SUPREME COURT OF QUEENSLAND

CITATION:	*Scott v WorkCover Queensland* [2000] QSC 414
PARTIES:	**COLIN MICHAEL SCOTT** (applicant) **v** **WORKCOVER QUEENSLAND** (respondent)
FILE NO:	S9077 of 2000
DIVISION:	Trial Division
DELIVERED ON:	20 November 2000
DELIVERED AT:	Brisbane
HEARING DATE:	27 October 2000
JUDGE:	White J

ORDER:

1. A declaration that the form being exhibit 1 to the affidavit of Peter John Hooper filed 18 October 2000 which on its face purports to be a form approved by the chief executive officer of WorkCover Queensland is not an approved form for the purposes of s 280 of the *WorkCover Queensland Act* 1996.

2. Declarations that the applicant

(a) need not give notice as stipulated by s 280(1) of the *WorkCover Queensland Act* 1996 whether within the period of limitation for bringing a proceeding for damages under the *Limitation of Actions Act* 1974 or otherwise;

(b) need not give WorkCover written notice under s 281 of the *WorkCover Queensland Act* 1996 of any change in relation to the information given in a notice of claim;

(c) need not organise and hold a conference of the parties of the kind referred to in s 293 of the *WorkCover Queensland Act* 1996;

(d) need not make a written formal offer of settlement as required by s 294 of the *WorkCover Queensland Act* 1996; and

(e) need not await the occurrence of the events or any of the events referred to in s 303 of the Act,

before starting a proceeding in a court for damages if there is no approved form as required by s 280 of the *WorkCover Queensland Act* 1996.

CATCHWORDS: WORKERS' COMPENSATION - ENTITLEMENT TO AND LIABILITY FOR COMPENSATION - whether form approved by the chief executive of WorkCover for a notice of claim for damages pursuant to s 280 of the *WorkCover Queensland Act* 1996 conforms with the Act - effect of "approved form" not conforming.

STATUTES - INTERPRETATION - whether regulation requiring person with no legal knowledge to swear to matters involving legal knowledge or understanding is *ultra vires*.

Acts Interpretation Act 1954 (Qld), s 36
Criminal Code, s 193, s 194
Oaths Act 1867 (Qld), s 6, s 14
WorkCover Queensland Act 1996 (Qld), s 279, s 280, s 281, s 285, s 293, s 294, s 303, s 305, s 532, Schedule 1
WorkCover Queensland Regulation 1997 (Qld), s 74(1)(c)(iii), s 74(1)(b)(v), s 74(1)(b)(vi)

Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421, considered
Neuss v Roche Bros Pty Ltd [2000] QCA 130, unreported judgments of 14 April 2000 and 13 June 2000, considered
State of New South Wales v Macquarie Bank Ltd (1992) 30 NSWLR 307, considered

COUNSEL: M Grant-Taylor SC and Dr G Cross for the applicant
D North SC for the respondent

SOLICITORS: Watling Roche for the applicant
Tutt & Quinlan for the respondent

[1] **WHITE J:** The applicant seeks certain declarations about his obligations under the *WorkCover Queensland Act* 1996 ("the Act"). The respondent contends that the issues being theoretical he has no standing to seek declaratory relief. It will be convenient to leave that issue until last. The application constitutes a fundamental attack on the validity of the form approved under s 280(2) of the Act by which a claimant for damages gives a notice of claim to the respondent. It is, as a consequence, an attack on the regime established in Chapter 5 - Access to Damages - Part 5 - Pre-court Procedures, of the Act. The application to some extent revisits the issues raised in *Neuss v Roche Bros Pty Ltd* [2000] QCA 130, unreported

decisions of 14 April and 13 June 2000 which concerned the rights of a claimant for damages when there was no "approved form" pursuant to the *Workers' Compensation Act* 1990 amendments made in 1995.

[2] The applicant, a 53 year old man, completed what purported to be a notice of claim form approved by the chief executive of the respondent ("WorkCover") about an injury which allegedly occurred in the course of his employment on 24 January 1999 as a motor mechanic. He alleges that he has been rendered unemployable as a consequence of an injury to his back. Although the applicant is represented by solicitors, by agreement with them the applicant completed the form without any legal advice. On 18 April 2000 he executed the form and returned it to his solicitors with instructions to serve it in accordance with the requirements of the Act. This occurred on 20 April 2000 when it was served on WorkCover and the applicant's employer.

[3] WorkCover wrote on 29 May 2000 that it was not satisfied that the notice of claim complied with s 280 of the Act in that the answer to question 77 - offer of settlement - included a claim for "stress" which had not been listed as an injury in answer to question 56. WorkCover indicated that the applicant would need to be assessed for such a claim. Schedule C - Method of Calculating Heads of Damage - had been completed by the applicant but WorkCover complained that

> "The heads of damage are not set out in the usual form and in their current state are not capable of acceptance and are therefore non-compliant."

WorkCover noted that the income tax returns for the previous three years as required by s 280(8)(b) had not been supplied. It required that further answers to make the notice of claim compliant were to be provided in the form of a statutory declaration or on a further notice of claim form "which should be sworn/affirmed as instructed in the notice".

[4] The applicant's solicitors responded by letter dated 1 June 2000

> "**Q77** The claimant's answer is sufficient. Stress is not listed at question 56 as no claim is being made for stress as an injury from the incident. Stress is a symptom of the injury. The claimant instructs us that he is claiming for stress as an aspect of pain and suffering he has endured.
>
> **Q77/Schedule C** The claimant has received no legal training and has set out heads of damage that, in his submission, he is entitled to claim. We have advised the claimant that pursuant to **Workcover Queensland Act 1996**:-
>
> 1. Legal training is not a prerequisite for commencing proceedings for damages.
>
> 2 Retaining the services of a solicitor is not a prerequisite for commencing proceedings for damages.
>
> The offer made by our client has been calculated according to the best of his knowledge, information and belief.

> **Section 280(8)(b)** Please find **enclosed*** copies of tax returns requested. We are instructed that our client has disclosed all tax records currently in his power or possession.
>
> We advise the aforementioned are not matters required to be sworn by statutory declaration pursuant to **Section 280 Workcover Queensland Act 1996**."

The solicitors sought advice from WorkCover as to whether the form had been approved and if so by whom and on what date.

[5] Having had no response from WorkCover (although WorkCover's present solicitors had been instructed from 14 June 2000 and were in correspondence with the applicant's solicitors about progressing the claim), the solicitors wrote to WorkCover foreshadowing this application. By letter dated 14 August 2000 WorkCover's solicitors informed the applicant's solicitors that WorkCover considered the applicant's s 280 notice to be compliant.

[6] The appellant seeks declarations that

- the offer of settlement referred to in s 280(6) of the Act need not be included in a notice of claim under s 280(2);
- the written authority referred to in s 280(7) of the Act need not be included in a notice of claim under s 280(2) of the Act;
- a declaration that s 74(1)(c)(iii) of the *WorkCover Queensland Regulation 1997* is a nullity and *ultra vires* the power conferred on the Governor in Council under ss 280 and 530 of the Act and Schedule 1 to the Act;
- a declaration that the approved form referred to in s 280(2)(a) of the Act is a nullity;
- declarations that a plaintiff before starting a proceeding in a court for damages as defined in s 11 of the Act
    - need not give notice as stipulated by s 280(1) of the Act whether within the period of limitation for bringing a proceeding for damages under the *Limitation of Actions Act 1974* or otherwise;
    - need not give WorkCover written notice under s 281 of the Act of any change in relation to the information given in a notice of claim;
    - need not organise and hold a conference of the parties of the kind referred to in s 293 of the Act;
    - need not make a written formal offer of settlement as stipulated by s 294 of the Act; and
    - need not await the occurrences of the events, or any of the events, referred to in s 303 of the Act.

[7] The applicant also seeks a declaration that he have leave pursuant to s 305(1) of the Act, despite non-compliance with requirements of s 280, to bring proceedings against his employer for damages for personal injuries. Mr Grant-Taylor SC for the applicant conceded that such relief was not appropriate. If the declarations or some of them, as sought, are made then there is no requirement for leave under s 305(1). If the applicant is not successful, since WorkCover has deemed the notice of claim to be compliant, there is no basis for granting such leave.

[8] The key elements of the present Act concern more flexible insurance arrangements for employers, comprehensive workplace and other rehabilitation programs for injured workers and pre-court proceedings processes which are expected to bring about early resolution of claims for damages.

[9] It is unnecessary for the resolution of this application to describe the whole of the new scheme as it relates to injured workers but of particular relevance are the provisions of Chapter 5 concerning access to damages. In Chapter 5, "claimant" means a person entitled to seek damages which is to be distinguished from elsewhere in the Act where the expression refers to a person applying for statutory compensation. The provisions of Chapter 5 are described as taking priority over any other legislation and are to be construed as substantive and not merely procedural provisions. s 252.

[10] Only the persons described in s 253 of the Act are entitled to seek damages for an injury sustained as a worker in circumstances creating, independently of the Act, a legal liability in the worker's employer to pay damages to the worker or the worker's dependant, s 11(1). That entitlement is governed by the provisions of Chapter 5. Such a person is a worker who has sustained a work-related impairment of 20 per cent or more ("a certificate injury"); or a worker who has sustained an injury with an impairment of less than 20 per cent and who has elected to seek damages ("a non-certificate injury"); or a worker who has been allowed compensation and has been assessed as having no permanent impairment; or a worker who has not lodged an application for compensation; or a dependant of a deceased worker, s 253(1).

[11] Where a claimant has been assessed as having sustained a certificate injury that person may seek damages only after receiving a notice of assessment from WorkCover, s 256. Where a worker has been notified that he has sustained a non-certificate injury that person may only seek damages after that person has received a notice of assessment from WorkCover, s 259(1). If such a claimant is offered a lump sum compensation for the injury the claimant is not entitled to both payment of the lump sum and damages and is required to make an election to seek damages which is irrevocable, s 259(2) and (3). Where a person has been granted compensation but has not been assessed as having any permanent impairment that person may not seek damages until WorkCover gives that person a notice of assessment and the person has complied with the requirements of Chapter 3 Part 9 Division 3, s 262(2). WorkCover may give that claimant a conditional damages certificate if there is an urgent need to bring proceedings for damages and the claimant's permanent impairment has not been assessed or agreed, sub-s (3). If a conditional certificate is given the claimant may start proceedings for damages for the injury but those proceedings are stayed until WorkCover makes the certificate unconditional and the claimant complies with Parts 5 and 6 of Chapter 5, sub-s (4). WorkCover must make the certificate unconditional when the claimant has been assessed and has been given a notice of assessment, sub-s (5). There are costs implications in respect of the various categories of claimant worker after a court has assessed a claimant's damages, Chapter 5 Part 11.

[12] If a worker has not lodged an application for compensation for injury the worker may seek damages only if WorkCover gives that person a damages certificate. WorkCover may give such a person a conditional damages certificate if there is an

urgent need to bring a proceeding for damages but that proceeding is stayed until the certificate is made unconditional and the person complies with Chapter 5 Parts 5 and 6. If WorkCover decides not to make a damages certificate unconditional then the person who started a proceeding on the basis of the conditional certificate must discontinue the proceeding, s 267(2).

[13] Part 3 provides that the common law duty of mitigation applies to all workers in relation to claims or proceedings for damages. Part 4 contains the familiar requirement that the amount of damages that an employer is legally liable to pay to a claimant for an injury must be reduced by the total amount paid or payable by WorkCover by way of compensation for the injury, s 276.

[14] Part 5 concerns pre-court procedures. The object of Part 5 as set out in s 279 is

> "… to enable WorkCover to enter into early negotiations with claimants to achieve early resolution of claims for damages before the start of court proceedings."

The Explanatory Note describes this Part as intended to

> "
> - implement a simplified procedure for the speedy resolution of claims for personal injury
> - minimise costs associated with the claim for both parties
> - promote early settlement of claims
> - encourage complete preparation and investigation of a damages claim prior to legal proceedings being initiated
> - ensure the claimant is fully informed of the possible costs penalties involved in proceeding further after WorkCover makes an offer or counter-offer to settle."

[15] The central provision of Part 5 is s 280. It provides in sub-s (1)

> "Before starting a proceeding in a court for damages, a claimant must give notice under this section within the period of limitation for bringing a proceeding for the damages under the *Limitation of Actions Act 1974*."

The claimant "must give" WorkCover "a notice of claim in the approved form" and a copy of the notice of claim to the worker's employer, sub-s (2)(a) and (b). By sub-s (3)

> "The notice must include the particulars prescribed under a regulation."

Section 530 of the Act provides that the Governor in Council may make regulations under the Act and a regulation may make provision for anything specified in Schedule 1. Section 6 of Schedule 1 contains the only relevant subject matter concerning Part 5, namely,

> "The proper conduct of WorkCover's insurance business."

The *WorkCover Queensland Regulation* 1997 which commenced on 1 February 1997 provides in s 74 for the particulars to be included in a notice of claim pursuant to s 280 of the Act. Before describing those particulars the scheme of s 280 needs to be further considered. Section 280(4) and (5) provide

> "(4) The claimant must state in the notice -
>
> (a) whether, and to what extent, liability expressed as a percentage is admitted for the injury; or

(b) a statement of the reasons why the claimant can not admit liability.

(5) The notice must be verified by statutory declaration."

[16] The balance of s 280 relates not to what must be *in* the notice of claim but what must *accompany* it. Subsections (6), (7) and (8) provide

"(6) The notice must be accompanied by a genuine offer of settlement or a statement of the reasons why an offer of settlement can not yet be made.

(7) The notice must be accompanied by the claimant's written authority allowing WorkCover to obtain information, including copies of documents relevant to the claim, and in the possession of -

(a) a hospital; or
(b) the ambulance service of the State or another State; or
(c) a doctor, provider of treatment or rehabilitation services or person qualified to assess, functional or vocational capacity; or
(d) the employer or a previous employer; or
(e) insurers that carry on the business of providing workers' compensation insurance, compulsory third party insurance, personal accident or illness insurance, insurance against loss of income through disability, superannuation funds or any other type of insurance; or
(f) a department, agency or instrumentality of the Commonwealth or the State; or
(g) a solicitor, other than where giving the information or documents which breach legal professional privilege.

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

(a) hospital, medical and other reports relating to the injuries sustained by the worker, other than reports obtained by or on behalf of WorkCover; and
(b) income tax returns, group certificates and other documents for the three years immediately before the injury supporting the claimant's claim for lost earnings or diminution of income-earning capacity; and
(c) invoices, accounts, receipts and other documents evidencing the claimant's claim for out-of-pocket expenses."

As can be seen sub-s (7) and (8) relate to information which would be obtained in a common law claim for damages from third party discovery, disclosure and statements of loss and damage.

[17] At the heart of the applicant's submissions is the contention that the form which he completed giving notice of his claim is not a form of the kind contemplated by s 280(2). WorkCover is established as a body corporate with a chief executive officer whose duties are to manage WorkCover under the board of WorkCover, ss 330, 399 and 400. The chief executive may approve forms for use under the Act,

s 532. He may delegate his powers, s 402. An "approved form" is defined in Schedule 3 to the Act by reference to s 532 - "The chief executive may approve forms". WorkCover has not responded to the solicitors' request to provide evidence that the form has been approved.

[18] The form utilised by the applicant is exhibited to the affidavit of Peter John Hooper filed 18 October 2000. The front page contains the following under the general heading "Notice of Claim for Damages":

> "This Notice of Claim for Damages is approved by the Chief Executive Officer of WorkCover Queensland in accordance with the *WorkCover Queensland Act 1996*. Questions should not be altered in any way."

At the hearing of the application there was no challenge to the process of delegation (if any) whereby this form became "approved".

[19] Under the heading "Important Information Regarding Your Claim" appears

> "The claimant is either the injured worker or dependant of a fatally injured worker. While a solicitor may assist in the completion of this document, it must be signed by the claimant."

The requirement of s 280(5) is that it be "verified by statutory declaration" to which I shall return. After some information about when "this form" should be completed by reference to before or after the Act came into force, the following appears

> "**Offer**
>
> This Notice of Claim for Damages must contain a genuine offer to settle or a statement of reasons why such an offer cannot be made."

Section 7 within the form is headed "Offer Of Settlement". It comprises question 77: "**Is the claimant in a position to make an offer of settlement?**" The claimant is directed to a box where "**Yes**" may be ticked. Adjacent to that box the claimant is directed to "(see below and also Schedule C)". At the foot of the page the claimant is told that Schedule C must be completed. Schedule C is headed "Method Of Calculating Heads Of Damage". The claimant is told that "**Regulation requires the Notice of Claim for Damages to contain the amount of damages sought under each head of damage being claimed and the method of calculating each amount. (Head of damage and amount should match the information supplied at question 77)**".

[20] Returning to question 77, if the claimant is not in a position to make an offer of settlement the claimant is directed to tick the "**No**" box. Adjacent thereto the following appears

> "If no, provide statement of reasons on Schedule E why offer cannot yet be made and when the claimant will be in a position to make an offer. **Note: When making an offer of settlement at any time this section must be used.**"

The balance of the page is headed "Heads of Damage" and "amount" with space for items to be inserted followed by certain items which would be expected to be taken into account when an offer was being made - "gross settlement amount", "less contributory negligence (percentage) (from Schedule B)", "less contribution from the third party (from Schedule B)", "less WorkCover statutory payments", "plus professional legal costs", "plus outlays (supported by documentary evidence)", "net settlement amount".

[21] Section 280(6) requires that the offer of settlement *accompany* the notice of claim. Section 74 of the *Regulation* does not require that the offer of settlement be included in the particulars in the approved form. It does however require by s 74(1)(c)(iii) full particulars of the nature and extent of -

> "the amount of damages sought under each head of damage claimed by the claimant and the method of calculating each amount."

[22] To add to the confusion, in s 285 WorkCover is required to give the claimant a written notice within six months after certain events have occurred which must contain a genuine offer or counter-offer of settlement,

> "if the claimant did not make an offer of settlement **in** the notice of claim …", s 285(4), (emphasis added).

[23] The Act expressly does not require the notice of claim to contain an offer of settlement or a statement of the reasons why an offer cannot be made. Whatever the ambit of the expression "accompanied by" it cannot have the same meaning as "include". The use of "in" in s 285(4) is clearly inadvertent and cannot affect the directive in s 280(6) that the notice of claim be "accompanied by" an offer. In other words, the offer of settlement should not be in the form. It is not a question of style or convenience as to which the chief executive can exercise a choice. The Act is precise about what is required in the notice of claim which must be in a form approved by the chief executive. The notice of claim must be verified by statutory declaration. It is appropriate to require a claimant to sign an offer of settlement but it is inappropriate to characterise it as a collection of statements of fact which must be declared to be true. Section 285 concerning offers of settlement which are made on a without prejudice basis and s 294 which requires each party to make a final written offer at the compulsory conference support the inappropriateness of requiring the offer to be verified as true by statutory declaration. A false statement in a statutory declaration attracts criminal sanctions, *Criminal Code*, s 194. I will consider below the form of declaration which the form requires a claimant to make.

[24] Returning to the cover page of the form, under the heading "Information To Help Complete This Notice Of Claim For Damages" the following appears

> "**Supporting documentation**
> Schedule D must be completed for documentation submitted with this Notice of Claim for Damages."

Schedule D, which is towards the end of the form, states "**The following documents must accompany the Notice of Claim for Damages as required by Section 280(8) of the *WorkCover Queensland Act* 1996**". There are some further guides and instructions as to what other documents might be included apart from those mentioned in the form. While stating, correctly in accordance with s 280(8), that the documents must accompany the notice of claim for damages nonetheless on the last page the claimant is directed to

> "… complete all the information required in this Notice of Claim for Damages and Schedules A, B, C, D and E (*if applicable*) and it must be sworn/affirmed before a Justice of the Peace or Commissioner for Declarations or Solicitor."

It is only the particulars prescribed under regulation and any percentage liability for injury which is admitted which must be verified by statutory declaration. Section 74 of the *Regulation* does not require the documents described in s 280(8) to be in the notice of claim neither does it require them to be sworn to or verified by

declaration. The notion that a claimant should swear to copies of documents is odd. It is not a requirement of affidavits of disclosure. Those deponents are merely required to swear that the mentioned documents are all that the deponent has in his/her possession.

[25] As has been mentioned, s 280(7) requires the notice of claim to be accompanied by the claimant's authority allowing WorkCover to obtain information including copies of documents relevant to the claim in the possession of certain persons or entities. On the final page of the form the claimant is reminded of this obligation but, curiously, rather than including the authorisation with provision for signature in that part of the form it appears under the heading "Declaration" and is run together with the statutory declaration provision

"**DECLARATION**

I hereby authorise WorkCover to contact those abovementioned and to obtain information and documents relevant to the claim in accordance with Section 280(7).

I swear/affirm that to the best of my knowledge and belief the statements of fact contained in this WorkCover Notice of Claim for Damages, questions numbered 1 to 77 and Schedules A, B, C, D, and E (if applicable) are true, correct and completed in every respect.

Also, a copy of this notice has been served on the employer."

There follows provision for the claimant's signature, name and the verification that the document was sworn or affirmed before a Justice of the Peace or a Commissioner for Declarations or a solicitor.

[26] Section 280 does not require the verification by statutory declaration that a copy of the notice of claim has been served on the employer. Section 280(2)(b) simply requires the claimant to give a copy of the notice of claim to the employer. The claimant is not required to notify the employer of the offer of settlement, to give the employer a copy of the written authority to allow WorkCover to obtain information, or to give the employer copies of documents supporting the claim.

[27] The form of the statutory declaration appears to confuse two distinct types of declarations. The *Acts Interpretation Act* 1954 defines "statutory declaration" to mean

> "(a) a declaration made under the *Oaths Act 1867*; or
> (b) a declaration made under another Act, or under a Commonwealth Act or an Act for another State or a Territory, that authorises a declaration to be made otherwise than in the course in a judicial proceeding."

Part 4 of the *Oaths Act* 1867 concerns statutory declarations. Section 14 provides

> "In all cases where a declaration in lieu of an oath shall have been substituted by this Act or by virtue of any power or authority hereby given or where a declaration is directed or authorised to be made and subscribed under the authority of this Act or of any power hereby given although the same be not substituted in lieu of an oath heretofore legally taken such declaration unless otherwise directed by the powers hereby given shall be in the following form -

> 'I A.B. do solemnly and sincerely declare that [*let the person declare the facts*] and I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the *Oaths Act 1867*.'."

That provision is a reference to s 6 of the *Oaths Act* which permits a declaration to the same effect as an oath, solemn affirmation or affidavit to be substituted for the oath etc in respect of certain official oaths. That provision only takes effect after the Governor in Council has substituted the declaration in lieu of the oath etc and it is notified in the Gazette. Such a declaration is not contemplated by s 280(5) of the Act.

[28] Section 280(5) is a reference to a statutory declaration of the second kind as described in the *Acts Interpretation Act*. There is no prescribed form of words for such a declaration but clearly the form cannot require that the claimant swear/affirm *and* declare. This may suggest some confusion. Put simply, the first type of declaration is regarded as more solemn and serious than the second. This is reflected in the penalties for making false declarations. Section 193(1) of the *Criminal Code* provides

> "Any person who, on any occasion on which a person making a statement touching any matter is required by law to make it on oath or under some sanction which may by law be substituted for an oath, or is required to verify it by solemn declaration or affirmation, makes a statement touching such matter which, in any material particular, is to the person's knowledge false, and verifies it on oath or under such other sanction or by solemn declaration or affirmation, is guilty of a crime, and is liable to imprisonment for 7 years."

Section 194(1) of the *Criminal Code* on the other hand applies to the kind of statutory declaration referred to in s 280(5). It provides

> "A person who makes a declaration that the person knows is false in a material particular, whether or not the person is permitted or required by law to make the declaration, before a person authorised by law to take or receive declarations, commits a misdemeanour.
>
> Maximum penalty - 3 years imprisonment."

The anomalies in the form of words associated with the statutory declaration as purportedly approved by the chief executive appear to be significant departures from what is required by the Act and the general law.

[29] Mr D North SC for WorkCover submitted that even though the Act and the *Regulation* do not require an offer of settlement to be included in the notice of claim the Act does not provide that only matters required by regulation may be included in the notice. So long as the form can be said to fall within the parameters of s 279 the chief executive cannot be said to be *ultra vires* his powers. That submission overlooks the express words of s 280(6) that the offer must *accompany* the notice. The appeal to s 279 which sets out the objects of Part 5 does not justify any departure from the plain and directory nature of the words in the section. The same observation may be made with respect to Mr North's submission about the written authority being in the form.

[30] The form approved by the chief executive is, then, in several respects, beyond the power of the chief executive (or his delegate). Where a statute specifically deals with a particular subject matter and provides expressly for the way in which something is to be done a power to give effect to those requirements may not be exercised in a way inconsistent with the statute. The most significant departure from the Act is the requirement that the offer of settlement need only accompany the notice of claim and thereby not be the subject of a statutory declaration. Other departures include the directive in the form to list the documents referred to in s 280(8); to include the written authority referred to in s 280(7) in the notice of claim; and to include an indication (and as a declared matter) that the employer has been served with the notice of claim. Finally, there is the unsatisfactory form of the declaration.

[31] As Pincus JA observed in *Neuss* at [7],

> "… a wide variety of documents could fulfil the description of an 'approved form' … however badly expressed or difficult to use, such a form could be one which is validly prescribed … ."

Whilst much of the information required in the form is lawfully sought neither the court nor a worker should have to trawl through the form to save it. It is understandable that WorkCover would wish to eliminate the prospect of a claimant not attending to all the matters which s 280 of the Act and s 74 of the *Regulation* require a claimant to address. It would not have been an overly taxing task to comply with the Act by giving suitable instructions about matters which were not required to be included in the form and placing an appropriate statutory declaration in the appropriate place. It is not, I think, possible to save this form. Taken as a whole its approval is beyond the power of the chief executive and cannot therefore be characterised as an "approved" form.

[32] Before considering the consequences of the finding that there is no approved form I should consider the submission that aspects of s 74 of the *Regulation* are *ultra vires*. The applicant seeks a declaration that s 74(1)(c)(iii) of the *Regulation* is a nullity and *ultra vires* the power conferred on the Governor in Council under ss 280 and 530 of the Act and Schedule 1 to the Act. In his written submissions Mr Grant-Taylor extended his criticism of the particulars required to s 74(1)(b)(v) and (vi). Those provisions require a claimant to give full particulars of the negligence alleged against the claimant's employer and any other party on which the claim is based; and whether and to what extent liability expressed as a percentage is admitted for the injury and, if another party is involved, the percentage that the claimant holds the other party responsible. As will be recalled, s 74(1)(c)(iii) requires the claimant to give particulars of the amount of damages sought under each head of damage claimed and the method of calculating each amount.

[33] Mr Grant-Taylor submitted that a claimant, who must be presumed to be a lay person with no relevant knowledge of the law, is required to swear to matters which require both legal training and understanding. Mr North's response was that, realistically, it must be understood that a claimant will not be completing these more technical and complex parts of the claim. In fact, the claimant here did fill out his own form and with reasonable competence, for example, in response to question B1 in Schedule B "Detail the negligence alleged against the worker's employer" the applicant wrote, after describing how the accident occurred,

> "Therefore I am claiming negligence against my former employer for the lack of care in the fact that the trolley jack in question was over the recommended weight for one person to lift unaided. Also no provisions were available for any mechanical assistance in the removal of the trolley jack from the van. If I had not taken the trolley jack out of the van I would have been unable to carry out my duties and in turn my employment would have been in jeopardy."

The method of calculating heads of damages found in Schedule C as filled in by the applicant contained "loss of income". The method of calculation related to each year's loss which the applicant claims for the past and future. He completed amounts under headings for "pain and suffering", "stress", "loss of capabilities" and "loss of superannuation". He refers to "tax paid", "pharmaceutical", "travel", "WorkCover payments". He had set out earlier in the notice that he was 85 per cent incapacitated for work and used that as a basis for calculating his general damages. The fact that s 74 of the *Regulation* may contain some concepts difficult for a lay person to understand does not, without more, render s 74 *ultra vires* the Act.

[34] The usual purpose of subordinate legislation, such as regulations, is to give effect to the provisions of the parent statute, *State of New South Wales v Macquarie Bank Ltd* (1992) 30 NSWLR 307 per Kirby P at 320. Regulations may not go outside the field of operation of the statute from whence they have their origin and typically are designed to carry into effect the expressed intention of the legislature in ways incidental to the execution of the statute itself, *ibid* 321.

[35] A general regulation making power is conferred by s 530 of the Act confined as to subject matter by the parameters of Schedule 1. As already mentioned, the only reasonably applicable subject matter is in respect of "the proper conduct of WorkCover's insurance business". It is not argued that s 74 of the *Regulation* concerning the particulars to be given in the notice of claim under s 280 would not come within that description. Although concepts of negligence, contributory negligence, contribution and heads of damage have precise meanings for lawyers, as the applicant has shown, they are not concepts beyond the grasp of a worker without legal skills. If a claimant had difficulties and did not have the services of a solicitor or a union then WorkCover would need to consider the reasonableness of its position if it maintained that the notice of claim was non-compliant because of a failure by a claimant to articulate a claim in language customary for lawyers. Not only is there nothing in the Act which precludes WorkCover from seeking this information in the notice of claim, s 280(4) specifically requires the claimant to give information about what percentage of liability is admitted or a statement why the claimant cannot do so. The purpose of the notice, consistent with the object of Part 5, is to put WorkCover in a similar position to that which it would have been in at the end of the interlocutory steps in an action brought by a claimant for damages for personal injuries arising out of a work-related injury in a court. That would include the pleadings, disclosure of documents, statements of loss and damage and third party inspection.

[36] The impugned regulation is conformable with the Act. It is, nonetheless, a curious requirement that matters essentially of opinion such as contributory negligence or contribution between the employer and another party referred to in s 74(b)(vi) of the *Regulation* and the amount under each head of damage in s 74(1)(c)(iii) are to

be verified by statutory declaration. The answer may be that verification of statements of fact would not include matters of opinion.

[37] Returning to the form, the difficulty is, as was recognised in *Neuss*, what consequences should follow the conclusion that the form purportedly approved by the chief executive is not a form for the purposes of s 280 of the Act. The applicant seeks declarations that he need not give a notice of claim as required by s 280 of the Act before starting a proceeding in a court for damages, that he not be required to do any of the things which are predicated on the giving of a notice, that is, by s 281 (written notice of change in relation to information given in the claim), by s 293 (organising and holding a conference of the parties) and by s 294 (final written offer of settlement to be made by the claimant). Once the form offered by WorkCover for completion by a claimant does not fulfil the description of an approved form the question is what consequence does this have for a claimant who wishes to commence an action in a court for damages. Part 7 of Chapter 5 concerns the conditions that must be satisfied before a claimant can start a court proceeding. Section 302 provides that a claimant

> "… may start a proceeding in a court for damages only if the complainant has complied with -
> (a) the relevant division under part 2; and
> (b) part 5, other than as provided by section 304 and 305; and
> (c) part 6; and
> (d) s 303."

[38] Part 2 concerns the entitlement provisions and limits a claimant to a person who comes within the definition of "worker" in s 253; Part 5 concerns the s 280 notice of claim and WorkCover's response to it (other than ss 304 and 305 which concern a declaration about compliance and leave to commence proceedings despite non-compliance, respectively); and Part 6 concerns the compulsory conference and final written offers of settlement. Section 303 provides that

> "The claimant may start the proceeding [in a court] if any of the following have happened -
> (a) at least 6 months or, for a terminal condition, 3 months have elapsed after -
> (i) the claimant has given a complying notice of claim; or
> (ii) WorkCover has waived the claimant's non-compliance with the requirements of s 280; or
> (iii) the court has made an order under s 304 or 305;
> (b) WorkCover has denied liability on the part of the employer in connection with the injury;
> (c) WorkCover has admitted liability, but is claiming contributory liability from the claimant or another party, and the claimant has given WorkCover written notice that the extent of the admission is disputed;
> (d) WorkCover has admitted liability but damages cannot be agreed."

[39] WorkCover has waived non-compliance with s 280. Sections 304 and 305 set out the circumstances in which the claimant may approach the court for declarations that a notice of claim has been given under s 280 or has been taken to have remedied non-compliance or where the court gives leave to bring the proceedings

despite non-compliance with the requirements of s 280. Both of those sections are dependent upon there being an "approved form". Section 303(b), (c) and (d) do not expressly depend upon a notice of claim on an approved form having been given but it is implicit that exchanges shall have occurred between a claimant and WorkCover commencing with a s 280 notice of claim.

[40] The scheme of the Act is to require a claimant for damages and WorkCover to pass through a number of openings in a quite complex, but not insolubly so, legislative maze before being permitted access to the courts. The legislative intent is that it is expected that on the way a claimant will cease to pursue the goal of court proceedings by an early resolution of the claim. However when one of the portals is closed by the failure to provide an approved form, the way forward is barred. As the Court of Appeal concluded in *Neuss* in respect of the 1995 amendments to *Workers' Compensation Act* 1990, exclusion from the courts is not an intention readily to be attributed to the legislature, de Jersey CJ at [1], Pincus JA at [11] and [12], and Byrne J at [15]. There is a clear legislative intent in the Act that a claimant has access to the courts provided the progression is in accordance with the path laid out in the Act. But it cannot be the case that a claimant is excluded because the chief executive has, in effect, impermissibly closed the road.

[41] The conclusion to which I have come is that until the chief executive approves a form compliant with the Act a claimant who comes within the provisions of the Act may commence proceedings in a court of law without following the path laid out in Parts 5 and 6 of Chapter 5 of the Act. Part 2 is not infected with the pre-condition of having a compliant notice of claim in the approved form and would remain as a pre-condition for the commencement of proceedings.

[42] Finally, I should deal with the applicant's standing to obtain declaratory relief. Mr North submits that the relief sought is theoretical because WorkCover has said that the applicant's notice of claim is compliant. However the applicant is required by s 281 to give WorkCover written notice of any change in relation to the information given in the notice of claim and by ss 293 and 294 to organise and hold a compulsory conference and make a written final offer of settlement all of which are predicated upon a notice of claim being made in an approved form. If the applicant is not obliged to give a notice of claim because he cannot do so since there is no approved form it would seem to follow that he is not obliged to fulfil the conditions subsequent to giving that notice.

[43] The jurisdiction to make a declaration is a wide one, s 128, *Supreme Court Act* 1995. The observation of Lord Dunedin in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448, quoted with approval by Gibbs J in *Forster v Jododex Australia Pty Limited* (1972) 127 CLR 421 at 437 is a convenient summary

> "The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought."

The applicant has an interest in some of the declarations sought, but not, I think, in all. The relief is discretionary and should go no further than to secure this applicant's rights.

[44] I would not make declarations that an offer of settlement and written authority are not required to be in the notice of claim. That is apparent on the face of the Act. Since I have not found s 74(1)(c)(iii) of the *Regulation* to be *ultra vires*, no declaration will be made.

[45] It is appropriate that a declaration be made about the status of the form which, on its face, is offered to claimants as an approved form pursuant to s 280. As I have mentioned, WorkCover did not offer any proof that it was what it purported to be and the declaration will reflect that. It is appropriate to make the declaratory relief sought in para 5 of the application.

[46] The orders are

1. A declaration that the form being exhibit 1 to the affidavit of Peter John Hooper filed 18 October 2000 which on its face purports to be a form approved by the chief executive officer of WorkCover Queensland is not an approved form for the purposes of s 280 of the *WorkCover Queensland Act* 1996.

2. Declarations that the applicant
   (a) need not give notice as stipulated by s 280(1) of the *WorkCover Queensland Act* 1996 whether within the period of limitation for bringing a proceeding for damages under the *Limitation of Actions Act* 1974 or otherwise;
   (b) need not give WorkCover written notice under s 281 of the *WorkCover Queensland Act* 1996 of any change in relation to the information given in a notice of claim;
   (c) need not organise and hold a conference of the parties of the kind referred to in s 293 of the *WorkCover Queensland Act* 1996;
   (d) need not make a written formal offer of settlement as required by s 294 of the *WorkCover Queensland Act* 1996; and
   (e) need not await the occurrence of the events or any of the events referred to in s 303 of the Act,

   before starting a proceeding in a court for damages if there is no approved form as required by s 280 of the *WorkCover Queensland Act* 1996.

[47] I will hear submissions as to costs.