DISTRICT COURT OF QUEENSLAND

CITATION:	*Stankovic v SS Family Pty Ltd & Anor* [2018] QDC 54
PARTIES:	**MILJAN STANKOVIC** (Plaintiff/Respondent) **v** **SS FAMILY PTY LTD ACN 117 147 449 (Trading as "Trendbuild")** (Defendant/Applicant) AND **WORKCOVER QUEENSLAND ABN 40 577 162 756** (Third Party/Respondent)
FILE NO/S:	3948/16
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	20 April 2018
DELIVERED AT:	Brisbane
HEARING DATE:	6 February 2018
JUDGE:	Porter QC DCJ
ORDER:	**1. The application filed by leave on 6 February 2018 is dismissed.**
CATCHWORDS:	WORKERS' COMPENSATION – INSURER'S LIABILITY TO INDEMNIFY IN A CLAIM FOR DAMAGES – where the insurer determines that a person is a worker to whom compensation is payable under the Act for an injury sustained by that person as a worker – where the insurer determines that the Work Related Impairment from the injury is less than 20% – where the worker elects to bring a claim for damages – whether the Act on its proper construction precludes the insurer from contending that the plaintiff in those proceedings is not a worker who has sustained an injury under the Act – whether the insurer is required to indemnify the defendant as an employer under the Act. **Legislation** *Workers' Compensation and Rehabilitation Act 2003* (Qld) (current as at 14 August 2012) ss. 4, 5, 8, 9, 10, 11, 30, 32,

46, 48, 108, 131, 132, 134, 135, 141, 168, 170, 178, 180, 184, 185, 186, 187, 188, 189, 233, 237, 239, 250, 254, 258, 262, 270, 275, 278, 278A, 279, 280, 281, 289, 292, 300, 305B, 305C, 305D, 538, 540, 541, 542, 544, 545, 548A, 556, 561

Cases
Bonser v Melnacis [2002] 1 Qd R 1
Castillon v P&O Ports Limited [2006] 2 Qd R 220
Connor v Queensland Rail Limited [2016] QSC 270
Dey v Victorian Railways Commissioner (1949) 78 CLR 62
Francis v Emijay Pty Ltd [2006] 2 Qd R 5
Glenco Manufacturing Pty Ltd v Ferrari [2005] 2 Qd R 129
Hawthorne v Thiess Contractors Pty Ltd [2002] 2 Qd R 157
Karanfilov v Inghams Enterprises Pty Ltd [2001] 2 Qd R 273
Lomsargis v National Mutual Life Association of Australasia Limited [2005] 2 Qd R 295
Maurice Blackburn Cashman v Brown (2011) 242 CLR 647
Watkin v GRM International Pty Ltd [2007] 1 Qd R 389
Wilkinson v Stevensam P/L & Ors [2006] QCA 88
Wingfoot Australia Partners Pty Ltd v Kocak (2013) 252 CLR 480
Witheyman v Simpson [2011] 1 Qd R 170

COUNSEL: M Grant-Taylor QC for the plaintiff

R J Douglas QC and K F Holyoak for the defendant

G W Diehm QC and C S Harding for the third party

SOLICITORS: Slater & Gordon Lawyers for the plaintiff

Barry Nilsson for the defendant

DWF Legal for the third party

Introduction

[1] If the Third Party (**Workcover**) determines that a person is a worker to whom compensation is payable under Chapters 3 and 4 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) (the **Act**) for an injury sustained by that person as a worker, is Workcover bound, on the proper construction of the Act, by that determination in subsequent proceedings for damages for that injury by that person regulated by Chapter 5 of the Act?

[2] The applicant/defendant (**Trendbuild**) contends that Workcover is bound by that determination and that Workcover's defence in Trendbuild's Third Party proceedings should be struck out to the extent it contains allegations which put in dispute the issue of whether Mr Stankovic is a worker who has sustained an injury *for the purposes of the Act.* This phrase is highlighted because Trendbuild's contention was not that Workcover (whether in its own right or in its role as conducting the defence) was precluded from raising any issue in the damages proceedings by Mr Stankovic. Rather Trendbuild's contention was that Workcover was bound to treat the plaintiff as a worker who had sustained an injury under the

Act, and therefore to indemnify the defendant in respect of the proceedings as an employer under the Act, simply by reason of having determined that the plaintiff was a worker who sustained an injury entitled to compensation under the Act.

[3] Workcover contends that it is not so bound and that it may dispute whether a person is a worker as defined in the Act in proceedings for damages by Mr Stankovic, notwithstanding it had previously determined that he was a worker for the purposes of compensation under the Act.

[4] For the reasons that follow, I reject Trendbuild's contention and accept Workcover's contention.

Events prior to the commencement of proceedings

[5] Mr Stankovic alleges by his statement of claim that he suffered injuries as a result of carrying out tiling works for Trendbuild in around late March/early April 2013.

[6] On 9 July 2013, Mr Stankovic applied to Workcover for compensation under s. 132 of the Act. His claim form identified Trendbuild as the employer and stated that on 3 April 2013 he sustained an injury to his right shoulder as a result of heavy lifting while working as a floor and wall tiler for Trendbuild. His claim form identified himself as a contractor but otherwise was prepared on the basis that Trendbuild was his employer. An option existed for him also to indicate if he was, relevantly, a trustee. He did not tick that option.

[7] On 22 July 2013, pursuant to s. 134 of the Act, Workcover notified Mr Stankovic by email that it had allowed his application for compensation under the Act for that injury.

[8] On 7 May 2015, pursuant to s. 185 of the Act, Workcover gave Mr Stankovic a Notice of Assessment of permanent impairment from his injury. The covering letter summarised the effect of that notice. It provided:

> I am writing to you about the latest assessment of your injury by Dr McCartney.
>
> For your injury, you were assessed as having a work-related impairment (WRI) of less than 20% and have been offered a lump sum of $7,377.45.
>
> You need to decide whether you agree or disagree with the assessment of the degree of permanent impairment stated in the notice of assessment. If you agree with the assessment of permanent impairment, you need to make a decision about the offer of lump sum compensation within 20 business days.
>
> Under the Act, WorkCover Queensland must stop paying your weekly compensation benefits and medical expenses when the earlier of the following happens:
>
> - you notify us of your decision about the offer of lump sum compensation
> - 20 business days after you receive the notice of assessment containing the offer.

[9] The "*decision about the offer*" referred to is the decision by the worker called for by s. 239 of the Act. As will be seen, that provision applies to assessments of Work Related Impairment (**WRI**) of less than 20% (including nil). In that case, the worker must elect whether to accept the lump sum payment or to reject the offer and chance his or her arm in proceedings for damages.

[10] There is no evidence on the application as to how Mr Stankovic responded to Workcover. However, given subsequent events, it can be inferred that he elected to reject the offer and seek damages for the injury.

[11] Although it was not the subject of direct evidence, it can also be inferred that prior to commencing these proceedings Mr Stankovic commenced the pre-court procedures under the Act which, as shall be seen, contemplate pre-court dealings between the plaintiff and Workcover. That appears to have precipitated Workcover's letter of 23 October 2015 to Mr Stankovic's solicitors. That letter provided:

> Dear Mr Schultz
>
> **COMMON LAW CLAIM FOR DAMAGES**
>
> **OUR CLIENT: WORKCOVER QUEENSLAND**
>
> **EMPLOYER: S S FAMILY PTY LTD TRADING AS TRENDBUILD**
>
> **YOUR CLIENT: MILJAN STANKOVIC**
>
> **DATE OF INJURY: 3 APRIL 2013**
>
> Our client has determined that at the material time, namely 3 April 2013, your client was not a 'worker' as defined in section 11 *Workers' Compensation and Rehabilitation Act* 2003.
>
> Consequently our client's position is that the policy of accident insurance held by SS Family Pty Ltd does not indemnify in respect of a claim for damages brought by your client for personal injury allegedly sustained while working with SS Family Pty Ltd.
>
> Consequently we have cancelled the appointment for Dr Walters for 5 November 2015 and request that you convey the fact of such cancellation to your client promptly.
>
> You will no doubt give consideration to whether your client has an alternative cause of action under the *Personal Injuries Proceedings Act* 2002 and we note in that regard the ordinary limitation period would not expire until **April 2016.**
>
> Our client has reached the decision that your client was not a 'worker' at the material time on the basis that:
>
> 1) having regard to section 1(b) of Schedule 2 Part 2 your client performed work under a contract of service with a trust of which he is a trustee and consequently by reason of section 11(3) *Workers' Compensation and Rehabilitation Act* 2003, is not a 'worker';
> 2) the relationship between SS Family Pty Ltd and your client was not in any event one of employer and employee and that your client did not work under a contract of service; and
> 3) your client would not be entitled to a determination that he was a 'worker', in particular under sections 1 and 2 of Schedule 2 Part 1.
>
> Yours faithfully
>
> **Robert Parcell**
>
> **Consultant**

The pleadings in these proceedings

[12] On 29 September 2016, Mr Stankovic commenced proceedings in this Court seeking damages from Trendbuild for breach of duty (in tort and contract) in respect of the Injury. The statement of claim articulates the claim against Trendbuild on alternative bases:

(a) **First**, on the basis that at the relevant time Mr Stankovic was a worker as defined in the Act employed by Trendbuild. The claim alleges that the Injury

occurred as a result of Trendbuild's breach of duty and seeks damages "*assessed pursuant to the [Act] and Regulations*";[1] and

(b) **Second**, it advances an alternative claim that Mr Stankovic was engaged by Trendbuild as a subcontractor and the circumstances of that engagement were such as to attract similar duties to those which Trendbuild had as employer (**the PIPA claim**). It formulates damages for the PIPA claim by reference to relevant provisions of the *Civil Liability Act 2003* (Qld) and Regulations.[2]

[13] The statement of claim also alleges that Mr Stankovic has "*complied with all the pre-court procedures under the [Act] and the PIPA and is entitled to bring these proceedings*".[3]

[14] Trendbuild's amended defence pleads to the allegations relating to the underlying merits of the claim. Of most interest, however, is Trendbuild's response to the bases of the claim against it. In that regard, Trendbuild admits the allegation that Mr Stankovic was a worker as defined in the Act and denies the alternative allegation that Mr Stankovic was a subcontractor. That denial is justified on three grounds:

(a) **First**, Trendbuild pleads facts which as a matter of substance are said to establish that Mr Stankovic was both an employee at common law and a worker as defined in the Act. Inter alia, it alleges that Mr Stankovic did not have a contract of service with "*a trust of which the Plaintiff was a trustee*"[4];

(b) **Second,** Trendbuild pleads that Workcover had accepted Mr Stankovic's application for compensation under the Act, provided benefits and issued the Notice of Assessment offering lump sum compensation. It then alleges, by paragraph 22 of the amended defence:

> In the premises of paragraphs 18-21 above, upon the true construction of the [Act], [Workcover] cannot deny, or put in issue, that the Plaintiff was and is:
>
> (a) a "worker" of the Defendant;
>
> (b) a "worker" in respect of whom the Defendant was an "employer" within the meaning of the [Act];
>
> (c) a "worker" who suffered and "injury" within the meaning of the [Act];
>
> (d) a "worker" who was entitled to seek "damages" pursuant to the [Act];
>
> (e) a "worker" in respect of whom the Defendant is entitled to coverage under "accident insurance" in sections 8 and 48 of the [Act] in relation to the proceedings of the Plaintiff which, by virtue of the issuing of the NOA under the [Act], is entitled to proceed with as of right against the Defendant for damages;
>
> (f) a "worker" in respect of which the Defendant, had to insure and remain insured; that is, to be covered to the extent of "accident insurance" against injuries sustained by the Plaintiff for the Defendant's legal liability for damages pursuant to section 48 of the [Act];
>
> (g) a "worker" in respect of whom [Workcover] is obliged to indemnify the Defendant for a claim for damages pursuant to the [Act].

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[1] Statement of Claim filed 29/09/16 Paragraph 2 and following.
[2] Statement of Claim filed 29/09/16 Paragraph 8 and following.
[3] Statement of Claim filed 29/09/16 Paragraph 18.
[4] Amended Defence filed 21/03/17 Paragraphs 13 to 17.

(c) **Third**, Trendbuild alleges that Workcover is estopped from denying that Mr Stankovic was a worker under the Act because:

(i) Mr Stankovic was induced by the acceptance of his claim for compensation and the subsequent payment of benefits to adopt the assumption that he would be a worker in subsequent damages proceedings; and

(ii) Mr Stankovic relied upon that assumption to his detriment by rejecting the lump sum offer, bringing proceedings and spending the compensation payments. (It might be wondered how Trendbuild has standing to raise an estoppel relied upon by Mr Stankovic. It is also interesting to note that Trendbuild does not seek to rely on s. 382 of the Act to sustain or support the alleged estoppel.[5] However, those interesting matters do not arise on this application.)

[15] It is the second ground identified above which arises in this application.

[16] A comment needs to be made at this point as to the matters alleged in paragraph 22(c) of Trendbuild's Amended Defence. That paragraph alleges that on the proper construction of the Act, Workcover cannot deny that Mr Stankovic was a worker who suffered an injury within the meaning of the Act. The Act defines injury in s. 32(1) as being a "*personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury*." The effect of that allegation, if taken literally, would be that Workcover was precluded from denying that the Injury was caused by the employment. It is difficult to see how that could be so, yet Trendbuild not be similarly precluded.

[17] However, the balance of Trendbuild's Amended Defence does not adopt the position that Trendbuild was precluded from denying that matter:

(a) Paragraph 37(c) of the Amended Defence admits that Mr Stankovic has sustained an injury to his right shoulder but denies the injury was caused by his work for Trendbuild; and

(b) Paragraphs 37(e) and (f), deny that the neck problems Mr Stankovic suffers from were the result of an injury at work but rather were the result of degeneration of the AC joint unrelated to his work.

[18] This is consistent with Trendbuild's construction as explained in detail in paragraph [70] below. As explained in detail there, Trendbuild does not submit that any party (including Workcover) was precluded from denying any allegation in the damages proceedings except whether the plaintiff was a worker who has sustained an injury for the purposes of indemnity under the Act in the damages proceedings.

[19] At the same time as the initial defence was filed, Trendbuild issued Third Party proceedings against Workcover. By its Amended Statement of Claim against Workcover (filed 9 November 2017), Trendbuild pleads relevantly as follows:

(a) Trendbuild was an employer under the Act covered by a contract of accident insurance;

[5] See *Castillon v P&O Ports Limited* [2006] 2 Qd R 220.

(b) By his statement of claim, Mr Stankovic alleges that he was a worker under the Act employed by Trendbuild who was injured at work as a result of Trendbuild's negligence as employer and thereby suffered loss and damage;

(c) If the plaintiff establishes his allegation he will suffer an injury under the Act in a claim for damages under the Act;

(d) Trendbuild then pleads each of the three matters identified in paragraph [14] above, and contends that by reason of each such matter Workcover is obliged to indemnify Trendbuild in respect of Mr Stankovic's claim for damages.

[20] In respect of the construction point referred to in paragraph [14](b), Trendbuild pleads:

> 20. In the premises pleaded in paragraphs 16-19 above, upon the true construction of the [Act] (including Chapter 13 thereof), WorkCover cannot deny, or put in issue, that the Plaintiff was, and is:
>
> (a) a "worker" of the Defendant;
>
> (b) a "worker" in respect of whom the Defendant was an "employer" within the meaning of the [Act];
>
> (c) a "worker" who has sustained "injury" within the meaning of the [Act];
>
> (d) a "worker" who has made a claim by the SOC against the Defendant for "damages" as that term is defined in the [Act];
>
> (e) a "worker" in respect of whom the Defendant had to insure and remain insured; that is, to be insured; that is, to be covered to the extent of "accident insurance" against injuries sustained by the Plaintiff for the Defendant's legal liability for damages pursuant to section 48 of the [Act]
>
> (f) a "worker" in respect of whom the Defendant is entitled to coverage under "accident insurance" in sections 8 and 48 of the [Act] in relation to the proceedings of the Plaintiff and who, by virtue of the issuing of the NOA under the [Act], is entitled to proceed, as of right, against the Defendant for damages as an employer, when, but for the issuing of the NOA, the Plaintiff could not have proceeded against the Defendant for damages as an employer;
>
> 20A. Further and alternatively, in the premises pleaded in paragraph 16-19 inclusive above, upon the true construction of the [Act] (including Chapter 13 thereof) the Third party cannot alter or revoke the decision that the Plaintiff was a "worker" within the meaning of, and for the purposes of the [Act], including Chapter 5 thereof.

[21] In respect of the estoppel claim, Trendbuild also pleads detrimental reliance on certain assumptions by Trendbuild itself as justifying an estoppel against Workcover.

[22] Workcover's Further Amended Defence (filed 31 January 2018) pleads, relevantly:

(a) By paragraph 15, a denial that Mr Stankovic was a worker because he was employed by the Miljan and Tanja Stankovic Trust, not Trendbuild and because he was a trustee of that trust (thereby invoking Schedule 2 Part 2 Paragraph 1(b) of the Act) and because he had a contract of service with "the Trust", not a contract for services;

(b) By paragraph 21 an allegation that the determination that Mr Stankovic was a worker under the Act was made solely for the purpose of s. 134(1) of the Act within the time allowed by the Act;

(c) By paragraph 24, a denial of paragraph 20 of Trendbuild's statement of claim because on the proper construction of the Act, it is entitled to deny or put in issue the matters there pleaded;

(d) By paragraph 24A, a denial of paragraph 20A of Trendbuild's statement of claim on the basis that by putting matters in paragraph 20 in issue it is not altering or revoking its original determination; and

(e) By paragraphs 29(c), (d) and 34(b), a denial that it is liable to indemnify Trendbuild because Mr Stankovic was not a worker under the Act.

[23] As is evident from the above summary, the pleadings raise the issue identified in the first paragraph of these reasons. By its amended application, Trendbuild seeks to have that question determined either by:

(a) Persuading the Court to strike out the paragraphs of Workcover's defence which are inconsistent with Trendbuild's contention; or alternatively

(b) Having that question determined as a preliminary point.

[24] On the hearing of the amended application filed by leave on 6 February 2018, neither party contended that the latter course was necessary. Further, Mr Diehm QC for Workcover accepted that it was appropriate to deal with the question as it arose on the application to strike out.

[25] In my view, that concession was rightly made. Although this matter involved extensive legal argument, the issue falls to be considered against an uncontentious factual background which in my view permits its proper resolution. Accordingly, I will proceed to deal with the strike out application, bearing in mind of course that the power to summarily determine, inter alia, that a ground of defence cannot as a matter of law be made out must be exercised with caution and only where the defence is clearly untenable. [6]

Relevant statutory provisions

[26] The Act deals with two distinct claims available to an employee injured in the course of employment: a claim for compensation under Chapters 3 and 4 of the Act and a claim for damages regulated by Chapter 5 of the Act. The claim for compensation is created by the Act. The claim for damages arises *dehors* the Act, by reference to the general law[7], but is regulated by the Act in a number of respects.

[27] The Act imposes rights and obligations, inter alia, on an insurer in respect of an employer's liability for compensation or damages. The insurer may be Workcover or a self-insuring employer. Neither party suggested anything turned on whether the insurer was Workcover or a self-employed insurer. In these reasons I will refer to Workcover when discussing the position of an insurer under the Act. There have been some amendments to provisions of the Act since the events the subject of these reasons. The relevant version of the Act agreed by the parties was the Act as stated in the reprint as current as at 14 August 2012.

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[6] *Dey v Victorian Railways Commissioner* (1949) 78 CLR 62, itself a case where a complex legal question relating to the inter-relationship of the then worker's compensation statute in Victoria with the right to pursue common law claims for damages; *Lomsargis v National Mutual Life Association of Australasia Limited* [2005] 2 Qd R 295.

[7] *Francis v Emijay Pty Ltd* [2006] 2 Qd R 5 at [27]-[28]; *Karanfilov v Inghams Enterprises Pty Ltd* [2001] 2 Qd R 273 at [10]-[11]; and in the context of cognate Victorian legislation see *Maurice Blackburn Cashman v Brown* (2011) 242 CLR 647 at [36].

[28] The following provisions are relevant.

Objects of the Act

[29] The objects of the Act identify the basic elements of the statutory scheme. Part 2 Chapter 1 relevantly provides:

(a) By s. 4:

> (1) This part states the main objects of this Act.
> (2) The objects are an aid to the interpretation of this Act.

(b) By s. 5:

> (1) This Act establishes a workers' compensation scheme for Queensland—
> (a) providing benefits for workers who sustain injury in their employment, for dependants if a worker's injury results in the worker's death, for persons other than workers, and for other benefits; and
> (b) encouraging improved health and safety performance by employers.
> (2) The main provisions of the scheme provide the following for injuries sustained by workers in their employment—
> (a) compensation;
> (b) regulation of access to damages;
> (c) employers' liability for compensation;
> (d) employers' obligation to be covered against liability for compensation and damages either under a WorkCover insurance policy or under a licence as a self-insurer;
> …
> (h) rights of review of, and appeal against, decisions made under this Act.
> (4) It is intended that the scheme should—
> (a) maintain a balance between—
> (i) providing fair and appropriate benefits for injured workers or dependants and persons other than workers; and
> (ii) ensuring reasonable cost levels for employers; and
> (b) …
> (c) provide for the protection of employers' interests in relation to claims for damages for workers' injuries;

Basic concepts of the Act

[30] Chapter 1 Part 4 contains definitions of basic concepts. Other definitions appear in Schedule 6. Trendbuild contends that these definitions apply to both provisions dealing with compensation and provisions regulating damages. Workcover did not cavil with that.

[31] Chapter 1 Part 4 relevantly provides:

(a) By s. 8:

> **Meaning of *accident insurance***
> ***Accident insurance*** is insurance by which an employer is indemnified against all amounts for which the employer may become legally liable, for injury sustained by a worker employed by the employer for—
> (a) compensation; and
> (b) damages.

(b) By s. 9:

> **Meaning of *compensation***
> ***Compensation*** is compensation under this Act, that is, amounts for a worker's injury payable under chapters 3 and 4 by an insurer to a worker, a dependant of a deceased worker or anyone else, and includes compensation paid or payable under a former Act.

(c) By s.10, relevantly:

> **Meaning of *damages***
> (1) ***Damages*** is damages for injury sustained by a worker in circumstances creating, independently of this Act, a legal liability in the worker's employer to pay damages to—
> (a) the worker; or
> (b) if the injury results in the worker's death—a dependant of the deceased worker.

[32] As already noted, the definition of damages reflects the fact that the cause of action for damages arises outside the Act.

[33] Section 11 deals with who is a worker. It provides:

> **Who is a *worker***
> (1) A ***worker*** is a person who works under a contract of service.
> (2) Also, schedule 2, part 1 sets out who is a ***worker*** in particular circumstances.
> (3) However, schedule 2, part 2 sets out who is not a ***worker*** in particular circumstances.
> (4) Only an individual can be a ***worker*** for this Act.

[34] The extensions and exclusions in Schedule 2 include the following, relevantly:

> **Part 2 Persons who are not workers**
> 1. A person is not a worker if the person performs work under a contract of service with-
> (a) a corporation of which the person is a director; or
> (b) a trust of which the person is a trustee; or
> …

[35] Section 30 defines an employer relevantly as follows:

> **Who is an *employer***
> (1) An ***employer*** is a person—
> (a) for whom an individual works under a contract of service; or
> (b) who enters into a contract with an individual in the circumstances mentioned in schedule 2, part 1.
> (3) To remove doubt, a reference to an ***employer*** of a worker who sustains an injury is a reference to the ***employer*** out of whose employment, or in the course of whose employment, the injury arose.

[36] Section 32 defines injury. It is the provision which links an injury to employment. It relevantly provides:

> **Meaning of *injury***
>
> (1) An ***injury*** is personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury.

Employer's obligations to insure

[37] Chapter 2 deals with employer's obligations under the Act. Section 46 deals with employer's legal liability. Again, this provision recognises that a worker's claim for damages arises *dehors* the Act. It provides:

> **Employer's legal liability**
> (1) An employer is legally liable for compensation for injury sustained by a worker employed by the employer.
> (2) This Act does not impose any legal liability on an employer for damages for injuries sustained by a worker employed by the employer, though chapter 5 regulates access to damages.

[38] Section 48 imposes the obligation to insure. It relevantly provides:

> **Employer's obligation to insure**
> (1) Every employer must, for each worker employed by the employer, insure and remain insured, that is, be covered to the extent of accident insurance, against injury sustained by the worker for—
> (a) the employer's legal liability for compensation; and
> (b) the employer's legal liability for damages.

Compensation under the Act

[39] Chapters 3 and 4 of the Act deal with compensation under the Act. Section 108 identifies the entitlement to compensation. It provides that "Compensation is payable under this Act for an injury sustained by a worker". This simple provision picks up, of course, the definitions of compensation, injury and worker set out above. Accordingly, the section provides (paraphrasing and reading in definitions) that compensation under the Act is payable for personal injury arising out of and caused by employment to a person who is a worker.

[40] Section 108(1) is modified and clarified in a number of respects in Parts 2 to 4 of Chapter 3 to deal with particular workers (miners and workers on ships and workers with industrial deafness) and particular situations (such as workers working outside Queensland and workers with compensation entitlements outside the Act corresponding to compensation under the Act). It is sufficient to note for present purposes that these Parts define certain conditions or circumstances and then modify the entitlement to compensation under the Act. In determining entitlement to compensation in these cases, therefore, Workcover must determine a number of additional matters to those which must be determined for "ordinary" claims.

[41] Part 5 of Chapter 3 deals with compensation applications. It relevantly provides:

(a) By s. 131, that an application for compensation must be brought within 6 months after the entitlement arises;

(b) By s. 132, that an application for compensation must be made in the approved form accompanied by certain basic medical evidence;

(c) By s. 134, for Workcover to decide the application as follows:

> **Decision about application for compensation**
> (1) A claimant's application for compensation must be allowed or rejected in the first instance by the insurer.
> (2) The insurer must make a decision on the application within 20 business days after the application is made.
> (3) The insurer must notify the claimant of its decision on the application.
> (4) If the insurer rejects the application, the insurer must also, when giving the claimant notice of its decision, give the claimant written reasons for the decision and the information prescribed under a regulation.
> (5) Subsection (6) applies if the insurer does not make a decision on the application within the time stated in subsection (2).

> (6) The insurer must, within 5 business days after the end of the time stated in subsection (2), notify the claimant of its reasons for not making the decision and that the claimant may have the claimant's application reviewed under chapter 13.

[42] As can be seen, Workcover must make its decision under s. 134 fairly promptly, within 20 business days. However, Workcover may seek a medical examination of the applicant pending approval of the application and if the claimant does not co-operate in that regard, any entitlement to compensation is suspended until the claimant undergoes the examination: see s. 135. Further, there is no entitlement to compensation at all until a worker is assessed by a doctor, nurse or dentist as the case may be: s. 141.

[43] Workcover's determination of the entitlement of a claimant can be reviewed by Workcover. Division 6 relevantly provides:

(a) By s. 168:

> **Review of compensation and associated payments**
> (1) An insurer may, from time to time, review a person's entitlement to compensation.
> (2) On a review, the insurer may terminate, suspend, decrease or increase an entitlement.

(b) By s. 170:

> **Recovery of compensation overpaid**
> (1) This section applies if, for an application for compensation, payment has been made to a worker or another person of an amount that is more than the amount to which the worker or person is entitled.
> (2) The insurer may—
> (a) recover from the worker or person the difference between the payment and the entitlement; or
> (b) from time to time deduct from weekly payments of compensation that become payable to the worker, whether for that application or a subsequent application for compensation, the difference between the payment and the entitlement, or any part of the difference.
> (3) If the overpayment has been made because of incorrect information given by a worker's employer, WorkCover may recover the overpaid amount from the employer.

[44] Part 10 of Chapter 3 deals with compensation for permanent impairment (in contrast to compensation payable as weekly payments). Section 178 contains the general statement of the entitlement to compensation for permanent impairment. It provides:

> **Entitlement to assessment of permanent impairment and lump sum compensation**
> (1) Under this part, an insurer or a worker is entitled to ask for an assessment to decide if a worker has sustained a degree of permanent impairment from injury.
> (2) If the worker is assessed under this part as having sustained a degree if permanent impairment, the worker is entitled to a payment, or an offer of payment, of lump sum compensation for the permanent impairment.
> (3) In particular circumstances, the worker may be entitled to a payment of additional lump sum compensation.

[45] Division 2 deals with assessment of permanent impairment and calculation of Work plan Related Impairment (**WRI**) by Workcover (s. 179) and calculation of lump sum compensation for that degree of permanent impairment (s. 180).

[46] Division 3 deals with notification of assessment of permanent impairment. It provides relevantly as follows:

> **184 Application of div 3**
> This division applies if an assessment of permanent impairment of a worker's injury has been made under section 179.
>
> **185 Insurer to give notice of assessment of permanent impairment**
> (1) The insurer must, within 10 business days after receiving the assessment of the worker's permanent impairment, give the worker a notice of assessment in the approved form.
> (3) The notice must state—
> (a) whether the worker has sustained permanent impairment from the injury; and
> (b) if the worker has sustained permanent impairment—
> (i) the degree of permanent impairment attributable to the injury; and
> (ii) the WRI calculated for the injury; and
> (iii) the amount of lump sum compensation under section 180 to which the worker is entitled for the injury; and
> …

[47] Section 186 sets out a scheme for a worker to dispute Workcover's assessment of permanent impairment. Thereafter the Act deals with offers of lump sum compensation and the consequences of differing degrees of permanent impairment as follows:

> **187 Offer of lump sum compensation**
> If the worker has an entitlement to lump sum compensation under section 180, the insurer must include, in the notice of assessment, an offer of lump sum compensation to the worker (the ***offer***).
>
> **188 Worker's decision about lump sum compensation—WRI 20% or more**
> (1) This section applies if—
> (a) the worker has—
> (i) a psychiatric or psychological injury from an event that results in a WRI of the worker of 20% or more; or
> (ii) another injury from an event that results in a WRI of the worker of 20% or more; and
> (b) the worker has an entitlement to lump sum compensation.
> (2) The worker may accept or defer a decision about the offer by giving the insurer written notice within the decision period.
> (3) The worker is taken to have deferred the decision if, within the decision period, the worker does not advise the insurer that—
> (a) the offer is accepted; or
> (b) the worker wants to defer the decision.
> (4) If the worker accepts the offer, the insurer must pay the worker the amount of lump sum compensation.
>
> **189 Worker's decision about lump sum compensation—WRI less than 20% or no WRI**
> (1) This section applies if—
> (a) the worker—

(i) has—

(A) a psychiatric or psychological injury from an event that results in a WRI of the worker of less than 20%; or

(B) another injury from an event that results in a WRI of the worker of less than 20%; and

(ii) has an entitlement to lump sum compensation; or

(b) the worker has an injury that does not result in any WRI of the worker.

(2) The insurer must also, when giving the notice of assessment—

(a) give the worker a copy of sections 10, 237(3), 239, 240 and 316; and

(b) advise the worker that the worker must make an irrevocable election as to whether the worker—

(i) accepts the offer of payment of lump sum compensation; or

(ii) seeks damages for the injury; and

(3) The worker may accept, reject or defer a decision about the offer by giving the insurer written notice within the decision period.

(4) The worker is taken to have deferred the decision if, within the decision period, the worker does not advise the insurer that the offer is accepted or rejected.

(5) If the worker accepts the offer, the insurer must pay the worker the amount of lump sum compensation.

(6) If the worker fails to give the insurer notice of the worker's election before the worker seeks damages for the injury, the worker is taken to have rejected lump sum compensation for the injury.

(7) For subsection (6), the worker is taken to seek damages for the injury when the worker lodges a notice of claim under chapter 5.

Entitlement to seek damages

[48] Chapter 5 deals with the entitlement to seek damages.

[49] Section 233 provides certain definitions. It defines, inter alia:

(a) 'claimant' to mean "*a person entitled to seek damages*". That entitlement is identified in s. 237(1) referred to below; and;

(b) 'worker' for a claim to mean "*the worker in relation to whose injury the claim is made*".

[50] Section 237 identifies the persons entitled to seek damages (as defined in the Act). It provided, at the relevant time:

General limitation on persons entitled to seek damages

(1) The following are the only persons entitled to seek damages for an injury sustained by a worker—

(a) the worker, if the worker—

(i) has received a notice of assessment from the insurer for the injury; or

(ii) has not received a notice of assessment for the injury, but—

(A) has received a notice of assessment for any injury resulting from the same event (**the assessed injury**); and

(B) for the assessed injury, the worker has a WRI of 20% or more or, under section 239, the worker has elected to seek damages;

(b) the worker, if the worker's application for compensation was allowed and the injury has not been assessed for permanent impairment;

(c) the worker, if—

(i) the worker has lodged an application, for compensation for the injury, that is or has been the subject of a review or appeal under chapter 13; and

(ii) the application has not been decided in or following the review or appeal;

> (d) the worker, if the worker has not lodged an application for compensation for the injury;
> (e) a dependant of the deceased worker, if the injury results in the worker's death.
> (2) The entitlement of a worker, or a dependant of a deceased worker, to seek damages is subject to the provisions of this chapter.
> (3) If a worker—
> (a) is required under section 239 to make an election to seek damages for an injury; and
> (b) has accepted an offer of payment of lump sum compensation under chapter 3, part 10, division 3 for the injury;
> the worker is not entitled under subsection (1)(a)(ii) to seek damages.
> (4) However, subsection (3) does not prevent a worker from seeking damages under section 266.
> (5) To remove any doubt, it is declared that subsection (1) abolishes any entitlement of a person not mentioned in the subsection to seek damages for an injury sustained by a worker.

[51] It can be seen that s. 237(1) contemplates six circumstances in which a person may qualify as entitled to seek damages: five relate to the circumstance where the worker is the claimant and one relate to the circumstance when the claimant is a dependent of the worker.

[52] The first two of those circumstances involve Workcover issuing a notice of assessment to the worker, either for the injury the subject of the claim for damages (s. 237(a)(i)) or for another injury resulting from the same event (s. 237(a)(ii)). These circumstances therefore contemplate that Workcover must have determined that there has been an injury sustained by a worker for the purposes of an entitlement to compensation (as only a person so entitled will receive a notice of assessment).

[53] The remaining four circumstances do not require a notice of assessment to have issued but nonetheless also require in each case that Workcover have determined that an injury has been sustained by a worker under the Act.

[54] That is provided:

(a) By s. 250 in respect of s. 237(1)(b), which relevantly provides:

> (1) The claimant may seek damages for the injury only if the insurer gives the claimant a notice of assessment.
> (2) For subsection (1), the insurer must have the degree of permanent impairment assessed under chapter 3, part 10 and give the claimant a notice of assessment.
> (3) Chapter 3, part 10 applies to the assessment.

(b) By s. 254 in respect of s. 237(1)(c), which relevantly provides:

> (1) The claimant may seek damages for the injury only after—
> (a) any review or appeal under chapter 13 ends; and
> (b) the application for compensation is decided; and
> (c) the insurer gives the claimant a notice of assessment.
> (2) For subsection (1)(c), the insurer must have the degree of permanent impairment assessed under chapter 3, part 10 and give the claimant a notice of assessment.
> (3) Chapter 3, part 10 applies to the assessment.

(c) By s. 258 in respect of s. 237(1)(d), which relevantly provides; and

> (1) The claimant may seek damages for the injury only if the insurer—
>
> (a) decides that the claimant—
>
> (i) was a worker when the injury was sustained; and
>
> (ii) has sustained an injury; and
>
> (b) gives the claimant a notice of assessment for the injury.
>
> (2) For subsection (1), the insurer must have the degree of permanent impairment assessed under chapter 3, part 10 and give the claimant a notice of assessment.
>
> (3) Chapter 3, part 10 applies to the assessment, but only for the purpose of assessing the degree of permanent impairment for the purposes of part 12.

(d) By s. 262 in respect of s. 237(1)(d), which relevantly provides:

> (1) The claimant may seek damages for the injury only if any of the following apply—
>
> (a) an application has been made for compensation under chapter 3, part 11 and—
>
> (i) the insurer has paid compensation under chapter 3, part 11 for the worker's death to the claimant as a dependant of a worker; or
>
> (ii) the application is or has been the subject of a review or appeal under chapter 13 and the application has not been decided in or following the review or appeal;

[55] Also relevant to this matter is the link between s. 237(3) and s. 239. That section relevantly provides:

> (1) This section applies if a worker's notice of assessment states that –
>
> (a) the worker's WRI is less than 20%; or
>
> (b) the worker has an injury that does not result in any WRI of the worker.
>
> (2) If, in the notice of assessment, the worker is offered a payment of lump sum compensation under chapter 3, part 10, division 3 for the injury, the worker is not entitled to both—
>
> (a) payment of lump sum compensation for the injury; and
>
> (b) damages for the injury.
>
> (3) If, in the notice of assessment, the worker is required to make an election to seek damages for the injury, the worker can not change the worker's election—
>
> (a) if the worker has elected to seek damages for the injury—after notice of the election is given to the insurer; or
>
> (b) if the worker is taken, under section 189(7), to have elected to seek damages for the injury—after the worker lodges a notice of claim.

[56] Part 4 of Chapter 5 deals with reduction in recoverable damages. Relevant to this matter is s. 270(1) of the Act which provides relevantly:

> (1) 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 an insurer by way of compensation for the injury.

Pre-court procedures

[57] Part 5 of Chapter 5 contains pre-court procedures which have become a familiar part of personal injury claims under the Act, PIPA and the *Motor Accident Insurance Act 1994* (Qld). It is sufficient to note that the procedures provide for, inter alia:

(a) Pre-action notice of claim by the claimant to Workcover (s. 275);

(b) A response to the notice of claim by Workcover (s. 278);

(c) The claiming of contribution by the Workcover from a contributor (s. 278A);

(d) The provision of information and documents relevant to the claim by the parties, being the claimant, the Workcover and the contributor (s. 279);

(e) Co-operation by the employer with Workcover (s. 280);

(f) Notice from Workcover to the worker as to whether liability is admitted or denied and why (s. 281);

(g) A compulsory conference of the parties (which seems to mean in that context Workcover, the claimant and any contributor: see s. 289(5));

(h) Final written offers by each party if the claim does not settle (s. 292).

Court Proceedings

[58] Section 300 deals with the carriage of court proceedings. It relevantly provides:

> (1) If a proceeding is brought for damages, the proceeding must be brought against the employer of the injured or deceased worker and not against WorkCover.
> (2) However, a proceeding may, and may only, be brought against WorkCover if—
> (a) the employer was an individual and can not be adequately identified, is dead or can not practically be served; or
> (b) the employer was a corporation and has been wound up; or
> (c) the employer was self-insured at the time of the event and WorkCover has since assumed the employer's liability for the injury.
> …
> (4) If the employer is not a self-insurer, legal process that starts the proceeding must be served on WorkCover within 30 days after the employer has been served, and no step may be taken in the proceeding until WorkCover or the self-insurer has been served.
> (5) WorkCover is entitled to conduct for an employer, other than an employer who is a self-insurer, all proceedings taken to enforce the claim or to settle any matter about the claim.
> (6) An employer who is a self-insurer is entitled to conduct all proceedings taken to enforce the claim or to settle any matter about the claim.
> …

Civil Liability

[59] Chapter 5 Part 8 deals with civil liability. It is sufficient to note that the Part 8 contains provisions which modify and/or supplement the common law applicable to claims for damages for an injury sustained by a worker in a number of important respects:

(a) Section 305B identifies requirements which must be satisfied before a person will have breached a duty to take precautions against a risk of injury to a worker;

(b) Section 305C states three further matters which modify and/or clarify the circumstances in which a breach of duty arises;

(c) Section 305D identifies principles to be applied in dealing with causation of an injury by a breach of duty; and

(d) Division 4 contains provisions which modify and/or clarify the principles applicable to a finding of contributory negligence by a worker who has sustained an injury.

Assessment of damages and costs

[60] Part 9 contains provisions which modify and/or clarify the general law applicable to assessment of damages. Part 12 similarly makes specific provision for the dealing with costs. Again these provisions apply to a claim for damages for an injury sustained by a worker as those terms are defined under the Act.

Reviews and Appeals

[61] The final part of the Act relevant to resolution to this application is Chapter 13 dealing with reviews and appeals. It is sufficient to summarise the effect of key provisions.

[62] Section 538 requires Workcover to undertake an internal review of any proposed decision to reject an application for compensation or terminate compensation.

[63] Chapter 13 Part 2 provides for review by the Worker's Compensation Regulatory Authority of a wide range of decisions by Workcover (or a self-insuring employer). This includes decisions allowing or rejecting an application for compensation or terminating compensation or failing to make a decision on an application for compensation: s. 540. A claimant, worker or employer aggrieved by such a decision or failure to make such a decision by Workcover may apply for review: s. 541. The review by the Authority proceeds in a prompt and informal manner. There is no structured disclosure nor process for identifying issues in dispute. However an applicant may put forward any relevant document it wants considered and the decision-maker must provide the Authority information required by the Authority: ss. 542 and 544. The Authority will also have reasons for the decision under review: s. 544(1)(a)(iii). The Authority must make a decision within 25 business days after receiving the application for review: s. 545.

[64] Part 3 provides for an appeal from a review decision by the Authority. The appeal is available to a claimant, worker, employer or insurer aggrieved by a review decision. The appeal is to the industrial commission in respect of decisions about entitlement to compensation: s. 548A. The process is more formal, requiring filing of a notice of appeal and permitting legal representation with leave or by agreement. There seems to be no constraint on the introduction of fresh evidence: s. 554, including medical evidence: s. 556.

[65] Part 3 also provides for an appeal by way of rehearing to the Industrial Court on the evidence before the industrial commission. Section 561(4) provides that the Industrial Court's "decision is final".

The Issues

[66] The issues arising on the application as formulated by Trendbuild are these:

(a) As a matter of statutory construction, if Workcover has decided that Mr Stankovic has sustained an injury as a worker for the purposes of entitlement to compensation under Chapter 3 of the Act, may Workcover deny that he is such a worker in proceedings for damages by Mr Stankovic regulated by Chapter 5 of the Act?

(b) Alternatively, having made such a decision, can Workcover alter or revoke its decision in the absence of fraud or misrepresentation for the purposes of proceedings for damages by Mr Stankovic?

[67] Trendbuild says that on the proper construction of the Act, the answer to both questions is "no".

[68] As to this formulation of the issues, it is useful to note that in some parts of its submissions, Trendbuild focuses on Workcover's determination that Mr Stankovic is a worker for the purposes of issue of a Notice of Assessment. This focus is understandable because Mr Stankovic's entitlement to seek damages for an injury sustained by him as a worker arises under s. 237 (1)(a) of the Act, which confers that entitlement on a worker who has received a Notice of Assessment. However, Trendbuild's central contention is that it is the determination by Workcover that Mr Stankovic was a worker which binds Workcover in the proceedings for damages. The issue of a Notice of Assessment is the consequence of such a determination, but is not the act which comprises that determination. Rather it was the decision made under s. 134 of the Act by which Workcover allowed Mr Stankovic's application for compensation which involved a determination that he was a worker under the Act.

[69] It is also useful to note that although a determination of entitlement to compensation as occurred in this case sustains an entitlement to seek damages for the injury the subject of the determination, it is not the only way that a determination by Workcover can sustain that entitlement. The statutory scheme in this respect is summarised in paragraphs [51] to [54]. A principled analysis of the construction advanced by Trendbuild requires consideration of that whole scheme.

Trendbuild's contentions

[70] It is first necessary precisely to identify Trendbuild's proposition of construction. Notwithstanding the helpful written submissions provided by Trendbuild, it seems best encapsulated by the following explanation by Mr Douglas QC[8]:

> MR DOUGLAS: Your Honour, in our submission, in a case such as the present, in which the application for compensation has been accepted – has been made and accepted, I should say – and with it, the acceptance of the plaintiff as being a worker who has suffered injury as defined, then proof of those definitional facts is irrelevant to the disposition of any common law claim for damages, except to the extent of qualification under section 237. So our submission is that once – once the plaintiff qualifies to pursue a claim for damages under section 237 – and we submit it does so by fulfilment of section 237, subsection (1) – then in those circumstances all that's left to do is prove a common law claim.
>
> For the sake of completeness, can I say prove a common law claim without having to prove as well that he was a worker within the definition, or, for that matter, suffered an injury within the definition in either case of the Act. That's the short point in our submissions.
> …
>
> MR DOUGLAS: We're not suggesting that fulfilment of the definitions in the – I should say the compensation phase – is determinative of anything in the common law claim. It was exactly the same in Maurice Blackburn. In Maurice Blackburn, the panel decided that the worker there suffered a serious injury. That was the qualification factor. And the High Court said, "Well, that's interesting. That's great. He's qualified to bring a common law claim." It might have been a she, I'm sorry. It was a she; I apologise.

[8] TS 1-67.33-69.41, irrelevant sections omitted.

HIS HONOUR: That's all right.

MR DOUGLAS: She, the solicitor in the Maurice Blackburn case, was entitled to bring a claim, but nothing in the compensation phase bore upon or regulated or determined the various elements of that common law claim; it merely went to qualification. That's the short point that we were seeking to make.

…

MR DOUGLAS: And your – once one's qualified in that respect he's entitled to prove liability. He may prove liability in various ways. He may prove liability on the basis that he is or isn't an employee - I use that in a common law sense – but he's still qualified to bring a claim for damages, and more importantly it's a claim which, if proved, we would submit – if proved must be met from the fund under the Act, and in turn the corollary is the defendant is entitled to be indemnified irrespective of the success of that claim. I mean that to the extent of the costs of defending the claim if it be unsuccessful.

…

HIS HONOUR: So, let's say he runs the case just on the basis of a Stevens v Brodribb type case and he wins that. Do you say that your client's entitled to indemnity under the policy?

MR DOUGLAS: Yes. Yes. Because he's qualified to bring a claim for damages …

HIS HONOUR: Well, to be clear, assuming that he runs and wins the case on a basis outside the scope of the definition of worker under the Act

MR DOUGLAS: Correct.

HIS HONOUR: you say that you're still entitled to indemnity?

MR DOUGLAS: Correct. Because he's entitled to bring a claim for damages. Even if he loses we're entitled to indemnity. We're entitled to indemnity to the extent of the costs that would be incurred in defending a claim. As matters stand, the defendant is defending this claim. The defendant is bearing the costs of defending this claim, and it's taken to trial and - I hope the plaintiff doesn't lose, perhaps, but if the plaintiff does go to trial and lose then the defendant still has a very real interest in this issue of indemnity to the extent of those costs.

[Underlining added]

[71] Taken with the written submission, Trendbuild's proposition seems to be that once Workcover has determined that a person is a worker who has sustained an injury within the meaning of the Act[9] such that they are entitled to seek damages for that injury under s. 237(1), Workcover is bound to indemnify the defendant as an employer under the Act in a proceeding by that person as plaintiff:

(a) Regardless of whether on the facts as alleged or proved at trial, the plaintiff "sustained an injury as a worker" under the Act; and

[9] Whether under s. 134 or under some other section which establishes entitlement to bring a claim for damages: see paragraphs [51] to [54] above.

(b) Regardless of whether the plaintiff succeeds at trial on the basis that the defendant breached a duty of care owed to him as an employee or on some quite different basis for liability in the defendant such as that the defendant breached a duty of care owed to the plaintiff as a sub-contractor or even that the liability arose out of the defendant's position as occupier or some other basis entirely unrelated at law to the employer/employee relationship; and

(c) Regardless of whether evidence comes to the attention of Workcover which demonstrates that the plaintiff was not a worker under the Act.

[72] Trendbuild's contentions in support of its construction can be summarised as follows.

[73] **First**, Trendbuild contends that the scheme of the Act supports its proposition. It points out that the Act, by s. 237(1), makes the entitlement to bring proceedings for damages for injury sustained by a worker conditional on a determination by Workcover that a person is a worker under the Act. It also points out that the Act contains an extensive review and appeal process in respect of, inter alia, such a decision. It contends that the centrality of the determination that a person is a worker to the entitlement to seek damages, taken with the extensive review and appeal processes in the Act in respect of that determination, discloses that Parliament intended that the determination that a person was a worker for the purposes of compensation should be binding in proceedings for damages. Trendbuild contends that if Workcover is able to contend that a person is not a worker in proceedings for damages, it can avoid the complex provision for review and appeal provided in the Act in respect of that issue that is unlikely to be Parliament's intention.

[74] **Second**, Trendbuild relies on s. 48 which requires an employer to have insurance against liability for damages and compensation as defined in the Act. It refers to McMurdo J's observations in *Francis v Emijay Pty Ltd* [2006] 2 Qd R 5 at [46] that:

> Section 155 required insurance against two types of liability. One was a liability for workers compensation under that Act. It was the employer's liability "in respect of all workers employed by the employer". The second was the employer's liability independently of the Act "for any injury to any such worker". The evident intent was that the same worker or workers would be the subject of insurance against each kind of liability. Accordingly, it is relevant to consider the circumstances in which an employer was liable under the Act for workers compensation. A connection with New South Wales which was sufficient to expose the employer to a liability for workers compensation is likely to represent the necessary connection for the obligation to insure against that liability and otherwise pursuant to s 155.

[75] Trendbuild contends that if, as his Honour held, the evident intent of the statute is that the same workers be the subject of insurance against each kind of liability, then it must be the intent of the Act that a person cannot be a worker for the purposes of liability of an employer for compensation and not a worker for the purposes of liability of an employer for damages.

[76] **Third**, Trendbuild refers to ss. 189 and 239 and submits that the effect of these provisions is to require a person who has been found to be a worker under Chapter 3 to choose between the lump sum compensation offered and seeking damages. It then contends that Parliament would not intend such an election to contemplate the possibility that the person might receive nothing because he or she was found not to have sustained an injury as a worker under the Act.

[77] **Fourth,** Trendbuild referred to the provisions relating to conduct of proceedings for damages under Chapter 5 that contemplate that Workcover will conduct the defence of on behalf of the employer. It contends it can be inferred from this that the Act proceeds on the assumption that a person who brings proceedings which are permitted under s. 237(1) will be a worker who has sustained an injury under the Act such that Workcover will be required to indemnify the employer in respect of the proceedings, regardless of the basis upon which they are pursued.

[78] **Fifth**, Trendbuild contends that the decisions of the High Court in *Brown*[10] and *Wingfoot*[11] do not lead to a different conclusion because the differences between the Victorian provisions considered in those cases and the relevant provisions of the Act mean that the conclusion reached in those cases could not be reached in respect of the Act.

[79] **Sixth,** Trendbuild contends that there are odd results if its construction is not accepted, being:

(a) A situation would arise where a person has a right to seek damages for an injury suffered as a worker but can be found at trial not to have that right at all because they are found not to be a worker. This is said to give rise to the odd result that a person who was found to be a worker with a right to proceed to trial was found at trial not to be so entitled;

(b) The plaintiff would be entitled under the Act to proceed against the defendant as his or her employer, but the employer would be left without indemnity for such proceedings to the disadvantage of both the defendant (who must defend the proceedings from his own resources) and the plaintiff (who may be left with a judgment which cannot be executed); and

(c) Workcover would not be entitled to a charge on any damages recovered in the proceedings, despite having paid compensation to the worker under Chapter 3.

[80] **Seventh,** Trendbuild relies upon the decision of Martin J in *Connor v Queensland Rail Limited* [2016] QSC 270 as providing authority for its construction. That case involved the question of the circumstances in which a person who had been issued a Notice of Assessment for certain injuries but had had her claim for compensation rejected in respect of others, was entitled to bring proceedings for damages in respect of both classes of injuries under s. 237(a)(ii). Trendbuild relies upon his Honour's observation in the course of resolving that question that:

> [32] The context of s. 237(1)(a)(i) is instructive. It assists to demonstrate that where decisions have been made on the "worker" and "injury" issues they need not be made again.

[81] The underlining in the above passage is taken from Trendbuild's submissions.

[82] **Finally**, Trendbuild contends that Workcover, by altering its position on whether the plaintiff is a worker under the Act, is purporting to alter or vary its decision about that matter under s. 134 of the Act and that it has no statutory authority to do that absent fraud or misrepresentation.

Consideration

Scope of indemnity under the Act

[10] *Maurice Blackburn Cashman v Brown* (2011) 242 CLR 647.
[11] *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480.

[83] Before dealing with Trendbuild's contentions, it is useful to identify a significant barrier which in my view stands in the way of accepting Trendbuild's construction.

[84] It is a consequence of Trendbuild's construction, forthrightly accepted by Mr Douglas QC, that Workcover may be required to indemnify an insured employer for damages awarded against that entity as defendant in a common law proceeding, even if it is established at trial that:

(a) The injury was not sustained by the plaintiff as a "worker" as defined in the Act, but as, for example, a sub-contractor or an employee who is an excluded worker under Schedule 2 Part 2 (i.e. a person who has incorporated his or her business and employed himself or herself);

(b) The injury did not arise out of, or in the course of, employment or in respect of which employment was not a significant contributing factor.

[85] Further, it is a consequence of that construction that Workcover must indemnify even if evidence comes to Workcover's attention demonstrating that the Act otherwise does not apply to the plaintiff's claim.

[86] This is to extend the indemnity conferred by accident insurance under the Act to amounts for which the insured employer may become legally liable as damages beyond amounts "*for injury sustained by a worker employed by the employer*": see s. 8 of the Act. In my view, Trendbuild's construction is therefore inconsistent with the scope of indemnity conferred by accident insurance under the Act.

[87] It would take compelling textual considerations derived from other provisions of the Act, or compelling authority, to sustain Trendbuild's construction in the face of the terms of s. 8. In my view, Trendbuild identified no such compelling considerations or authority. I now turn to the specific matters of construction and authority relied upon by Trendbuild.

The Scheme of the Act

[88] As Trendbuild correctly submits, s. 237(1) has been characterised as a gateway provision. Unless a person is one of the persons identified in s. 237(1)(a) to (e), the person is not entitled to seek damages for an injury sustained by a worker. Each of s. 237(1)(a) to (e) requires, ultimately, a determination to be made by Workcover that a worker has sustained an injury under the Act. And, again as Trendbuild correctly submits, each such determination is subject to extensive review and appeal rights. However, I do not agree that this demonstrates Parliament's intention that the determination bind Workcover in proceedings for damages permitted by that section, such that Workcover must indemnify the insured employer regardless of the basis of liability established in proceedings authorised by s. 237(1).

[89] The adoption of the gateway provision must be seen as part of the broader object evident in Chapter 5 as a whole, inter alia, to modify and regulate common law proceedings by workers against employers so as to limit the frequency and scope of such proceedings.[12] That in my view is the evident purpose of that section.

[12] See the discussion by the Court of Appeal in *Bonser v Melnacis* [2002] 1 Qd R 1 particularly at [44] dealing with equivalent provisions in the *Workcover Queensland Act 1996* which introduces these reforms following the recommendations of the Kennedy Report and see Byrne J with whom McMurdo P and Thomas JA agreed in *Hawthorne v Thiess Contractors Pty Ltd* [2002] 2 Qd R 157 [32] to [36].

[90] Further, the extensive appeal provisions provided by Chapter 13 are explicable by reference to:

(a) The importance to a worker of an adverse determination by Workcover of entitlement to compensation, both in terms of access to compensation and entitlement to sue for damages; and

(b) The importance to all parties involved in a compensation claim of the determination that a worker is entitled to compensation for an injury sustained by the worker.

[91] The scheme identified by and relied upon by Trendbuild has clear statutory purposes. There is no necessity to impose upon it the additional purpose of providing for a once and for all determination of whether a person is a worker for indemnity purposes in proceedings for damages. I do not consider that that scheme justifies the implication that Workcover's obligation to indemnify goes beyond the scope of s. 8, especially when there are no words in s. 237 which appear to admit of that construction.

[92] I should deal here with a submission made by Mr Diehm QC for Workcover. He characterised Trendbuild's submission as being to the effect that Workcover was bound in the proceedings by its determination that Mr Stankovic was a worker but not that it was bound by the determination that he had suffered an injury as defined. In my view, Trendbuild's submissions can be read in that way.

[93] On that basis, he pointed out that an entitlement to seek damages for injury sustained by a worker will only arise under s. 237(1) if Workcover has determined *two* matters favourably to the worker or his or her dependants:

(a) That there is an injury as defined in the Act; and

(b) That that injury was suffered by a worker as defined in the Act.

[94] Bearing in mind the definition of injury in the Act, the determination by Workcover would then have the consequence that in those proceedings, Workcover would be bound in the following respects:

(a) That the worker had in fact suffered a personal injury;

(b) That that personal injury arose out of, or in the course of employment; and

(c) That employment was a significant contributing factor to the injury.

[95] He submitted that it could not be Parliament's intention because it would leave very little apart from breach of duty and assessment of damages to be resolved at trial. He relied on *Wilkinson v Stevensam P/L & Ors* [2006] QCA 88 at [51] for the proposition that the injury must be established in proceedings for damages.

[96] (Such construction would also be inconsistent with s. 305D of the Act which regulates causation in Chapter 5 proceedings. True it is that s. 305D is concerned with whether a breach of duty caused a particular injury, rather than the broader questions of whether an injury arose out of employment and whether employment was a significant contributing factor to the injury. However, the questions would overlap and it is hard to imagine that Parliament intended such an overlap to arise.)

[97] Mr Diehm QC submitted that if the determination that an injury has been sustained is not binding in the subsequent proceedings, one could not conclude that Parliament

intended the determination that a person is a worker be binding, there being no good reason to distinguish between the two aspects of the determination.

[98] This would be a hard proposition for Trendbuild to answer. However, as I understood Mr Douglas' case, it is not a proposition which impugns Trendbuild's construction.[13] As noted above, that construction is that Workcover is bound by its determination that Mr Stankovic has sustained an injury as a worker under the Act, but only in respect of indemnity for the employer, not in respect of any issue in the common law proceedings.

[99] That might answer Mr Diehm QC's argument, but it leaves Trendbuild with the problem identified in paragraphs [83] to [87] above.

Relevance of Section 48

[100] I do not agree that s. 48 assists Trendbuild. There is nothing in s. 48 which necessarily contemplates that if a person is a worker for compensation purposes in respect of an injury, he or she must also be worker for the purposes of entitlement to indemnity in respect of a damages claim for that injury. The legal liability for compensation and for damages arise from separate sources (the Act and the general law). Further, the scope of the indemnity for accident insurance arises under s. 8. As has already been observed, that section is inconsistent with the construction contended for by Trendbuild.

[101] Neither does the passage from *Francis v Emijay* support the construction suggested. His Honour's comments were made in quite a different context. That case involved an injury to an interstate truck driver which occurred in NSW but where the proper law of the employment contract was Queensland law. The question was whether s. 155(1) of the *Workers' Compensation Act 1987* (NSW) required the employee to have indemnity for damage for that injury so as to engage the exclusion to the definition of damage in s. 11(2) of the Act. It did not raise the issues in this applicant.

Relevance of the requirement to elect

[102] Trendbuild submitted that the effect of ss. 189 and 239 is to require a person who has necessarily been found to be a worker under Chapter 3 to choose between the lump sum compensation offered and seeking damage. It was contended that Parliament would not intend such an election to contemplate the possibility that the person might receive nothing because he or she was found not to be a worker who sustained an injury for the purposes of the Act in the damages proceeding. I disagree.

[103] Section 189 requires a worker to either accept the offer of lump sum compensation offered by the insurer or to seek damages for the injury. Even on Trendbuild's case, if the person offered the compensation decides to reject it and seek damages, he or she is taking a risk. The Court might decide that there was no personal injury suffered, or that the injury was not caused by the employer's conduct, or if it was, that that conduct did not involve any breach of duty by the employer, or that the damages assessed were less than offered by the insurer as lump sum compensation. I do not see why the risk that a person will be found not to be a worker who has suffered injury as defined in the Ac should be quarantined from the range of risks associated with electing to pursue a claim for damages.

[13] See Mr Douglas' submission at TS 1-65.5 and following.

[104] Further, the risk which Trendbuild seeks to quarantine is the risk that the plaintiff will not be able to recover from Workcover if he or she succeeds on a basis other than that for which indemnity is provided under the Act. It is difficult to see, as a matter of policy, why the Act should be construed to avoid that outcome. The Act defines the scope of the indemnity it confers. If the claim as alleged or proved falls outside that scope of that indemnity, that is a consequence of the scope of indemnity described in the Act.

[105] Finally, even if it was thought that s. 189 supported an implication that Parliament intended that Workcover could not dispute that a claim brought following an election was a claim covered by the Act, it is important to recall that the requirement to elect relates only to that subset of claimants for damages who receive a Notice of Assessment with 20% or less WRI, and to whom ss. 237(3) and 239 apply. There are many other categories of claimants for damages under s. 237(1). Trendbuild's construction is said to be applicable to all such claimants. Section 189 has nothing to do with those claimants. It is difficult to see therefore how s. 189 could sustain a Trendbuild's construction of the Act.

Pre-court procedures

[106] It is correct that the Act contemplates that claims for damages will be managed by Workcover. I also recognise that ss. 273 to 304 refer to a claimant, and a claimant is defined in Chapter 5 as meaning a "*person entitled to seek damages*". Accordingly, it can be accepted that the Act contemplates that a person entitled to seek damages under s. 237(1) who brings a claim for damages must comply with the requirements of those provisions. However, I do not agree that those matters support Trendbuild's construction.

[107] The situation in which the issue raised by Trendbuild will arise will necessarily be one in which the plaintiff is asserting that he or she is a worker who has suffered an injury for the purposes of the Act who is entitled to bring a claim for damages under s. 237(1). Such a plaintiff will be a claimant as defined. He or she should be required to comply with the pre-Court procedures required of a claimant under the Act. However, a claimant is just that. Status as a claimant under the Act does not confer of itself entitlement to indemnity under the Act.

Odd consequences if Trendbuild's proposition is rejected?

[108] As to paragraph [79](a) above, there is nothing odd about the consequence that a person who is entitled to bring a claim might be found not to be entitled to indemnity under the Act. As I have observed, the determination by Workcover is properly characterised as a threshold condition having the effect of limiting common law claims to those which have sufficient merit to meet that condition.

[109] As to Trendbuild's second point, Trendbuild contends that injustice and inconvenience could arise if the Act permits a proceeding to be brought against an employer by a worker for injury sustained by the worker, but then the insurer is permitted to refuse indemnity. Trendbuild contends that that could leave the employer without indemnity and the employee with an empty judgment in proceedings which were only able to be brought because of the insurer's determination that permitted the proceedings to be brought. I do not accept that that those consequences would follow.

[110] The plaintiff/worker will only be affected if he or she succeeds at trial. If the plaintiff succeeds in establishing that he or she sustained an injury as a worker under

the Act, the accident insurance policy will respond and Workcover's denial of indemnity will ultimately fail.

[111] If success follows despite a finding that the plaintiff is not a worker who sustained an injury under the Act, but because the plaintiff establishes some quite distinct source of liability such as contractor/subcontractor or occupier's liability, then other employer's insurance would likely respond, such as defendant's public liability policy. However, even if the employer's other insurance did not respond, it is hard to see the injustice which arises in that circumstance from *the operation of the Act* for plaintiff or defendant. The Act provides indemnity limited by s. 8. I cannot see how it is unjust for indemnity to be confined in accordance with that section.

[112] It is convenient here to deal with Trendbuild's reliance on *Hawthorne*[14], *Watkin*[15] and *Glenco*[16]. These cases were concerned with attempts to establish claims for damages for injuries sustained by a worker at work, where the plaintiff had sought a Notice of Assessment and failed, but then sought to bring proceedings, contending that they fell outside the scope of s. 237(1) (or its equivalent) and therefore were not prohibited by s. 237(5) (or its equivalent) from bringing proceedings.

[113] In *Hawthorne*, the plaintiff contended that proceedings could be brought despite the failure to obtain a Notice of Assessment because the insurer had refused to give such a notice on the grounds that the causation test in the then relevant provision was not met. It was in this context that the Court of Appeal held that there was no residual common law claims which could be brought by workers for personal injury against employers. The Court held in separate judgments that on the proper construction of the Act, the effect of the equivalent provision to s. 237(1) under the *Workcover Queensland Act* was to prohibit all claims for workers against employers for injuries at work where the threshold requirements of that section were not met. *Glenco* followed that decision in respect of the Act. *Watkin* involved a slightly different situation in which a worker sued his employer for injuries at work excluded from the Act because the injury occurred outside Queensland in circumstances that did not attract the provisions of the Act. The employee had sought and failed to obtain a Notice of Assessment.

[114] In each case the plaintiff was suing his employer as a worker for injuries arising out of his employment. That is not the situation here. In this case, the alternative case of the plaintiff is that he was an independent contractor.

[115] However, Trendbuild's contention relying on these cases seems to be a more general one. It contends that it is inconsistent with those cases "*for the plaintiff to be able to proceed against an employer but the employer not be indemnified by Workcover*". I find this difficult to understand. The three cases identified stand for the proposition that there is no residual claim against an employer as such where the worker sues for a workplace injury. But that is not Trendbuild's contention. Trendbuild says that the Act should be construed as requiring Workcover to indemnify under the Act claims which are not claims by a worker against an employer at all. I do not see how those cases assist Trendbuild.

[116] As to Trendbuild's third point in paragraph [80] also, I do not find the possibility that Workcover might be unable to recover compensation it has paid to a person

[14] *Hawthorne v Thiess Contractors Pty Ltd* [2002] 2 Qd R 157.
[15] *Watkin v GRM International Pty Ltd* [2007] 1 Qd R 389.
[16] *Glenco Manufacturing Pty Ltd v Ferrari* [2005] 2 Qd R 129.

because of a finding at trial that the person is not a worker as capricious or odd. The entitlement to compensation and the right to pursue damages are distinct. The possibility of different outcomes from the two always exists.

The High Court decisions

[117] The first case to consider is *Maurice Blackburn Cashman v Brown* (2011) 242 CLR 647. The respondent to that appeal was a salaried partner employed by the appellant. She alleged harassment at work and that the appellant had failed to address her complaints with the consequence that she suffered injury, including psychiatric injury. She sued for damages in the County Court of Victoria. The central issue was whether the appellant employer was precluded by operation of the Victorian equivalent of the Act, or by issue estoppel, from making certain contentions in the proceedings. The Court of Appeal of Victoria found that the employer was so precluded by operation of the Victorian Act. It did not decide the issue estoppel point. That point was raised again before the High Court, which found that the employer was not precluded on either ground.

[118] The preclusions alleged were formulated as matters said to have been necessarily decided by an opinion of a medical panel under the Victorian Act. That Act established medical panels to form and express opinions on medical questions referred to them. Section 68(4) of the Victorian Act provided relevantly that:

> *For the purposes of determining any question or matter, the opinion of a Medical Panel on a medical question referred to the Medical Panel is to be adopted and applied by any court, body or person irrespective of who referred the medical question to the Medical Panel or when the medical question was referred.*

[119] The Medical Panel opinion under consideration in the appeal arose in this way. Section 134AB(2) of the Victorian Act permitted a worker to recover damages in respect of a work related injury if the injury was a serious injury. Section 134AB also provided, inter alia, that if an injury was assessed under s. 104B as giving rise to impairment of more than 30%, the injury was deemed to be a serious injury. Section 104B(9) in turn provided for referral to the Medical Panel of issue of the degree of impairment if the worker disputed the Authority's assessment of impairment. Section 104B(12) provided that no appeal lay to any court or tribunal from the opinion of a Medical Panel on degree of impairment.

[120] The Authority seems to have accepted that an injury had been suffered but the respondent disagreed with the extent of impairment assessed. Accordingly that matter was referred to the Medical Panel under s. 104B which found that there had been a 30% psychiatric impairment.

[121] At trial, questions were stated by the County Court judge to the Court of Appeal raising the construction point and issue estoppel point. The Court of Appeal decided the matter on the basis of the construction point. It relied upon the terms of ss. 68(4) and 104B(12) as disclosing an intention that the appellant employer be precluded by operation of the Victorian Act from disputing matters necessarily determined in the medical opinion of the Medical Panel.

[122] The High Court reached the contrary conclusion by reading down the scope of both provisions as not binding a court in common law proceedings. The joint judgment relevantly states:

[34] At first sight, s 68(4) of the Act is cast in terms of very general application. Reference is twice made to "any court, body or person". But the subsection is introduced by the expression "[f]or the purposes of determining any question or matter". Those words should not be given a literal meaning. The meaning of the phrase that best accords with its context, and which should be adopted, is "for the purposes of determining any question or matter arising under or for the purposes of the Act". Those are the purposes for which the opinion of a Medical Panel on a medical question is to be adopted and applied and accepted as final and conclusive.

[35] Once that step is taken, it is then clear that s 68(4) does not speak at all to the litigation of questions or matters that are not questions or matters arising under or for the purposes of the Act. More particularly, s 68(4) does not speak at all to an action for damages brought by a worker against an employer.

[36] An action of that kind presents no question or matter to which the opinion of a Medical Panel could be said to relate that is a question or matter arising under or for the purposes of the Act. The action that a worker brings against an employer (commonly for the tort of negligence, but sometimes for other causes of action such as breach of contract or breach of statutory duty) is an action for a cause of action which is not one created by the Act. Each cause of action either is a common law cause of action or has its origin in a statute other than the Act. Of course, as an examination of the provisions of s 134AB of the Act shows, the worker's bringing of an action against his or her employer, the damages that may be awarded in the action, the amount of interest that may be allowed on damages, and even the orders that are to be made for costs are all regulated by the Act. And s 134AB makes frequent reference to an action which a worker may bring against an employer as one which is brought "in accordance with" or "under" the Act. But none of these provisions detracts from the force of the observation that none of the causes of action on which the worker sues the employer is created by the Act. And because the relevant causes of action are not created by the Act, no question or matter arises in the action, to which the opinion of a Medical Panel could be said to relate, that can be described as a question or matter arising under or for the purposes of the Act.

[37] Nor does s 104B(12) point to any different result. It provides that there is to be no appeal against a Medical Panel's opinion. That says nothing about when a Medical Panel's opinion must be applied. To the extent to which s 68(4) provides that the opinion of a Medical Panel as to the degree of permanent impairment of a worker resulting from an injury is "final and conclusive", it is necessary to identify from some source other than s 104B(12) the purposes for which, or circumstances in which, that description is legally significant. It is only if s 68(4) is treated as applying to an action brought by a worker against the worker's employer that the description of the Panel's opinion as final and conclusive is significant to the hearing or the determination of that action. And for the reasons given, s 68(4) does not apply to a worker's action for damages against the worker's employer, there not being any question or matter in that action that is a question or matter arising under or for the purposes of the Act.

[38] As the plaintiff submitted in argument in this court, s 134AB of the Act regulates when an action for damages may be brought by a worker against an employer. But contrary to the plaintiff's submission, once the steps required by s 134AB have yielded the result that there is either a determination or a deeming that a serious injury has been suffered, and the conditions prescribed by s 134AB have been satisfied, the prosecution of an action brought by the worker is not a matter with which the Act deals in any respect that permits or requires the application of s 68(4).

[123] The Court also held that no issue estoppel arose because the decision of the Medical Panel was not final in the subsequent proceedings, but only in respect of any question or matter arising under the Act.[17]

[124] Before considering the implications of that case, it is convenient to deal with *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480. That case also dealt with the Victorian Act. Its focus was also on the scope of the binding effect of a medical opinion under s. 68(4). However, the issue arose in a different context. In that case, Mr Kocak commenced proceedings in relation to a neck injury sustained at work. He brought two applications: a serious injury application and a statutory compensation application.

[125] In the course of the statutory compensation application, certain medical questions were referred to a Medical Panel which provided an opinion adverse to Mr Kocak, which were applied by the Court to dismiss the statutory compensation proceeding.

[126] The serious injury application arose under s. 134AB. It will be recalled from the above summary of *Brown* that common law proceedings could only be brought in respect of a serious injury. Obtaining an opinion from a Medical Panel was one way that entitlement to bring common law proceedings could be established. Section 134AB provided a number of other ways to meet the threshold, including that a court is satisfied on the balance of probabilities that an injury is a serious injury. Mr Kocak's serious injury application came on for hearing in the County Court.

[127] This time the employer sought to rely on the opinion of the Medical Panel given in the statutory compensation proceedings. It foreshadowed that it would contend that the County Court was bound on the serious injury application by the adverse opinion of the Medical Panel and (as had the worker in *Brown*), relied on s. 68(4) and issue estoppel. The worker sought an order in the nature of certiorari to quash the opinion of the Medical Panel on the basis of a failure to provide adequate reasons for its decision. The trial judge found in favour of the employer.

[128] The Victorian Court of Appeal reversed the decision of the trial judge and quashed the decision of the Medical Panel. It held, relevantly, that the opinion of the Medical Panel bound the County Court in the serious injury application pursuant to Section 68(4) and also independently by way or issue estoppel arising from application of the opinion by the Magistrates Court in dismissing the compensation application.

[129] The High Court disagreed with both conclusions. As to the construction issue, the Court referred to the above passages in *Brown* then observed:

> [35] The Court of Appeal reached its conclusion that the County Court would be compelled by s 68(4) of the Act to adopt and apply the opinion of the Medical Panel because it considered itself bound by the reasoning in the first of those quoted passages in *Brown* to hold that an opinion of a Medical Panel on a medical question referred to it must thereafter be adopted and applied for the purposes of determining all questions or matters arising under or for the purposes of the Act. An earlier decision of the Court of Appeal, *Pope v WS Walker & Sons Pty Ltd*, is to the contrary. The correctness of *Pope* was not in issue in *Brown*, and is supported in the present appeal by both the Employer and the Worker. The Court of Appeal's reasoning in *Pope* highlights the potential for injustice in the outworking of the construction to which the Court of Appeal felt compelled, as well as the lack of support for that

[17] See paragraphs [39] to [41].

construction in legislative history. The passage in *Brown* should not be interpreted as having overruled *Pope.*

[36] The correct construction of s 68(4) of the Act, consistent with *Pope* and with *Brown*, is to read the word "any" in the introductory expression "[f]or the purposes of determining any question or matter" as referring to "*a* question or matter" not "*all* questions and matters". In respect of a particular opinion of a Medical Panel on a medical question referred to it, formed under s 68(1) and certified under s 68(2), the question or matter to which s 68(4) refers is the question or matter in which the medical question arose and in respect of which the medical question was referred to the Medical Panel.

[37] What s 68(4) of the Act on that construction requires is that an opinion of a Medical Panel on a medical question referred to it must thereafter be adopted and applied for the purposes of determining *the* question or matter, arising under or for the purposes of the Act, in which the medical question arose and in respect of which the medical question was referred to the Medical Panel. What s 68(4) does not require is that the opinion must thereafter be adopted and applied for the purposes of determining some *other* question or matter.

[38] The operation of s 68(4) of the Act in the present case was therefore to require the opinion given by the Medical Panel on the medical questions referred to it in the statutory compensation application to be adopted and applied by all courts and persons in the determination of the question or matter the subject of the statutory compensation application. That question or matter comprised the controversy between the parties to the statutory compensation application about the Worker's entitlement to the statutory compensation he claimed under Pt IV of the Act, and was brought to a conclusion when the statutory compensation application was dismissed. Section 68(4) did not have, and does not have, the further effect of requiring the opinion given on the medical questions referred in the statutory compensation application to be adopted and applied if and to the extent that the same medical question may arise in the determination of the question or matter the subject of the serious injury application. That quite distinct question or matter, which remains unresolved, comprises the controversy between the parties to that application as to whether the Worker should have leave to bring common law proceedings.

[39] That being the limited operation of s 68(4) of the Act, the second of the legal consequences for the serious injury application identified by the Court of Appeal cannot arise for the reasons set out in the second of the quoted passages in *Brown*. Section 68(4) provides an exhaustive statutory measure of the extent to which the opinion of a Medical Panel on a medical question referred to it is to be adopted and applied and is to be accepted as final and conclusive. The adoption and application of a medical opinion as required by s 68(4) cannot create an estoppel giving a greater measure of finality to a medical opinion than that provided by s 68(4) itself. The Magistrates' Court's adoption and application of the opinion when dismissing the statutory compensation application therefore created no issue estoppel binding the parties in the conduct of the serious injury application.

[40] The answer to the threshold question properly asked by the Court of Appeal is that the opinion of the Medical Panel sought to be quashed by an order in the nature of certiorari had no continuing legal consequences. The only legal effect of the opinion was that given to it by s 68(4) of the Act. That legal effect was spent when the question or matter, in respect of which the medical question was referred to the Medical Panel, was brought to a conclusion by the order dismissing the statutory compensation application. The Employer's foreshadowed reliance on the opinion having legal effect in the serious injury application would be of no avail.

> [41] The order in the nature of certiorari made by the Court of Appeal was not available to quash the opinion of the Medical Panel because that opinion had no continuing legal consequence which could be removed by that order. Despite the irony of this being relied on by the Worker as respondent and eschewed by the Employer as appellant, that is a sufficient reason to allow the appeal.

[130] Trendbuild rightly pointed out that there are material differences in the statutory provisions under consideration. However, it contended that the approach in *Wingfoot* assisted Trendbuild. It formulated that contention as follows.

> [59] It will be observed that the scheme of the Victorian legislation is quite different but, in any event, even if WCRA section 561(4) is construed, consistent with W*ingfoot*, and *Brown*, to mean final "for the purposes of determining any question or matter arising under and for the purposes of the WCRA" then, as demonstrated by the foregoing review of the scheme, such purposes include:
>
> > (a) Who is a "worker" for the purposes of actually accessing common law <u>at all</u> against an employer; and
> >
> > (b) Who is a "worker" for the purposes of the indemnity afforded by the WCRA by WorkCover (or a self-insurer) for the employer under "accident insurance".

[131] It can be seen that this submission assumes that the Act is construed in the manner for which Trendbuild contends. It is not a submission that the reasoning or result of *Wingfoot* or *Brown* assist in sustaining that construction of the Act.

[132] Workcover also called in aid the High Court decisions. It submitted in writing at paragraph 20 of its submission:

> [20] It is submitted that the reasoning of the High Court in *Maurice Blackburn Cashman v Brown* can equally be applied to the present case. The decision made by the WorkCover claims officer was for the purpose of deciding whether an application for compensation should be accepted. The finding that the plaintiff was a "worker", while necessary to enable him both to receive compensation and also to make a claim for damages, was for a limited purpose and does not preclude WorkCover from pleading in the plaintiff's damages proceeding that he was not a "worker" as that term is defined in the WCRA. Any assertion to the contrary does not sit well with the fact that s 134 requires a decision about an application for compensation to be made within 20 business days of that application being made, when there will, of necessity, have been limited opportunity to investigate issues relevant to a determination of whether a claimant is a "worker".
> [Footnotes omitted]

[133] It is to be noted that the last sentence of this submission focuses on a determination under s. 134 of the Act. As has been explained, entitlement to seek damages is not limited to the circumstances where there is a determination under s. 134 of the Act. For that reason, the relatively short time for making a decision under s. 134 does not seem a compelling issue on construction. That is especially so given that extensive review and appeal rights provide an opportunity for full examination of the circumstances of a doubtful case should Workcover decide to refuse compensation under s. 134.

[134] In my view, however, the importance of *Brown* and *Wingfoot* lies in the willingness of the Court to construe the opinion in question in those cases as not applicable to subsequent common law proceedings even where:

(a) (As here) that determination permitted a party to meet the threshold requirement for bringing common law proceedings; and

(b) (In contrast to the situation under the Act, with one qualification), there was a provision like s. 68(4) which in terms calls for the opinion to be "to be adopted and applied by any court, body or person".

[135] Both considerations tell against Trendbuild's proposition.

[136] As to the first, it is the link between a determination that there has been an injury sustained by a worker and the entitlement to seek damages for the injury which is relied upon by Trendbuild. However, that link of itself was plainly inadequate to persuade the High Court of the applicability of the opinion in *Brown* to later common law proceedings authorised by that opinion.

[137] As to the second, if the High Court was not persuaded that the opinion was binding in later proceedings in circumstances where there was an express provision of the kind in s. 68(4), one would logically infer that conclusion would apply *a fortiori* where no such provision exists.

[138] The matter underpinning the High Court's conclusion in *Brown* that s. 68(4) should be read down so that "it accords with its context" is that underlined in [36] and [38] of the reasons: i.e. that the common law proceedings arise *dehors* the Act and that findings of the Medical Panel for the purposes of meeting the threshold requirements for access to damages exhausted their significance once that threshold had been established. I do not think that the more elaborate appeal processes in the Act would materially distinguish the two statutory schemes in that respect. Accordingly I consider that *Brown* supports Workcover's position on this application.

[139] The final point to deal with here is the effect of s. 541(4) of the Act. Mr Diehm QC made the submission that the precise implications of a decision by the Industrial Court is a matter which does not arise on this application. That is correct in the sense that no such decision has been made by the Industrial Court on whether Mr Stankovic is a worker who has suffered an injury under the Act. However, provisions like s. 541(4) can have implications for the proper construction of the Act. It is of a similar character to s. 68(4) in the Victorian Act, if not as prescriptive.

[140] However, in my view it has little relevance to the construction argument. As has been seen, the review and appeal process in Chapter 13 provides for up to four appeals: an internal review by the insurer (s. 538), a review by the Authority (s. 541), and appeal to an industrial magistrate or an industrial court (s. 549) and finally to the Industrial Court. Only the ultimate appeal under the Act is stated to be final. The Act therefore contemplates that many, if not most, reviews and appeals are likely to be resolved without the application of s. 541(4). It is difficult to place much weight on it as a factor guiding the search for Parliament's intention in respect of whether all determinations by Workcover that a person is a worker are intended to bind Workcover to indemnify in subsequent damages proceedings.

Authority relied upon by Trendbuild

[141] Trendbuild also relied upon *Connor v Queensland Rail Limited* [2016] QSC 270.

[142] In that case, the applicant was an employee of Queensland Rail (**QR**), a self-insurer under the Act. She suffered injuries arising from an event on 16 July 2013. The plaintiff sought compensation under the Act for certain injuries. QR as insurer accepted that some of the injuries (the **accepted injuries**) were injuries sustained by

Ms Connor as a worker and provided a Notice of Assessment for those injuries. QR rejected the other injuries (the **rejected injuries**), concluding that there was no entitlement to compensation for those injuries.

[143] Thereafter, Ms Connor caused a notice of claim under s. 275 to be delivered to QR in relation to both the accepted injuries and the rejected injuries. QR presumably challenged the entitlement of Ms Connor to seek damages in relation to the rejected injuries. Ms Connor sought a declaration that she was entitled to seek damages for the rejected injuries and QR sought a declaration in contrary terms. Ms Connor relied on s. 237(1)(a)(ii) of the Act to sustain her entitlement to seek damages for the rejected injuries. The argument relied on the fact that she met the literal requirements of that section: she had not received a Notice of Assessment for the rejected injuries but had received a Notice of Assessment for the accepted injuries which were injuries resulting from the same event, and she had elected to seek damages for the accepted injuries.

[144] The consequence of this argument would have been that QR was required by s. 245(3) of the Act to decide again whether the rejected injuries were injuries sustained by her as a worker despite the fact that QR had already determined under s. 134 that the rejected injuries were not injuries sustained by Ms Connor. The effect of Ms Connor's contention therefore was to require QR to decide the same issues already decided adversely to Ms Connor under s. 134 of the Act.

[145] QR contended that such a construction of the Act should not be accepted. In summary it was contended that Parliament would not have intended that the same matter have to be decided twice and that such a construction would lead to duplication of claims, possibly conflicting decisions and additional costs for all parties. QR contended that the decision on s. 134 should stand for all purposes.

[146] His Honour accepted the contentions of QR as to the inconvenient consequences of Ms Connor's contention. It was in that context that His Honour made the following observation (at paragraph [31] of his Honour's reasons):

> No rational explanation was proffered for reading s 245 as requiring another decision to be made when the same decision-maker had already made a decision on the same materials. This objection to the applicant's construction is strengthened in light of the issue estoppel which would arise where the matter had been the subject of review or appeal.

[147] Trendbuild relies on this passage as supporting its construction. I disagree:

(a) **First**, Trendbuild does not rely on its allegations of estoppel to sustain its strike out. It relies purely on construction of the Act to sustain its case on this application;

(b) **Second,** it is far from clear that his Honour was advancing the proposition that a decision on a review or appeal would give rise to an estoppel in proceedings for damages which prevented Workcover from disputing that employer defendant was entitled to indemnity in respect of proceedings authorised under s. 237(1). It might be that his Honour was contemplating the prospect of an issue estoppel arising from a decision on review or appeal in the second determination under s. 245(3) contemplated by Ms Connor's submissions; and

(c) **Third,** even if it were thought his Honour's observations supported Trendbuild's construction, it is to be noted that neither *Brown* nor *Wingfoot* were considered by his Honour. Nor was the scope and nature of any issue

estoppel in damages proceedings under consideration in the case. Rather, the issue before his Honour was whether the Act on its proper construction contemplated that injuries rejected under s. 134 were required to be assessed again under s. 245(3). Further, it is evident from paragraph [41] that his Honour was not intending to advance firm conclusions about the "*problem of issue estoppel*".

Other relevant considerations

How is Trendbuild's construction derived from the text of the Act?

[148] For the above reasons, I reject Trendbuild's construction. However, a further matter tells against it. Propositions of construction must arise from the construction of some words used in the statute; they must be linked back to the text enacted by the Parliament. Construction must be text based.

[149] The authorities were reviewed by Muir JA, inter alia, in *Witheyman v Simpson* [2011] 1 Qd R 170 where his Honour observed:

> [40] None of the provisions in the IPA under consideration are ambiguous or obscure. Nor will giving the provisions their ordinary meaning produce a result that is "manifestly absurd or … unreasonable." The giving of a purposive construction to statutory provisions does not mean that the language of the provisions can be ignored. As Mason and Wilson JJ observed in Cooper Brookes (Wollongong) Pty Ltd v FCT:
>
> > The fundamental object of statutory construction in every case is to ascertain the legislative intention by reference to the language of the instrument viewed as a whole. But in performing that task the courts look to the operation of the statute according to its terms and to legitimate aids to construction.
>
> [41] In the joint judgment in WACB v Minister for Immigration and Multicultural and Indigenous Affairs, their Honours observed that "In Cooper Brookes (Wollongong) Pty Ltd v FCT, Gibbs CJ said that the canons of construction should not be treated so rigidly as to prevent the implementation of a realistic solution in the case of a drafting mistake". However, it was also remarked that Gibbs CJ went on to say that "where the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, it must be given its ordinary and grammatical meaning".
>
> [42] Neither s 14A nor the purposive approach to construction, authorises a departure from the grammatical or literal meaning of a statute, where that meaning gives effect to the purpose or object of the statute. The court's role is one of construction not legislation.
>
> [43] The circumstances in which it is permissible for a court to add words to a statute as part of a process of construction are explored in the reasons of McHugh J in Newcastle City Council v GIO General Ltd, where, after referring to a statement by Brennan CJ and himself in IW v City of Perth, his Honour said:
>
> > Nevertheless, when the purpose of a legislative provision is clear, a court may be justified in giving the provision "a strained construction" to achieve that purpose provided that the construction is neither unreasonable nor unnatural. If the target of a legislative provision is clear, the court's duty is to ensure that it is hit rather than to record that it has been missed. As a result, on rare occasions a court may be justified in treating a provision as containing additional words if those additional words will give effect to the legislative purpose. In Jones v Wrotham Park Estates, Lord Diplock said that three conditions must be met before a court can read words into legislation. First, the court must know the mischief with which the statute was dealing. Second, the court must be satisfied

> that by inadvertence Parliament had overlooked an eventuality which must be dealt with if the purpose of the legislation is to be achieved. Third, the court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect. (footnotes deleted)

[44] Lord Diplock's statement of principle had earlier been adopted and applied by McHugh JA in Kingston v Keprose Pty Ltd.

[45] The part of McHugh JA's reasons in Kingston v Keprose Pty Ltd approving the relevant passage from the reasons of Lord Diplock in Jones v Wrotham Park Estates was referred to with approval in the joint reasons of the High Court in Bropho v Western Australia and by Spigelman CJ and James J in R v Young. Abadee and Barr JJ relevantly agreed with the reasons of both Spigelman CJ and James J.

[46] In Jones v Wrotham Park Estates Lord Diplock propounded the test referred to by McHugh J in the above passage from Newcastle City Council v GIO General Ltd after stressing that the task of the court in making a purposive construction "remains one of construction; even where this involves reading into the Act words which are not expressly included in it". McHugh J, immediately prior to making the observations quoted above, said:

> Having identified the relevant extrinsic material and determined that it may be considered, the final question is, can the Court legitimately interpret s 40 to cover the policy in question in the present appeals?
>
> Extrinsic material cannot be used to construe a legislative provision unless the construction of the provision suggested by that material is one that is "reasonably open". Even if extrinsic material convincingly indicates the evil at which a section was aimed, it does not follow that the language of the section will always permit a construction that will remedy that evil. If the legislature uses language which covers only one state of affairs, a court cannot legitimately construe the words of the section in a tortured and unrealistic manner to cover another set of circumstances. (footnote deleted)

[47] Spigelman CJ, in R v Young, after referring to Kingston v Keprose Pty Ltd, Bropho v Western Australia and other authorities, said:

> As I understand the recent cases, they are not authority for the proposition that a court is entitled, upon satisfaction of the three conditions postulated by Lord Diplock, to perfect the parliamentary intention by inserting words in a statute. The court may construe words in the statute to apply to a particular situation or to operate in a particular way, even if the words used would not, on a literal construction, so apply or operate. However, the words which actually appear in the statute must be reasonably open to such a construction. Construction must be text based.

[48] His Honour later elaborated on these propositions as follows:

> Where the words actually used are not reasonably capable of being construed in the manner contended for, they will not be so construed: McAlister v R (1990) 169 CLR 324 at 330; R v Di Maria (1996) 67 SASR 466 at 472–474. If a court can construe the words actually used by the parliament to carry into effect the parliamentary intention, it will do so notwithstanding that the specific construction is not the literal construction and even if it is a strained construction. The process of construction will, for example, sometimes cause the court to read down general words, or to give the words used an ambulatory operation. So long as the court confines itself to the range of possible meanings

> or of operation of the text — using consequences to determine which meaning should be selected — then the process remains one of construction.

[49] Spigelman CJ's approach, thus expressed, is consistent with that of: McHugh J in Newcastle City Council v GIO General Ltd; Brennan CJ, Dawson, Toohey and Gummow JJ in CIC Insurance Ltd v Bankstown Football Club Ltd and Mason CJ, Wilson and Dawson JJ in Re Bolton; Ex parte Beane. In Re Bolton, after referring to the Minister's second reading speech, Mason CJ, Wilson and Dawson JJ said:

> That speech quite unambiguously asserts that Pt III relates to deserters and absentees whether or not they are from a visiting force. But this of itself, while deserving serious consideration, cannot be determinative; it is available as an aid to interpretation. The words of a Minister must not be substituted for the text of the law. Particularly is this so when the intention stated by the Minister but unexpressed in the law is restrictive of the liberty of the individual. It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law.

[50] The primacy of the language of a statute in the determination of its meaning was affirmed, yet again, in the joint reasons of Hayne, Heydon, Crennan and Kiefel JJ in Alcan (NT) Alumina Pty Ltd v Cmr of Territory Revenue in which it was said:

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

[51] The joint reasons further warned against concentrating on the legislative purpose at the expense of due consideration of the text:

> Fixing upon the general legislative purpose of raising revenue carried with it the danger that the text did not receive the attention it deserves. This danger was adverted to by Gleeson CJ in when he said:
>
> > [I]t may be said that the underlying purpose of an Income Tax Assessment Act is to raise revenue for government. No one would seriously suggest that s 15AA of the Acts Interpretation Act has the result that all federal income tax legislation is to be construed so as to advance that purpose. Interpretation of income tax legislation commonly raises questions as to how far the legislation goes in pursuit of the purpose of raising revenue. In some cases, there may be found in the text, or in relevant extrinsic materials, an indication of a more specific purpose which helps to answer the question. In other cases, there may be no available indication of a more specific purpose. Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.

[52] At no time did counsel for the respondent advance an explanation of how the provisions of the IPA under consideration, either alone or considered together with the relevant provisions of the VMA, might be construed so that the requirement to apply for a development approval before clearing "native vegetation on freehold land" ceases to exist. No such explanation could have been advanced. The above authorities make it plain that, despite the clear ministerial statements, a court is not free to

> construe the IPA as if the language of the IPA had been altered to reflect the policy contained in the ministerial statements. The respondent's argument, like the Judge's findings, was based on the erroneous premise that it was permissible to construe a statute, not by reference to its words, but by ignoring its words and applying a Legislative policy perceived to arise from extrinsic materials. [Footnotes omitted]

[150] I do not suggest that Trendbuild's proposition is sought to be established from policies extracted from extrinsic materials as Muir JA considered was occurring in that case. However, the authorities referred to by his Honour emphasise that construction must be open on the text used by Parliament.

[151] It is therefore important to identify how Trendbuild seeks to link its construction to the text of the Act. I found this difficult accurately to determine from the written or oral submission.

[152] Perhaps relevant is paragraph 62(a) of Trendbuild's submissions which provides:

> Not only is it inconsistent with the scheme of the [Act] for the issue of "worker" to be at large for the purposes of, inter alia, section 237, such a construction:
>
> (a) requires the word and concept "worker" to be at large, to be determined by the Courts, and not under the [Act] processes, at least where the word first appears in the chapeau of section 237(1). This is not consistent with ordinary statutory construction. It is wholly inconsistent with the worker being the holder of the NOA or a successful applicant for compensation and each of the other portals in section 237. It is also inconsistent with the statutory right to proceed to seek damages under section 237 at the election of a worker in the Notice of Assessment found in section 239. Even where a decision has not yet been made by the insurer, that a person is a "worker" the portals contemplate that the decision will be made by the insurer, not by the Courts, and if that is unfavourable then, subject to the review process found in Chapter 13, there is no access to common law damages for the issue to be determined by the Courts;

[153] The proposition seems to be that the word "worker" in ss. 233 and 237(1) means a worker as determined by Workcover (or on review or appeal under the Act). That can be accepted to this extent. The ultimate effect of s. 237(1), as I read it is that if Workcover has determined that an injury has been sustained by a worker (under the various sections supplementing s. 237(1)(a) to (e)), then the worker or his or her dependents are entitled to seek damages for that injury. What I cannot see is how that text can be construed to sustain Trendbuild's further proposition that the person authorised by the section to bring the proceedings is also entitled to the benefit of a conclusive determination that they (or at least their employer) are entitled to the benefit of indemnity under the Act even if the common law proceedings succeed on a basis other than that they are a worker under the Act.

[154] Paragraphs 9 and 10 of Appendix 3 to Trendbuild's submissions set out well known principles relating to the meaning of words used in statutes, and might be relevant here. Those submissions provide (omitting footnotes):

> [9] Where a word is used consistently in legislation it should be given the same meaning consistently. "There ought to be very strong reasons present before the Court holds that words in one part of a section have a different meaning from the same words appearing in another part of the same section.".
>
> [10] Definitions in or applicable to an Act apply except so far as the context or subject matter otherwise indicates or requires. A definition in and applying to an Act applies to the entire Act. Regard is to be had, not simply to the context, but also to the subject

> matter of the provision in which the defined term occurs. Moreover the application of the definition may be affected, not only because the context otherwise requires; it may be affected because the context (or subject matter) otherwise indicates. These features evince an intention by the legislature that a more flexible approach be taken to the application of a statutory definition, when interpreting Queensland legislation, than would be required under some other interpretation provisions. The proper approach is to assume that the expression is used as defined and then ask whether in the particular context in which it appeared a contrary intention can be shown. This enquiry is not affected one way or the other by the term being used other than as defined in another place in the Act. If the definition is to be departed from it is only to be for the purposes of the particular provision under consideration.

[155] Trendbuild in paragraph 62(a) refers to Workcover's position as requiring the word "worker" to be at large in the Court proceedings and Trendbuild submits that this is not consistent with ordinary statutory construction. I disagree with that submission. Workcover's position accepts that the word "worker" in damages proceedings will involve application of statutory definition in the Act. It submits that that definition can be applied to the facts as known or discovered in the course of steps preliminary to or during the proceedings.

[156] Trendbuild's real contention seems to me to amount to the contention that on the proper construction of this Act, the application of the definition of the word "worker" to the facts of the particular case for the purposes of, inter alia, s. 237(1) should bind Workcover in the later proceedings in respect of its obligation to indemnify in respect of those proceedings. That is a different issue from the issue of whether the definition applies when that word when used in the Act.

[157] It is of course possible to read words into a statute in the limited circumstances identified in the above passage. However, Trendbuild did not contend for such an approach and the circumstances of this matter do not appear to me to raise that possibility.

[158] I have been unable to identify how Trendbuild's construction is properly derived from the text in the Act.

Other considerations

[159] There are two other matters which might tell against Trendbuild's construction.

[160] First, it is plain from the manner in which the pleadings have been formulated in this case, that the question of whether a person is a worker who has sustained an injury under the Act can emerge as an issue on the pleadings in a claim for damages. This demonstrates that the construction advanced by Trendbuild cannot, in practice, be treated as arising only outside the issues in a claim for damages.

[161] Second, the construction advanced by Trendbuild has a material effect on the practical conduct of a claim for damages. As has been seen, Chapter 5 contains numerous provisions which modify the law and practice for such claims. It seems to me that if Parliament intended the construction advanced by Trendbuild to apply, it is reasonable to expect that it would have said so expressly in Chapter 5.

Conclusion

[162] In my view, Trendbuild's construction is wrong. The Act on its proper construction does not constrain Workcover's right to dispute liability to indemnify Trendbuild on the basis that the plaintiff was not a worker for the purposes of the Act in a claim for damages permitted under s. 237(1). I therefore refuse to strike out the paragraphs of

Workcover's Amended Defence identified in the amended application. I note that there is no cross application by Workcover to strike out those parts of Trendbuild's statement of claim which advance its proposition of construction.

[163] Finally, I do not consider that in doing so, Workcover is wrongly altering or revoking any determination it has made that the plaintiff is a worker which sustains the entitlement under s. 237(1) to bring the claim for damages. Those determinations are made for purposes under the Act, including to permit a person to bring a claim for damages. As I have found, those purposes do not include binding Workcover to indemnity in damages proceedings.

Orders

[164] I order that the amended application filed by leave on 6 February 2018 be dismissed. I will hear the parties as to costs and any other orders which might be appropriate.