are not exhaustive and are illustrative of the types of matters that may be the subject of interlocutory proceedings.
- [18] Therefore, if there is a power to make an order for costs of interlocutory proceedings for proceedings under another Act, if s 545 of the IR Act does not apply to such a proceeding, the power must be in another Act.
- [19] For these reasons, my view is that s 536(h) of the IR Act is not a source of power upon which the Commission may award costs in respect of the Regulator's application.
- [20] The next question, therefore, is whether there is a power to make an order for costs in relation to the Regulator's application in the IR Act.
- [21] Section 545 of the IR Act relevantly provides:
- 545 General power to award costs**
- (1) A person must bear the person's own costs in relation to a proceeding before the court or commission.
 - (2) However, the court or commission may, on application by a party to the proceeding, order-
 - (a) a party to the proceeding to pay costs incurred by another party if the court or commission is satisfied-
 - (i) the party made the application or responded to the application vexatiously or without reasonable cause; or
 - (ii) it would have been reasonably apparent to the party that the application or response to the application had no reasonable prospect of success;
- [22] I am not persuaded that s 545 of the IR Act is a source of power to make an order for costs in relation to the Regulator's application. There are a number of reasons for this.

- [23] First, where there is a conflict or inconsistency between general and specific provisions in two separate Acts, the presumed but rebuttable intention of Parliament is that the specific provisions prevail in relation to the subject matter.⁶
- [24] Section 558(3) of the WCR Act is found within ch 13, pt 3, div 1 of the WCR Act and is a provision dealing specifically with, relevantly to appeals made to this Commission under that division, the power of the Commission to award costs. Section 132 of the WC Regulations applies to a proceeding heard by an Industrial Magistrate or the Commission under the WCR Act.
- [25] On the other hand, s 545 of the IR Act concerns the general power of the Court and the Commission to award costs and that section makes no express reference to proceedings under the WCR Act.
- [26] There are other indications in the IR Act that s 545 of the IR Act has no application where a specific provision is made elsewhere concerning the power to award costs. Section 548 of the IR Act provides that the provisions for costs contained in sch 2 to the IR Act apply to a proceeding heard by the Commission under the *Anti-Discrimination Act 1991* ('the AD Act') and to an appeal to the Court under pt 6 of the IR Act against a decision of the Commission in relation to a proceeding heard by the Commission under the AD Act.
- [27] Secondly, s 558(3) of the WCR Act provides that costs '... of the hearing are in the appeal body's discretion, except to the extent provided under a regulation.' Section 132 of the WC Regulation does affect the discretion to be exercised under s 558(3) of the WCR Act:
- by limiting the extent to which costs for counsel's or solicitor's fees can be awarded to those contained in sch 2, pt 2, scale C of the *Uniform Civil Procedure Rules 1999* (Qld) ('the UCPR');
 - by providing that costs in relation to witness fees and expenses are as under the *Uniform Civil Procedure (Fees) Regulation 2019*, pt 3;
 - by providing that costs in relation to bailiff's fees are as under the *Uniform Civil Procedure (Fees) Regulation 2019*, sch 2, pt 2; and
 - in relation to counsel's or solicitor's fees, by conferring specific discretion to allow a greater amount of costs, up to 1.5 times, to be awarded where the Commission is satisfied the amounts are inadequate having regard to the work involved or the importance, difficulty or complexity of the matter to which the proceeding relates.

⁶ *Smith* (n 4) 348 and *Commissioner of Police of New South Wales v Eaton* [2013] HCA 2; (2013) 252 CLR 1, [21] Heydon J and [45]-[46] (Crennan, Kiefel and Bell JJ).

[28] By contrast, pursuant to s 545(1) of the IR Act, a person must bear the person's own costs in relation to a proceeding before the Court or the Commission. Section 545(2) of the IR Act provides that the Court or the Commission may, on application by a party to the proceeding, order:

- that a party to the proceeding pay costs incurred by another party if the Court or the Commission is satisfied of certain matters; or
- that a representative of a party pay costs incurred by another party to the proceeding if the Court or the Commission is satisfied of certain matters.

[29] Furthermore, pursuant to s 545(3) of the IR Act, the Court or the Commission may order a party to pay another party an amount reasonably payable to a person who is not a lawyer, for representing the other party.

[30] By further contrast in terms of making an order for costs under s 545 of the IR Act, r 70(2) of the *Industrial Relations (Tribunals) Rules 2011* ('the Rules') sets out the particular scale of costs under the UCPR to which the Court, a Full Bench of the Commission or the Commission constituted by a single-member, may have regard. In addition, the Court, pursuant to r 70(3) of the Rules, has discretion to order that costs be assessed by the Registrar.

[31] Thirdly, the WCR Act expressly deals with, relevantly, appeals to the Court from decisions of the Commission.⁷ Under the WCR Act, a party aggrieved by a decision of the Commission under ch 13, pt 3, div 1 can appeal to the Court⁸ and the IR Act applies to the appeal.⁹ However, the WCR Act expressly deals with the issue of costs on such an appeal. The Court may order a party to pay costs incurred by another party only if satisfied the party made the application vexatiously or without reasonable cause.¹⁰

[32] Finally, reference should be made to s 553 of the IR Act which provides:

553 General application of provisions

The provisions of this Act providing for the powers of and procedures before the court, the commission or an Industrial Magistrates Court apply in relation to the jurisdiction of the court, the commission or an Industrial Magistrates Court under this Act or another Act, unless the contrary intention appears.

[33] In respect of the conduct of an appeal under ch 13, pt 3, div 1 of the WCR Act, the provisions in that division, plus the applicable provisions in the UCPR and the Rules, effectively provide a complete statement of the matters necessary for the conduct of such an appeal, such that a contrary intention appears and the IR Act does not apply.¹¹ The reasoning I have referred to in paragraphs [24]-[30] above demonstrates the contrary intention appearing in the WCR Act and the WC Regulation as to the power of

⁷ *Workers' Compensation and Rehabilitation Act 2003* s 560A(b).

⁸ *Workers' Compensation and Rehabilitation Act 2003* s 561(1).

⁹ *Workers' Compensation and Rehabilitation Act 2003* s 561(2).

¹⁰ *Workers' Compensation and Rehabilitation Act 2003* s 563(1). Costs of the order are to be in accordance with r 70 of the *Industrial Relations (Tribunals) Rules 2011: Workers' Compensation and Rehabilitation Act 2002* s 563(2).

¹¹ *Brisbane City Council v Gillow & Simon Blackwood (Workers' Compensation Regulator)* [2016] ICQ 007; (2016) 255 IR 268, [52] (Martin J, President).

the Commission to make a costs order for an appeal under ch 13, pt 3, div 1 of the WCR Act.

- [34] For all these reasons, my opinion is that the more general provisions in s 545 of the IR Act must give way to the contrary specific powers in s 558(3) of the WCR Act and in s 132 of the WC Regulation. Section 545 of the IR Act does not apply to the conduct and determination of an appeal under ch 13, pt 3, div 1 of the WCR Act.¹²
- [35] The next question is whether there is a provision in the WCR Act or the WC Regulation that confers on the Commission power to award costs in relation to the Regulator's application.

Section 558 of the Workers' Compensation and Rehabilitation Act 2003

- [36] The Regulator submits that the decision '... was of an interlocutory application and not an appeal' and, on that basis, s 558 of the WCR Act does not empower the Commission to award costs where the appeal has not been heard.
- [37] In support of that submission, the Regulator refers to the decisions in *Hooyer v Workers' Compensation Regulator*¹³ and *Ellis v Workers' Compensation Regulator*.¹⁴ However, these cases are about different factual circumstances.
- [38] In *Hooyer*, a consent order was made by the Commission allowing the worker's appeal under the WCR Act, but leaving the issue of costs to be determined by the Commission.¹⁵ A similar circumstance occurred in *Ellis*, save that the appellant in that case filed an application in existing proceedings seeking an order that the Regulator pay the appellant's '... reasonable legal costs and disbursements incurred in lodging and pursuing the appeal'.¹⁶
- [39] Neither *Hooyer* or *Ellis* involved the question of whether the Commission had a power to award costs in respect of an application in existing proceedings heard and determined prior to the hearing of, or a decision made under s 558(1) of the WCR Act about, an appeal against a 'review decision' under ch 13, pt 3, div 1 of the WCR Act.¹⁷

¹² Similar reasoning was applied by Industrial Commissioner Knight in *Kujawa v Workers' Compensation Regulator* [2020] QIRC 179, [6]. In *Kim v Workers' Compensation Regulator* [2019] ICQ 14, the Court, at [53], held that s 545 of the IR Act governed the issues of costs in the proceedings before the Commission. However, in that case, the decision of the Commission, referred to at [11], was to dismiss the appellant's appeal pursuant to s 541 of the IR Act. In *Gambaro v Workers' Compensation Regulator* [2017] ICQ 005, the Court held that s 545 of the IR Act governed its power to award costs, but in that case, the respondent sought an order that the appellant's appeal to the Court be dismissed pursuant to s 541(b) or s 558 of the IR Act or set aside pursuant to r 226 of the Rules. At [4], the Court held that its decision did not determine the substantive appeal. At [50], the Court exercised discretion under r 226 to dismiss the appeal against the decision of the Commission. Therefore it may be arguable that s 545 of the IR Act has application to proceedings before the Commission under the ch 13, pt 3, div 1 of the WCR Act where specific power under the IR Act or under the Rules can be and is enlivened by the Commission.

¹³ [2020] QIRC 163 (*Hooyer*).

¹⁴ [2020] QIRC 201 (*Ellis*).

¹⁵ *Hooyer* (n 13) [1]-[5] (Industrial Commissioner Pidgeon).

¹⁶ *Ellis* (n 14) [1]-[3] (Industrial Commissioner McLennan).

¹⁷ Namely, the hearing *de novo* of the case which was before the Regulator or insurer: *Church v (Simon Blackwood) Workers' Compensation Regulator* [2015] ICQ 031; (2015) 252 IR 461 (*Church*) [33] (Martin J, President).

[40] The Regulator also referred to the decision in *Canton v Workers' Compensation Regulator*.¹⁸ In that case, the appellant, who was an unsuccessful applicant for compensation for a psychological injury, applied for an order that he should be entitled to lead evidence in accordance with his statement of facts and contentions including evidence regarding the employer's conduct subsequent to what was described as 'the electrical shock incident'.¹⁹ The Vice President made an order in favour of the appellant and further ordered that the Regulator pay the appellant's costs of 'this application' to be agreed, or failing agreement, to be subject of an application to the Commission. The basis upon which the Vice President made that order was s 558(3) of the WCR Act.²⁰ The Regulator submits that the arguments it raises about s 558 of the WCR Act were not raised in *Canton*.

[41] In *R v A2*,²¹ Kiefel CJ and Keane J, in summarising the principles of statutory construction, stated in part:

32 The method to be applied in construing a statute to ascertain the intended meaning of the words used is well settled. It commences with a consideration of the words of the provision itself, but it does not end there. A literal approach to construction, which requires the courts to obey the ordinary meaning or usage of the words of a provision, even if the result is improbable, has long been eschewed by this Court. It is now accepted that even words having an apparently clear ordinary or grammatical meaning may be ascribed a different legal meaning after the process of construction is complete. This is because consideration of the context for the provision may point to factors that tend against the ordinary usage of the words of the provision.

33 Consideration of the context for the provision is undertaken at the first stage of the process of construction. Context is to be understood in its widest sense. It includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole. It extends to the mischief which it may be seen that the statute is intended to remedy. "Mischief" is an old expression. It may be understood to refer to a state of affairs which to date the law has not addressed. It is in that sense a defect in the law which is now sought to be remedied. The mischief may point most clearly to what it is that the statute seeks to achieve.

[42] The meaning of the provision in a statute must be determined by reference to the language of the instrument viewed as a whole²² and the legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals.²³ The purpose of the legislation must be derived from what the legislation says, and not from any assumption about the desired or desirable reach or operation of the relevant provisions.²⁴

[43] If a statutory power to award costs exists, it must be construed to achieve its identified purpose.²⁵ A section empowering orders for costs will be construed in the context of any peculiarities of the legislation in which it appears.²⁶

¹⁸ [2019] QIRC 145.

¹⁹ *Ibid* [2]-[6].

²⁰ *Ibid* [30]-[33].

²¹ [2019] HCA 35; (2019) ALJR 1106 (citations omitted) (Nettle and Gordon JJ at [148] agreeing).

²² *Project Blue Sky Inc. v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, [69] (McHugh, Gummow, Kirby and Hayne JJ).

²³ *Ibid* [70].

²⁴ *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378, [26] (French CJ and Hayne J).

²⁵ *Re JTT* (n 3) [41].

[44] Section 558(1) of the WCR Act sets out the decisions the Commission may make in respect of an appeal made to it under ch 13, pt 3, div 1 of the WCR Act. Section 558(3) of the WCR Act provides:

- (3) Costs of the hearing are in the appeal body's discretion, except to the extent provided under a regulation.

[45] In my view, the question is whether, applying the rules of construction referred to above, s 558(3) of the WCR Act encompasses the hearing and determination of an application in existing proceedings in relation to an appeal under ch 13, pt 3, div 1 of the WCR Act, where the Commission has made no decision pursuant to s 558(1) of the WCR Act.

[46] The Commission has jurisdiction to hear and decide all appeals properly made to it under the IR Act or another Act.²⁷ This includes appeals made to it under ch 13, pt 3, div 1 of the WCR Act.

[47] Section 558 of the WCR Act is set out in paragraph [9] of these reasons. The heading to that section is '**Powers of appeal body.**' Section 558(1) of the WCR Act concerns the different powers that, relevantly, the Commission has in deciding an appeal against a review decision, within the meaning of s 545 and s 548(1)(a) of the WCR Act, under ch 13, pt 3, div 1 of that Act.

[48] Should the phrase 'Costs of the hearing', in s 558(3) of the WCR Act, be narrowly construed to only mean the costs of the hearing from which the Commission exercises one of the powers available to it under s 558(1) of the WCR Act? Support for such a construction may be found in the legislative scheme in ch 13, pt 3, div 1 of the WCR Act.

[49] Section 552 of the WCR Act provides:

552 Notice of time and place for hearing

The registrar of the industrial commission or the Magistrates Court at which the notice of appeal is filed must give the appellant and the respondent (the *parties*) written notice of the time and place fixed for the hearing of the matter.

[50] The reference to '... the hearing of the matter' referred to in s 552 of the WCR Act is directly referable to the notice of appeal referred to in that section.

[51] Section 552A of the WCR Act provides:

552A Conference

- (1) If the appeal is to the industrial commission, the industrial commission may, before the hearing of the matter, call a conference of the parties.
 (2) The parties must attend the conference.

[52] Section 554(1) of the WCR Act provides that at least 10 business days before 'the hearing', each party must give to each other party any relevant document the party

²⁶ Ibid.

²⁷ *Industrial Relations Act 2016* s 448(1)(d).

wants to adduce as evidence at the hearing. Section 554(2) provides that at 'the hearing', a party cannot rely on a document that was not given to the other party as required by s 554(1) unless the appeal body agrees.

[53] Section 555 of the WCR Act provides:

555 Adjourned hearing

- (1) The appeal body may, at any time before or after the start of the hearing, adjourn the hearing if-
 - (a) the appeal body is satisfied the hearing could be held more conveniently at a future time; or
 - (b) if the appeal body is an industrial magistrate, the appeal body is satisfied that the hearing could be held more conveniently at another place or before another industrial magistrate-
 - (i) having regard to the difficulty or expense of producing witnesses; or
 - (ii) for another appropriate reason.
- (2) If subsection (1)(b) applies-
 - (a) the appeal body must send the relevant documents to the registrar of the appropriate Magistrates Court; and
 - (b) the other industrial magistrate has jurisdiction to decide the matter as if it had been brought before that magistrate.

[54] Section 556(2) of the WCR Act provides that the appeal body may, at any time before or after the start of 'the hearing', order the claimant or a worker to submit to a personal examination by one or more specified registered persons.

[55] Section 557(1) of the WCR Act provides that for the '... proper hearing of an appeal', the Commission may order that anything necessary be supplied, or defects or errors be corrected. Section 557(2) provides that the Commission may make the order at any time before or after the start of '... the hearing.' Section 557(4) provides that 'Costs of the order are in the appeal body's discretion, except to the extent provided under a regulation.'

[56] In respect of the appeal jurisdiction of the Commission under ch 13, pt 3, div 1 of the WCR Act, having regard to the purpose of that division and having regard to the phrase 'the hearing' as used in s 552, s 552A, s 554, s 555, s 556(2) and s 557(2) of the WCR Act, my view is that 'the hearing' in s 558(3) is the hearing from which a decision, under s 558(1) of the WCR Act, is made in an appeal against a review decision.²⁸ It is significant to the construction of the phrase 'the hearing' in s 558(3), that the decisions the Commission can make in determining such an appeal, and its power to award costs, are located where they are in s 558.

[57] By contrast with s 558(1) of the WCR Act, the orders that can be made under s 557(1) are not orders that finally determine the rights of the parties to such an appeal. Thus, the power to make an order for costs 'of the order' in s 557(4) concerns an unique order which does not finally determine the rights of the parties. If the power to make an order for costs 'of the hearing' in s 558(3) was broad enough to apply to decisions other than those in s 558(1), then there would be no need for s 557(4) of the WCR Act.

[58] For these reasons, my view is that the Commission does not, pursuant to s 558(3) of the WCR Act, have power to make an order for costs in respect of the Regulator's

²⁸ There may be a related question of whether s 558(3) of the WCR Act confers power to make an order for costs where one party concedes an appeal at a point before a hearing.

application. This is because, in making the decision about the Regulator's application, I did not, in a hearing *de novo*, determine Ms Wicks' present appeal against the review decision of the Regulator by making a decision under s 558(1) of the WCR Act.

Section 132(1) of the Workers' Compensation and Rehabilitation Regulation 2014

[59] The Regulator submits that:

- the phrase '... a proceeding heard' in s 132(1) of the WC Regulation means the hearing of the appeal itself which resolves the proceedings and '... not an interlocutory aspect of them'; and
- such a construction is consistent with the distinction drawn between:
 - a 'matter' being claims or causes of action or the underlying controversies which are raised in the 'proceeding' or 'proceedings' which is or are prosecuted in the court;²⁹
 - the distinction between a 'proceeding' and an 'application in a proceeding' for the purposes of costs as referred to in r 693 of the UCPR;³⁰ and
 - a proceeding and 'interlocutory matters to be taken before the hearing of the proceeding' within the meaning of s 536(h) of the IR Act.

[60] Is s 132(1) of the WC Regulation a source of power for the Commission to award costs in relation to the Regulator's application?

[61] It is legitimate, in construing a power appearing in legislation, to have regard to the course of any amendments which help explain the legislative purpose that lies behind the present provision.³¹

[62] Section 98(2) of the *Workers' Compensation Act 1990* provided that a claimant for entitlement to compensation may appeal to an industrial magistrate against particular decisions. Section 98(5) of that Act provided that after hearing the matter, the Magistrate '... must set aside, affirm or vary the decision.' Section 31 of the *Workers' Compensation Regulation 1992* dealt with the issue of costs and s 31(1) provided that subject to s 31(2) (which prescribed the costs that were allowed) '... costs of proceedings before an industrial magistrate for the purpose of the Act or this regulation are in the discretion of the magistrate.'

²⁹ *Melbourne Stadiums Ltd v Sautner* [2015] FCAFC 20; (2015) 317 ALR 665 ('Sautner'), [156] (Tracy, Gilmore, Jagot and Beach JJ). This case concerned the construction of the costs provisions in s 570 of the *Fair Work Act 2009*.

³⁰ Rule 693 of the *Uniform Civil Procedure Rules 1999* ('UCPR') provides:

693 Application in a proceeding

- (1) The costs of a proceeding do not include the costs of an application in the proceeding, unless the court orders otherwise.
- (2) Subrule (1) applies even if the application is adjourned until the trial of the proceeding in which it is made.

³¹ *Re JJT* (n 3) [41].

[63] The powers of an Industrial Magistrate, contained in s 506 of the *WorkCover Queensland Act 1996* in deciding an appeal, were identical to the powers given to an Industrial Magistrate or the Commission under s 558 of the WCR Act. That included, at s 506(3) of the *WorkCover Queensland Act 1996*, that the costs of the hearing were '... in the magistrate's discretion, except to the extent provided under a regulation.' Section 75(1) of the *WorkCover Queensland Regulation 1997* provided:

- (1) The costs of a proceeding before an industrial magistrate are in the discretion of the magistrate.

[64] When the WCR Act was enacted in 2003, s 558(3) was in the same form as it is presently other than making reference to 'the magistrate's discretion' as opposed to 'the appeal body's discretion.' When made in 2003, s 113(1) of the *Workers' Compensation and Rehabilitation Regulation 2003*³² provided:

- (1) The costs of a proceeding before an industrial magistrate are in the discretion of the magistrate.

[65] When s 113(1) of the *Workers' Compensation and Rehabilitation Regulation 2003* was amended in 2005,³³ to make reference to the Commission, it provided:

- (1) The costs of a proceeding before an industrial magistrate or the industrial commission are in the discretion of the magistrate or commission.

[66] The costs provisions in the *Workers' Compensation Regulation 1992*, the *WorkCover Queensland Regulation 1997* and in the *Workers' Compensation and Rehabilitation Regulation 2003* were expressed to confer a power on either an Industrial Magistrate or, where relevant, the Commission, to make an order about the costs of a proceeding before the Industrial Magistrate or the Commission. In my view, having regard to their history, those provisions were an independent source of power for those tribunals to award costs of proceedings before them.

[67] When the WC Regulation was made in 2014, s 132(1) was enacted in its current form,³⁴ namely:

132 Costs-proceeding before industrial magistrate or industrial commission

- (1) A decision to award costs of a proceeding heard by an industrial magistrate or the industrial commission is at the discretion of the magistrate or commission.

[68] Despite the change in the introductory words of s 132(1) of the WC Regulation compared to s 113(1) of the *Workers' Compensation and Rehabilitation Regulation 2003*, there was nothing in the Explanatory Note to the WC Regulation which indicated that the change in wording was reflective of any change in, or diminution to, the power to make an order for the costs '... of a proceeding heard.'³⁵ The change was to conform to current drafting practice and did not change existing policy.³⁶

³² SL 2003 No. 119.

³³ SL 2004 No. 289, s 17.

³⁴ SL 2014 No. 189.

³⁵ Explanatory Notes for SL 2014, No. 189, s 132, page 21.

³⁶ *Ibid* page 2.

[69] The noun 'proceeding' is not defined in the WCR Act or in the WC Regulation. However, by the combined effect of s 36 and sch 1 to the *Acts Interpretation Act 1954*, it is defined in the WC Regulation³⁷ in the following way:

proceeding means a legal or other action or proceeding.³⁸

[70] There is no contrary intention shown in the WC Regulation as to why that definition should not apply.³⁹

[71] In my view, 'a proceeding', within the meaning of s 132(1) of the WC Regulation means a legal or other action or proceeding commenced before an Industrial Magistrate or the Commission under the WCR Act.

[72] Is an application within existing proceedings 'a proceeding' within the meaning of that section?

[73] In general, a grant of power to a court to make orders as to costs will not, in the absence of the legislative indication to the contrary, be construed narrowly. This is because it is implied from the character of the donee of the power that the power will be exercised judicially and in accordance with established principles.⁴⁰ The provision that I must construe is s 132(1) of the WC Regulation and not the costs provisions in the UCPR or in other legislation.

[74] In my opinion, an application in existing proceedings is a 'proceeding' as defined by the *Acts Interpretation Act 1954*. This is because it is a legal action. There is nothing in s 132(1) of the WC Regulation that indicates that the phrase '... costs of a proceeding heard by the industrial commission' should be limited to the costs of an application that starts a proceeding as opposed to the costs of an application in existing proceedings. In the absence of clear words to the contrary, it would be an unduly narrow construction to hold that 'a proceeding heard' would exclude an application in existing proceedings. For these reasons, my view is that the Regulator's application was 'a proceeding heard' within the meaning of s 132(1) of the WC Regulation.

[75] For the reasons given above, there is a discretionary power to make an order as to costs in relation to the Regulator's application.

Should a cost order be made in Ms Wicks' favour?

[76] A grant of discretion to make an order for costs must be exercised judicially by reference only to considerations relevant to its exercise and upon facts connected with or leading up to the litigation.⁴¹

³⁷ By virtue of the combined effect of s 14(1) and sch 1 of the *Statutory Instruments Act 1992*.

³⁸ Section 36 of the *Acts Interpretation Act 1954* provides:

36 Meaning of commonly used words and expressions

(1) In an Act, a term defined in schedule 1 has the meaning stated in that schedule.

(2) In an Act, a reference to schedule 1 of this Act includes, if the context permits, a reference to this section.

³⁹ *Statutory Instruments Act 1992* s 4.

⁴⁰ *Re JTT* (n 3) [41].

⁴¹ *Northern Territory v Sangare* [2019] HCA 25; (2019) 265 CLR 164, [24] (Kiefel CJ, Bell, Gageler, Keane and Nettle JJ).

[77] The application in existing proceedings was made by the Regulator. Ms Wicks was successful in relation to that application. Ms Wicks directly briefed counsel to draw and settle her submissions in response to that application. The application was heard and determined on the papers. The Regulator did not submit that the costs of its application should be reserved.

[78] Ms Wicks claims 150% of counsel's costs under UCPR, sch 2, pt 2, scale C, namely:

- item 2, instructions to defend - \$1,125;
- item 8(j), counsel's fees, on an application in a proceeding - \$248.70; and
- item 11(a), on hearing with counsel, counsel's fees - \$475.70.

[79] There is no reason for me not to follow the ordinary case that costs follow the 'event',⁴² namely, the event or issues arising in the proceeding.⁴³ To do justice between the parties, I order that the Regulator indemnify Ms Wicks, to the extent allowed under the UCPR, sch 2, pt 2, scale C, item 8(j), for directly engaging counsel in relation to the Regulator's application. Under that scale, that amount is \$248.70. The other costs claimed could not reasonably have been incurred in relation to the Regulator's application.

[80] The matters raised by the Regulator did not give rise to important matters as described in s 132(3) of the WC Regulation. Most of the matters raised had been dealt with in *Church*,⁴⁴ although the facts in the present case were different. Similarly, the matters were not difficult or complex and the work involved was not significant. For these reasons, I am not persuaded that this is a case where I should allow costs of up to 1.5 times of the amount allowed under the relevant scale because that amount is inadequate.

Conclusion

[81] For the reasons given above, s 132(1) of the WC Regulation confers power to make an order for costs in relation to the Regulator's application. I exercise that discretion in favour of Ms Wicks to the extent allowable under the WC Regulation.

Order

[82] I make the following Order:

The Respondent pays the Appellant's costs fixed in the sum of \$248.70.

⁴² *Truffet v Workers' Compensation Regulator* [2020] ICQ 13, [25] (Martin J, President).

⁴³ *Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No. 3)* [2001] QCA 191; [2003] 1 Qd R 26, [84] (McPherson JA).

⁴⁴ *Church* (n 17).