SUPREME COURT OF QUEENSLAND

CITATION:	*Cloncurry Shire Council v Workers' Compensation Regulatory Authority & Anor* [2006] QSC 362
PARTIES:	**CLONCURRY SHIRE COUNCIL** (applicant) v **WORKERS' COMPENSATION REGULATORY AUTHORITY** (first respondent) **IAN JAMES JOHNSTON** (second respondent)
FILE NO/S:	BS 8751 of 2006
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	05 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	25 October 2006
JUDGE:	Lyons J
ORDER:	**Application dismissed**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – RULES OF CONSTRUCTION – GENERAL PRINCIPLES – where the applicant seeks a declaration as to the proper construction of s 542(1) of the *Workers' Compensation and Rehabilitation Act* 2003 *Acts Interpretation Act* 1954, s 14B *WorkCover Queensland Act* 1996, s 491 *Workers' Compensation and Rehabilitation Act* 2003, Chapter 13 Part 2, s 540(1)(b)(ii), s 542(1) *Berowa Holdings Pty Ltd v Gordon* [2006] HCA 32 [applied] *Project Blue Sky Inc v Australian Broadcasting Authority* [applied] *Emerson v Coles Myer Limited & Anor* [considered] *Q Comp v Baulch* [2004] QIC 11 [considered]
COUNSEL:	M Grant-Taylor SC for the applicant PJ Flanagan SC with CJ Murdoch for the first respondent

R Myers for the second respondent

SOLICITORS: HBM Lawyers for the applicant

Workers' Compensation Regulatory Authority (Legal Services Unit) for the first respondent

Shine Lawyers for the second respondent

[1] **LYONS J:** The applicant, Cloncurry Shire Council, a self-insurer under the Queensland Workers Compensation Scheme, seeks a declaration as to the proper construction to be placed upon certain provisions found within Chapter 13 Part 2 of the *Workers' Compensation and Rehabilitation Act* 2003 ("the *WCRA*"), and more particularly the time limitation found within s 542(1).

[2] In particular the applicant seeks an order for a declaration that upon a proper construction of Chapter 12 Part 2 of the *WCRA:*

(a) There is no power to extend the period of three months after the person applying for review receives notice of a decision by a self-insurer under s 540(1)(b)(ii) of the *WCRA* within which an application for a review of the decision must be made; and

(b) A review by the first respondent of a decision by a self-insurer under s 540(1)(b)(ii) of the *WCRA* in respect of an application for review made later than three (3) months after the person applying for the review receives notice of the decision is invalid.

History of the Claim

[3] The relevant facts are as follows:

(i) On 2 April 2004 the second respondent claims that he sustained a back injury in the course of his employment with the Cloncurry Shire Council, the applicant in these proceedings.

(ii) On 27 June 2005 the second respondent lodged with the Shire Council an application for workers' compensation No 12430 with respect to a "prolapsed disc- back."

(iii) On 5 September 2005 the second respondent lodged with the Shire Council an application for workers' compensation No 12673 with respect to "prolapsed disc lower back/stress."

(iv) On 24 January 2006 there was a decision by the Local Government Work Care (LGW) rejecting claim No 12430.

(v) On 25 January 2006 there was a decision of LGW rejecting claim No 12673.

(vi) On 30 January 2006 the decision in relation to claim No 12430 was confirmed by a more senior office within LGW and the second respondent was advised of this decision.

(vii) On 21 April 2006 the second respondent lodged with the first respondent, the Workers Compensation Regulatory Authority (Q-Comp) an application for review of LGW's 25 January decision regarding claim No 12673.

(viii) On 17 July 2006 Q-Comp upheld LGW's decision in relation to claim No 12673.

(ix) On 14 August the second respondent lodged with Q-Comp an application for review of LGW's 24 January decision regarding claim No 12430.

(x) On 8 September 2006 Q-Comp advised of its intention to undertake a review of LGW's decision in relation to claim No 12430.

(xi) On 10 October 2006 Q-Comp upheld LGW's decision to reject the claim No 12430.

The Issues

[4] The statutory scheme set up by the *WCRA* allows a self-insurer, such as the applicant, to allow or reject an application for compensation. A claimant, worker or an employer aggrieved by a decision of a self insurer may apply to Q-Comp for a review of the decision. The Act states that an application for review must be made within three months after the person applying for the review receives written notice of the decision.

[5] In the current case it is clear that an application for review of the decision of 25 January 2006 in relation to claim No 12673 was made by the second respondent within three months. An application for a review of the decision of 24 January 2006 in relation to No 12430 was not however made within 3 months because the application for review was dated 14 August 2006. The application for review was therefore not made until 15 weeks outside the three month prescribed period.

[6] The second respondent undertook a review of LGW's decision despite the fact that the application for review was out of time.

[7] The applicant seeks declarations, not just between the parties in this case but rather general declarations, that:

(i) Q-Comp has no power to extend the time limit of three months prescribed by s 542(1); and

(ii) Any review conducted by Q-Comp of a decision by a self insurer in respect of an application for review made later than three months after receipt of written notice is invalid.

Does Q-Comp have power to extend the period within which an application for review must be made?

[8] Section 4(1) of *WCRA* states that the main objects of the Act are set out in Part 2 of Chapter 1 of the Act and s 4(2) specifically states that the objects are an aid to the interpretation of the Act.

[9] Section 5(1) which is within Part 2 of Chapter 1 states:

> "**5. Workers' Compensation Scheme**
> (1) This Act establishes a Workers' Compensation Scheme for Queensland -
> (a) providing benefits for workers who sustain injury in their employment, or dependants if a worker's injury results in the worker's death or persons other than workers, and for other benefits; and
> (b) encouraging improved health and safety performance by employers."

[10] Section 539 of the *WCRA* states that the object of Part 2 Chapter 13 of the Act is to provide a non adversarial system for prompt resolution of disputes and sets up a scheme whereby the first respondent known as Q-Comp reviews decisions of a self insurer such as the applicant in relation to claims which are made by workers such as the second respondent. Section 541 of the *WCRA* states that a claimant, worker or an employer aggrieved by a decision or the failure to make a decision may apply for a review. Section 545 of the *WCRA* then states that Q-Comp must, within 25 business days after receiving the decision, review the decision and decide whether to confirm, vary or set aside the decision. If a decision is set aside then Q-Comp can either substitute another decision or return the decision to the decision-maker with directions.

[11] Section 542 of the *WCRA* sets out how to apply for review as follows:

> **"542 Applying for review**
> (1) An application for review must be made within 3 months after the person applying for review (the ***applicant***) receives written notice of the decision or the failure to make a decision and the reasons for the decision or failure, unless subsection (4) applies.
> (2) For subsection (1), the applicant may, within the 3 months mentioned in the subsection, ask the Authority to allow further time to apply for review.
> (3) The Authority may grant the extension if it is satisfied that special circumstances exist.
> (4) If the notice did not state the reasons for the decision or the failure to make a decision—
> (a) the applicant must ask the decision-maker for the reasons within 20 business days after receiving the notice; and
> (b) the decision-maker must give written reasons within 5 business days after the applicant asks for the reasons; and
> (c) the application for review must be made within 3 months after the applicant receives the reasons, regardless of

whether the reasons addressed the matters prescribed under a regulation.

(5) The application for review—

(a) must be made in the approved form and given to the Authority; and

(b) must state the grounds on which the applicant seeks review; and

(c) may be accompanied by any relevant document the applicant wants considered in the review.

(6) The Authority must, within 10 business days after receiving the application, give the applicant and the decision-maker written notice that the application has been received."

[12] The issue of whether applications for review could be considered out of time has been considered in relation to a similarly worded provision of the previous Act. The current Chapter 13 of *WCRA* is the successor to Chapter 9 part 2 of the now repealed *WorkCover Queensland Act 1996* ("*WCQA*") and the previous sections 488 to 491 inclusively were basically in the same terms as the current sections 539 to 542 of the *WCRA*. In particular, s 491 (1) of the *WCQA* provided for a three month period within which to apply for review in similar terms to s 542 of the *WCRA*.

[13] In considering the issue of whether compliance with s 491 of the *WCQA* could be waived, President Hall in the decision of *Q Comp v Baulch*[1] ("*Q Comp v Baulch*") held that compliance could be waived as the provision was not mandatory but directory. In particular it was held that:

> "The *WorkCover Queensland Act 1996* was beneficial legislation ….. Every consideration of context and justice suggests that just as the limitation at s499(1) is read as directory so also should the limitation period at s.491 be read as directory."

[14] The applicant's counsel in the current case however submit that the correct approach is set out in the obiter comments by Dutney J in the decision of *Emerson v Coles Myer Limited & Anor*[2] where his Honour indicated that strict compliance with the time constraints is required:[3]

> "Since the only right to review a rejection decision on the merits which an applicant has is the right granted to the applicant by the statute itself, it follows that if that right is limited by the imposition of a time constraint, the failure of an applicant to bring herself within the time constraint that time constraint must be fatal. This is because she could not bring herself within the scope of the statutory right. It is not necessary to consider the issue further in this matter because of my conclusions regarding the other issues raised. Nonetheless, I have great difficulty in accepting that a statutory provision authorising a review of a decision within a specific limited time,

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1 [2004] QIC 11

2 [2004] QSC 161

3 [2004] QSC 161 at [26]

> without a power to extend time being confirmed, authorises an application outside the prescribed time."

[15] Counsel for the applicant submitted that the decision of President Hall in *Q-Comp v Baulch* should not be relied upon as it was made ostensibly without reference to the High Court's decision in *Project Blue Sky Inc v Australian Broadcasting Authority*[4] ("*Project Blue Sky*") in allowing a variation of the limitation period for which compensation might be applied. In particular it was submitted that President Hall's discussion of the section of the Act, in terms of whether it was directory or mandatory, was an approach which was explicitly rejected by the High Court in *Project Blue Sky* because the court essentially ended the distinction between directory and mandatory requirements. In particular it was submitted that the majority indicated that "*they are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid"*.[5] Ultimately the High Court concluded that a better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. And in determining the question of purpose regard must be had to the language of the provision and the scope an object of the statute as a whole.

[16] Accordingly, counsel for the applicant submits that the proper inquiry is not whether the relevant provision in the legislation is mandatory or directory but rather whether it was the intention of the legislature that the lodging of an application for review outside the time prescribed and Q-Comp's consideration of such an application thereafter should be invalid. In this regard Counsel for the applicant relies in particular on the explanatory notes of clause 45 of the Bill that led to the inclusion of s 491 of the *WCQA*, which was the provision that was in the same terms as the legislative provisions in this particular case. Section 14B of the *Acts Interpretation Act* 1954 permits regard to be had to this extrinsic material.

[17] Relevantly this explanatory memorandum provides that the extension of time for the lodgement of an application for review from a period of 28 days to a new period of three months was considered to be sufficient to provide time for an application to be lodged and allows the review unit to undertake a review to achieve the timely resolution of disputes.

[18] The applicant submits therefore that the explanatory memorandum could not be any clearer in conveying an intention that the failure by an applicant to bring themselves within the time constraints imposed by s 491(1) of the *WCRA* is fatal to the efficacy of the application. The applicant submits that the current Act, and its predecessor, is a statute replete with time limits which is "properly to be seen as providing for certainty in entitlement, exposure and the need for investigation". Accordingly the applicant submits that the three month time period ought be treated as immutable and an application for review lodged outside the three month period must be incompetent.

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4 (1998) 194 CLR 355

5 (1998) 194 CLR 355 at [93]

[19] The applicant submits that the time constraint provided for in s 542(1) of the *WCRA* was essential and indispensable to the competency of the Application for Review lodged in August and there is therefore no power in Q-Comp to undertake a review of LGW's original rejection of the claim. Counsel for he applicants is essentially submitting that it is a condition precedent to the exercise of the power by Q-Comp that the application is lodged within the time limitations set out in s 542(1) of the *WCRA*.

[20] It is clear that the starting point as to the correct interpretation of s 542 of the *WCRA* is the High Court decision in *Project Blue Sky* previously referred to. This decision makes it clear that what is required is for the Court to ascertain the intention of Parliament. As Brennan CJ held:[6]

> "When the validity of a purported exercise of a statutory power is in question, the intention of the Parliament determines the scope of the power as well as the consequences of non-compliance with a provision prescribing what must be done or what must occur before a power must be exercised."

[21] Counsel for the applicant has submitted that the words of the Explanatory Memorandum of the previous Act should be determinative of the issue of the intention of the Legislature. The applicant submits that the period of 3 months is immutable as the Explanatory Memorandum makes it clear that the intention of the legislature in relation to this section was to provide for the timely resolution of disputes.

[22] It is important to look at Chapter 13 of the *WCRA* and consider its purpose. The Chapter obviously deals with Reviews and Appeals as the chapter heading indicates. It is also clear that decisions of a self insurer such as the applicant are covered by the chapter (s 540(1)(ii) of the *WCRA*). Section 541 of the *WCRA* gives a claimant, a worker or an employer a right to apply for a review if they are aggrieved by the decision or failure to make a decision. Importantly that section itself does not contain any conditions or qualifications on the right to review. There is no condition precedent contained within the section itself. Section 540(5) of the *WCRA* then provides that such a decision may only be reviewed by Q-Comp.

[23] Section 542 of the *WCRA* then sets up a methodology as to how to apply for a review. Is the methodology intended to be a condition precedent to the exercise of power as the applicant submits?

[24] Whilst it is clear that the timely resolution of disputes is the object of this section it must be remembered that the Act has as its main aim the establishment of a workers compensation scheme whose aim is to provide benefits for workers who sustain injuries in their employment as well as their dependants and to encourage improved health and safety performance by employers. The Act is clearly what is commonly described as "beneficial legislation" and s 108 of the *WCRA* gives an entitlement to

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6 (1998) 194 CLR 355 [40]-[41]

compensation when it provides "compensation is payable under this Act for injuries sustained by a worker." Counsel for the applicant is essentially arguing that the provisions of *WCRA* in relation to the time periods operating for review of decisions by a self-insurer should be given their strict interpretation and any failure to comply must be fatal to the claim.

[25] In this regard however I consider that the decision in *Project Blue Sky* clearly states the approach that the court should take in determining this question as follows:[7]

> "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that the "context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.
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> A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve the result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme."

[26] I do not consider that it is necessarily inconsistent to allow for the timely resolution of disputes and to still allow Q-Comp to consider applications for review outside the period allowed for review. To give the section the intention sought by the applicant would mean that non-compliance with this time limitation would bring to an end the ability of a worker to seek workers compensation in all possible circumstances. As Counsel for the first respondent has pointed out this would cover situations where a worker in a coma has not complied with the strict time constraints.

[27] I agree with the submissions of the first and second respondent that s 542 of the *WCRA* should be interpreted to give effect to a beneficial purpose particularly when there is no inherent conflict between the object of prompt resolution of disputes and the object which recognises the right to seek a review of a decision refusing compensation. In terms of an examination of a hierarchy of provisions, to use the

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7 (1998) CLR 355 at [69]-[70]

language of the High Court, it is clear that the major aim of the *WCRA* is to provide benefits for workers who sustain an injury in their employment and provisions which relate to timeliness are clearly provisions which are lower in the hierarchy to provisions which give rights to compensation.

[28] I am not satisfied that non-compliance with the method of applying for a review was intended by the legislature to affect the ambit of the power such that non-compliance is fatal to the existence of the power.

Are Q-Comp Reviews in relation to out of time applications invalid?

[29] Turning specifically then to the issue of whether any review conducted by Q-Comp outside the time provisions is invalid. As Counsel for the first respondent has submitted, as a result of the decision in *Project Blue Sky*, the primary question to be considered is whether the legislature intended that a failure to comply with the time limit would invalidate an application for review. Having considered the Act as a whole and particularly in view of the objects of the Act I am not satisfied that it was the intention of the legislature that failure to comply with the time limit would invalidate the application for review.

[30] Importantly in other sections of the Act where a step taken by a worker is held to be invalid the matter of validity has been specifically referred to. In particular I note that s 131 of the *WCRA* contains specific provisions referring to validity. This section specifically states that "An application for compensation is valid and enforceable only if the application is lodged by the claimant within 6 months after the entitlement to compensation arises." The inference to be drawn is that because the issue of validity is not specifically referred to, such as it is in s 131, the intention of the legislature was that failure to comply with the time provision in s 542(1) would not invalidate the application for review.

[31] Section 542 of the *WCRA* itself is silent in relation to whether non-compliance constitutes invalidity and I note the comments of the High Court in *Project Blue Sky*, where it was indicated that if public inconvenience would result from a declaration that the act was invalid then it was unlikely that that was the intention of the legislature:[8]

> "Courts have always accepted that it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act. Having regard to the obligations imposed on the ABA by s 160, the likelihood of that body breaching its obligations under s160 is far from fanciful, and, if acts done in breach of s 160 are invalid, it is likely to result in much inconvenience to those members of the public who have acted in reliance on the conduct of the ABA."

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8 (1998) 194 CLR 355 at [97]

[32] The decision of the High Court in *Berowa Holdings Pty Ltd v Gordon*[9] ("*Berowa*") is also relevant in this regard. In that case s 151 of the *Workers Compensation Act* 1987 (NSW) was in issue and the question was whether proceedings commenced by the plaintiff were invalid or a nullity because of non compliance with that section. In particular the High Court examined principles of statutory construction where the statute imposed a restriction upon the commencement of court proceedings but made no provision for consequences of non-compliance. The High Court held in *Berowa*:[10]

> "First, s 151C(1) does not use the language of nullity or voidness. It is, instead, expressed in terms of what a person to whom compensation is payable under the Act is entitled, or not entitled, to do. Unlike ss 151F, 151G and 151H, it is not addressed to what the court may do in the award of damages. The Act does not state the consequences of breach of the non-entitlement expressed in s 151C(1). Deriving those consequences therefore depends on drawing, from the language and apparent purpose of the provision, outcomes which the Parliament has not stated.
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> The duty imposed on a person by s 151C(1) is one of imperfect obligation. Where Parliament has enacted a provision in language which holds back from attaching consequences of nullity and voidness to the acts of a person in breach, it requires a very strong indication elsewhere in the Act that this is Parliament's purpose, if the court is to derive an implication that this is so. This is because of the drastic consequences that can follow conclusions of nullity and voidness in the law."

[33] In the circumstances therefore I am not satisfied that the decision taken by Q-Comp to review the decision outside of the time period allowed for in the legislation is invalid.

[34] Even if I am wrong in this regard I am not satisfied that declarations in the terms sought by the applicant should be made in any event.

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9 [2006] HCA 32

10 [2006] HCA 32 at [85]-[86]

Is this an appropriate case for declaratory relief in the general terms sought?

[35] The declarations sought by the applicant are essentially declarations to the world at large and not just simply declarations in relation to the parties to this litigation. I am not satisfied that this is an appropriate case for declaratory relief in the very broad terms sought by the applicant as the declarations sought require the Court to give an advisory opinion as to rights and obligations under varying factual situations.

[36] In particular it is clear that there are a variety of factual situations which could occur. In this regard I note in particular s 542(2) and (3) of the *WCRA*, which allows the applicant to ask Q-Comp to allow further time to apply for review that may be granted if special circumstances exist. I also note s 542(4) of the *WCRA*, which provides that if the written notice given to the person applying for review did not contain reasons for the decision or the failure to make the decision then the applicant has 20 days in which to ask for reasons and the decision maker then has 5 days to give the written reasons and the application for review must then be made within three months after receipt of the reasons. Whilst the applicant has indicated that the declaration sought could be amended to cover this exigency by addition of words such as "other than is provided in subsection (2) and (3) of section 542", I do not consider that this cures the very real problem concerning the utility of such a declaration given the varying factual situations which are clearly anticipated in relation to applications for review.

[37] Furthermore as the respondent has pointed out, in certain situations and in the current case in particular, there may well be an issue as to whether there has in fact been substantial compliance with the requirement to apply for a review within three months.

[38] Another important consideration is the fact that the evidence was given at the hearing by a senior appeals officer from the Workers Compensation Regulatory Authority that currently there are 45 applications for review which have been filed out of time.[11] 35 of those applications have been granted an extension of time. If a declaration is made in the terms sought by the applicant all of these parties would have their interests adversely affected without being given the opportunity to be heard. None of these parties have been served and they have no notice of these applications.

[39] I am also satisfied that the applicant has other avenues available to determine the issues between the parties without recourse to declaratory relief from this court. Sections 558(1) and (2) make it clear that the Industrial Magistrates Court and the Industrial Commission have the power to determine the question whether or not the review was in time.

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[11] Evidence of Darren John Taylor, Transcript at pp 17 &18

[40] I am not satisfied therefore that this is an appropriate case for a declaration in the general terms sought by the applicant.

[41] I would dismiss the application.

[42] I will hear the parties as to costs.