07/09; [2009] VSC 92

SUPREME COURT OF VICTORIA

STATE OF VICTORIA v LECK

Smith J

12 February, 23 March 2009

ACCIDENT COMPENSATION – PERSONAL INJURY – STRESS RELATED INJURY TO WORKER – MULTIPLE CAUSES – MANAGEMENT ACTION TAKEN IN RESPECT OF EMPLOYEE – WHETHER SUCH ACTION THE WHOLE OR PREDOMINANT CAUSE OF THE INJURY – STATUTORY INTERPRETATION – USE OF THE WORD "OR" IN LEGISLATION – FINDING BY MAGISTRATE THAT THE WORD HAD A DISJUNCTIVE MEANING – CLAIM BY EMPLOYEE UPHELD – EMPLOYEE AWARDED WEEKLY PAYMENTS OF COMPENSATION FOR TWO SEPARATE PERIODS – WHETHER MAGISTRATE IN ERROR: *ACCIDENT COMPENSATION ACT* 1985, S82(2A).

Section 82(2A) of the *Accident Compensation Act* 1985 ('Act') provides:

> Compensation is not payable in respect of an injury consisting of an illness or disorder of the mind caused by stress unless the stress did not arise wholly or predominantly from—
> (a) reasonable action taken in a reasonable manner by the employer to transfer, demote, discipline, redeploy, retrench or dismiss the worker; or
>
> (b) a decision of the employer, on reasonable grounds, not to award or to provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with the employment, to the worker; or
>
> (c) an expectation of the taking of such action or making of such a decision.

HELD: Appeal dismissed.
1. Section 82(2A) is intended to limit recovery in respect of injuries otherwise covered by the Act. The actions listed in sub-section 82(2A)(a) ("transfer", "demote", "discipline", "redeploy", "retrench" or "dismiss") are separated by the word "or", which on ordinary construction has a disjunctive meaning. Thus, as a matter of ordinary construction, s82(2A)(a) *prima facie* requires the employer to show that the stress emanated "wholly or predominantly" from only one of the alternative actions listed therein.

2. The *prima facie* disjunctive interpretation in this case should prevail. If Parliament had intended a conjunctive approach, it could easily have said so, particularly where 'or' is plainly used in a disjunctive way elsewhere in the relevant section. Accordingly, the magistrate was not in error in upholding the claim and making the order for weekly payments of compensation.

SMITH J:
Proceeding
1. By Notice of Appeal dated 11 July 2008, the Appellant, the State of Victoria, challenges the order of the Melbourne Magistrates Court made on 16 June 2008 in a proceeding number W02444601. By that order, the plaintiff, Mr John Leck, was awarded compensatory payments under section 82(2A) of the *Accident Compensation Act* 1985 ('the Act'), for injury resulting from stress incurred at work. The payments included compensation for reduced work capacity, medical expenses and applicable interest.

Background — The relevant events
2. Mr Leck has been employed by the Victoria Police for 26 years. In the original hearing before his Honour, Mr Leck, as Plaintiff, established that he suffered injury as a result of stress at work. The evidence showed that Mr Leck's stress arose out of a number of workplace incidents that occurred between 28 June 2006 and 12 December 2006, resulting in him seeking medical assistance on 13 December 2006. On 14 December 2006, further stress was caused to him by the Appellant instigating a disciplinary action against him. This was followed by another workplace incident on 8 January 2007, which again resulted in Mr Leck seeking medical attention on 9 January 2007. At that time, he was diagnosed with depression and anxiety and placed on sick leave. On 30 January 2007, Mr Leck was served with a notice of possible deployment and asked

to comment on it. Then, on 9 March 2007, a meeting was held at Mr Leck's workplace, where it was decided that he would be transferred. Following this event, he again consulted a general practitioner and on 14 March 2007, he sought compensation for stress at work. The claim was rejected. He was unable to commence work at the new location on the date requested of him (3 June 2007), due to an adjustment disorder, diagnosed by a psychiatrist, Timothy Entwhistle. Instead, he returned to work on 9 July 2007 and then at the reduced capacity of only two days per week. He sought further psychiatric help on five occasions between 19 July 2007 and 22 November 207. He did not become fully operational in the workplace until 4 May 2008.

The decision and issues analysis by the learned Magistrate — *The decision*

3. His Honour found that the evidence presented to him established that Mr Leck had sustained an injury for the purposes of the Act and that this injury resulted in Mr Leck being incapacitated for work as claimed.

4. His Honour awarded Mr Leck weekly payments of compensation for two separate periods, namely the period between 13 March 2007 and 9 July 2007 as for "no current work capacity", and the period between 10 July 2007 and 3 May 2008 as for "current work capacity".

The principal issue

5. The key issue before the learned Magistrate was whether the defences in s82(2A)(a) and (c) of the *Accident Compensation Act* 1985 (the Act) were established. In relation to the provisions of s82(2A), the defendant relied on the words 'discipline' and 'transfer' and 'expectation of discipline and transfer'.

6. Relevantly, s82(2A) provides:

> "Compensation is not payable in respect of an injury consisting of an illness or disorder of the mind caused by stress unless the stress did not arise wholly or predominantly from –
> (a) reasonable action taken in a reasonable manner by the employer to transfer, demote, discipline, redeploy, retrench or dismiss the worker; or
>
> (b) a decision of the employer, on reasonable grounds, not to award or to provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with the employment, to the worker; or
>
> (c) an expectation of the taking of such action or making of such a decision."

His Honour noted that neither party sought to argue that the burden of establishing the relevant matters in s82(2A) did not fall on the State of Victoria.

The consideration of s82(2A)

7. As the above case history discloses, there were several factors that contributed to the stress that caused the injuries to Mr Leck. These included the initial stressors, or incidents, that occurred in the workplace, and the subsequent actions of discipline and transfer.[1] The analysis before his Honour proceeded on the basis that the stress to Mr Leck was caused by a combination of the initial incidents and the employer's actions, making it necessary to apportion the causal effect between those factors, to determine the "whole or predominant" cause of the "stress injury" to the Plaintiff.

8. After the evidence had been received, his Honour expressed concern to counsel about the proper interpretation of s82(2A) – in particular, whether it allowed a combination of the actions such as "transfer" and "discipline" to be considered in deciding whether the actions of the employer "wholly or predominantly" caused the stress.

9. The Defendant argued, and the learned Magistrate agreed, that the discipline and transfer when combined were likely to outweigh the initial incidents as causal factors of the stress injury. His Honour expressed the view that if they could be combined under the section, then Mr Leck would lose. The critical question arose, therefore, of whether this interpretation was open to the Defendant under s82(2A).

10. The actions listed in sub-section 82(2A)(a) ("transfer", "demote", "discipline", "redeploy", "retrench" or "dismiss") are separated by the word "or", which on ordinary construction has a

disjunctive meaning. Thus, as a matter of ordinary construction, s82(2A)(a) *prima facie* requires the employer to show that the stress emanated "wholly or predominantly" from only one of the alternative actions listed therein. The Defendant canvassed a number of bases to justify departure from this interpretation.

11. The Defendant went on to argue that the word "or" in the above section ought to be interpreted to mean "or, or as well", with the result that actions of the designated types could be considered in combination in deciding whether the stress arose wholly or predominantly from them. On this interpretation, the two actions of discipline and transfer could be viewed, in combination, and, once combined, was said to be the predominant cause of the Plaintiff's stress. The Defendant argued that this interpretation was justified on the grounds that it followed the purpose or object underlying the Act, namely to immunise certain classes of management action from a claim in compensation. The disjunctive interpretation, on the other hand, was said to yield a repugnant or absurd result.

12. For Mr Leck it was argued that a disjunctive meaning of 'or' should be adopted, on the basis that it is the ordinary meaning of the word and that it accorded with the underlying purpose of the Act, which was to compensate employees for workplace related injuries.

13. After considering the arguments, his Honour held that 'or' should be given its disjunctive meaning for the following reasons:

> "(a) it is the ordinary meaning of the word;
>
> (b) there is no underlying purpose or object for the provision which will be promoted by the different meaning of "or, or as well";
>
> (c) there is no other matter of context which would point to the "or, or as well" meaning; and
>
> (d) in this type of legislation and in the presence of two possible constructions, the ordinary meaning of the word favours the worker."

14. Having resolved the issue of construction, the learned Magistrate went on to conclude that

> "...the plaintiff's mental disorder caused by stress did not arise[2] wholly from the defendant's action taken to transfer nor did it arise wholly from its action taken to discipline the plaintiff. It certainly did not arise wholly from an expectation of either."

Questions of law and grounds of appeal

15. The Appellant, consistently with its original argument, put forward the following questions of law and grounds of appeal:

> **"Questions of law**
>
> 1. Whether the learned magistrate erred in law in constructing sub-section 82(2A) of the *Accident Compensation Act* 1985*?*
>
> 2. Whether on proper construction of sub-section 82(2A) the defendant was required to establish that the plaintiff's stress injury arose either wholly or predominantly because of the actions of transferring him or either wholly or predominantly because of the action of transferring him or either wholly or predominantly because of the action of disciplining him, or either wholly or predominantly from an expectation of taking an action of disciplining him, or alternatively, was required only to establish that the plaintiff's stress injury arose wholly or predominantly because of such action or actions, whether individually or jointly?
>
> 3. Whether on a proper construction of sub-section 82(2A) the word 'or' in ss82(2A)(a), (b) and (c) is to be construed as having the disjunctive sense 'or' or, alternatively, the sense when applied distributively of 'or', or as well?
>
> **Grounds of appeal**
>
> 1. That the learned magistrate erred in law in construing sub-section 82(2A) of the *Accident Compensation Act* 1985;
>
> 2. That the learned Magistrate erred in law in holding that on proper construction of sub-section 82(2A), the defendant was required to establish that the plaintiff's stress injury arose either wholly or

> predominantly because of the action of transferring him or either wholly or predominantly because of the action of disciplining him or either wholly or predominantly from an expectation of taking an action of transferring him, or either wholly or predominantly from an expectation of taking an action of disciplining him;
>
> 3. That the learned Magistrate ought to have held that on a proper construction of sub-section 82(2A) the defendant was required only to establish that the plaintiff's stress injury arose wholly or predominantly because of the actions of transferring him, disciplining him, or from an expectation of taking an action of transferring of disciplining him, whether wholly or jointly;
>
> 4. That the learned Magistrate erred in law by giving the word 'or' in s82(2A) a wholly disjunctive meaning."

The Appeal — Appellant's submissions

16. The appellant argued for a disjunctive and conjunctive approach. It was submitted that that use is not unusual. Counsel identified two places in the Act itself where this occurred. He submitted that the first was the definition of "injury" in section 5. It was put that plainly 'or' was used there 'distributively'. The other example was the definition of 'heart attack injury'. Counsel submitted that in that case also it could not have been intended that 'or' be used to describe exclusive alternatives. 'Or' in those provisions meant "and/or".

17. As to the two examples, I accept counsel's interpretation. The definitions, however, are lists of the injuries to be covered by the Act. Section 82(2A), on the other hand, is intended to limit recovery in respect of injuries otherwise covered by the Act.

18. The Appellant argued that the section should be interpreted consistently with the legislative purpose. In its written submissions, this argument was put as follows:

> "The evident legislative purpose [of the provision] is to immunise the specified classes of management action from an accident compensation stress claim for compensation as long as the actions were reasonable actions taken in a reasonable manner, and as long as the stress was due wholly or predominantly to such actions."

Plainly the Act reflects an intent to give protection to management from claims where the stated types of management action caused stress, wholly or predominantly – for example, staff being moved to another city. But the above argument for the Appellant goes further, because it is suggesting that the legislative purpose was to immunise management action of the type referred to in circumstances where there was a pre-existing stress injury suffered which would otherwise be compensable, in circumstances where its causes did not predominate when compared with the subsequent reasonable management actions in combination.

19. Accepting that the purpose of the provision was to give protection to the employer where management decisions contributed to stress-related illness, the problem remains of determining where the legislature intended to draw the line. In considering that question it is relevant to bear in mind the objects of the legislation, particularly, that of providing adequate and just compensation to injured workers.[3]

20. The Appellant went on to argue that a wholly disjunctive interpretation of the word 'or' in s82(2A) could produce results unintended by the legislature, by unfairly disadvantaging the employer. Counsel's argument was stated in written submissions as follows:

> "Is it conceivable that the legislature would have intended the *additional* requirement that the 'wholly or predominantly arising from' criterion would be required to be established in respect of the classes of actions *considered individually* so that, for example, if a worker's stress could be shown to be 50% due to reasonable 'discipline' actions, and 50% due to linked and closely ensuing 'dismissal' actions, then the employer's otherwise reasonable actions would be no longer immunised by the provisions because neither the 'discipline' actions nor the 'dismissal' actions were, considered separately, the whole or predominant cause of the stress because, *ex hypothesi*, each class only contributed 50% of the cause of the stress? .. One cannot conceive that the legislature would have intended that the sub-section would have the additional requirement of establishing the causal connection *individually and separately* for each class of management action."

Counsel went on to ask a rhetorical question

> "Why would the legislature wish to immunise an employer from a stress claim caused wholly or predominantly by reasonable transfer actions, or caused wholly or predominantly by reasonable discipline actions, but withdraw that protection from a stress claim caused 100% by the combined effect of reasonable discipline actions and reasonable transfer actions based only upon the circumstance that neither set of actions considered individually were the whole or predominant cause of the stress?"

21. In essence, the Appellant argued that employers undertaking a series of reasonable actions could find themselves unable to defend those actions, purely because no action on its own could constitute the whole or predominant cause of the stress.[4] The Appellant's submission was that this was a 'repugnant' or 'absurd' result that was contrary to the purpose of the provision and not intended by the legislation and that on ordinary principles of statutory interpretation, 'a construction that avoids repugnant or absurd results is to be preferred.' These arguments are considered further below. Other arguments were put.

> (a) Counsel also drew attention to the fact that the same action might be described as "deployment" or "transfer" and that it could be impossible to make the choice between them as causal factors as was required by the disjunctive interpretation. In my view, a problem does not arise. There is only one action and, because it satisfies each of the descriptions, it would be considered.
>
> (b) Another unsatisfactory consequence of the disjunctive construction alleged by the appellant is said to occur when management actions of different defined kinds in combination cause the relevant stress, but their effects cannot be "unpicked". It was put that it would not be possible to determine whether one of them was the predominant cause of the stress. Counsel submitted that this would be an incongruous result.

This argument overstates the issue. Applying that construction, what the section requires is that the employer prove that the stress was caused wholly or predominantly by its reasonable action of one of the kinds described. Identifying predominance need not involve unpicking to determine a percentage but it requires a characteristic of predominance (superior influence) to attach to one of the described kinds of action. If there are three kinds of factors, the employer will not be obliged to compensate if reasonable action, on its part, of one of the relevant kinds was a predominant cause.

22. Counsel for the appellant then cited a number of cases where, in different contexts, 'or' had been interpreted 'conjunctively'[5]. While they confirm that the court should look at the underlying intent of the statute to determine the correct interpretation of 'or', none, in my view, offer direct assistance. They confirm that, *prima facie*, 'or' should be interpreted disjunctively.[6]

23. As to the argument that a beneficial construction favouring the worker was required having regard to the nature of the legislation, counsel for the Appellant argued that there was no ambiguity to resolve to which that principle might apply and, if there was, the intention of the provision was to benefit the employer not the worker.

24. In my view, it is the appellant's argument that is based on an alleged ambiguity; for it is based on the proposition that the *prima facie* meaning of 'or' was not intended to be used and instead that 'or' should be used as a conjunctive as well as a disjunctive term. As to the intention of the provision, as I have suggested above, it would be more accurate to say the purpose was to place limits on the benefits otherwise payable under the Act. Such limits, however, would presumably be intended to meet the express object of the Act of providing "adequate and just compensation to injured workers".[7]

Mr Leck's submissions

25. Counsel for Mr Leck submitted the following:

> • That Mr Leck's mental disorder arose partly from the workplace incidents and therefore, did not arise wholly from the actions of discipline or transfer, and that this finding is not open to re-examination on this appeal;
>
> • That the actions of transfer and discipline were two distinct actions, and, as evidenced in this case, can occur months apart and in a different factual context. Counsel submitted that it is understandable that the Parliament's intention was not to aggregate the effect of those two actions. Counsel argued that clear language would be required if it was intended to secure the combination of such categories of actions;

• That the underlying intent of the Act is to be found in its 'cornerstone provision', s82(1), which contains '*a prima facie* entitlement to compensation under the Act';

• That the word 'or' has been used in a clearly disjunctive meaning in 'at least several' of the ten occasions where it occurs within a s82(2A) – for example, the key expression "wholly or predominantly" – so that it was not justified to ascribe a different meaning to the same word elsewhere in the same section without a clear indication. Another example cited was "retrenched" or "dismissed". Counsel submitted that they could not be combined. Counsel also submitted that it could not have been intended by Parliament that paras.(a), (b), and (c) could be combined.

Analysis of arguments — The consequences of the interpretations

26. I will consider the arguments advanced on the basis debated before me – that is that the section requires that the causes of the stress that led to the illness must be identified and the issue is which cause or causes predominated. The section in fact directs attention to what caused the relevant stress to 'arise'. I will return to that issue at the conclusion of these reasons.

27. The Appellant argues for a departure from the ordinary interpretation of the word 'or', on the grounds that otherwise such an interpretation yields absurd results not intended by Parliament. As evidence, it puts forward hypothetical situations where an employer undertaking a series of reasonable actions is penalised by the Act by not being able to rely on s82(2A), because when viewed individually, none of the actions could be said to be 'wholly or predominantly' the cause of the employee's stress.

28. The force of the Appellant's argument depends in large measure on the view that is taken about how common and unreasonable the envisaged scenarios are likely to be. I suggest it is difficult to envisage such scenarios commonly taking place. For example, the section will typically come into operation where at least one cause of the stress, not of the kind listed, exists giving rise to a right to compensation. I suggest that it would also be unusual to have cases where the only causes of the relevant stress were the different kinds of management actions described in the sub-section. It would also be unusual for such actions to be of equal causal significance.

29. The possibility of scenarios of the kind described is also reduced because a number of the categories of actions referred to are alternatives that are unlikely to occur in combination. It is true that 'discipline' is likely to be found in combination with the other categories of actions, while 'demoting' may involve a 'transfer' or 'redeployment' in some cases. But in such situations, bearing in mind that Parliament was seeking to provide adequate and just compensation for workers, it would be reasonable for it, when one management action follows upon another, to intend that only one of the linked management actions be considered – namely the more significant one causally. The issue would be did it predominate as a cause of the stress that caused the injury. Another reason why that approach might be thought reasonable is that, without it, injustice could be done to the worker who is deprived of compensation because of management action made necessary because of the compensable stress illness which at the same time added to the state of stress and aggravated the illness. The impact of the management action as a causal factor is constrained by the disjunctive approach but it is compounded by the conjunctive approach.

30. Where there is a cause of stress associated with work, other than the categories of management action, the disjunctive approach could in some circumstances create the result described by the appellant, the result said to favour the employee and alleged to be unfair to the employer. But it must again be emphasised that in this provision, Parliament was trying to draw a line and strike a balance, and it is not absurd or repugnant in legislation dealing with the compensation of workers, for Parliament to strike a balance that may favour the employee on occasions when its object is to provide a system for adequate and just compensation for injured workers.

31. The situation is one where arguments can be mounted about possible unsatisfactory consequences for both the employer and the employee from the competing constructions. At best from the appellant's point of view, the unsatisfactory situations postulated may be said to be evenly balanced. In those circumstances, there is an insufficient basis for departing from the *prima facie* position that 'or' means 'or'. But that is not the situation, in my view. There is a further issue.

32. I suggest that the Appellant's interpretation would open up an undesirable situation. On

the Appellant's argument, the employer who was otherwise liable to compensate could take steps to avoid liability by undertaking a series of ostensibly reasonable actions, the sum of which would predominate over the original cause of the employee's stress. I suggest that that would not be difficult to achieve.

33. For example, the facts of the present case reveal a situation in which the illness onset occurred prior to any management action of the kind listed. The subsequent management action taken was ostensibly reasonable and conducted reasonably; for there was a problem that had to be addressed and it was reasonable to address it ultimately by moving the employee from the workplace he was in, because the origin of the problem lay in the relationship between him and his superior. That process and the disciplinary process appeared to have been carried out in accordance with standard procedures. Thus the employee had a work-related illness but because two things occurred – action to discipline and action to transfer – and because in combination they predominated as causal factors, the employee, on the appellant's analysis, would lose his compensation to which he was otherwise entitled under the Act.

34. I suggest that it would not be uncommon for the employer to be able to point to management action of that kind in a situation where there was already a stress related illness before taking any such action. Where an employee suffers a stress related illness caused by the conduct of another employee, it is likely that employee with the illness will not be functioning very well. It would in many of such cases be a simple matter to reduce the ill employee's responsibility ('demote' and 'redeploy') and move that employee ('transfer') and the reasonableness of those actions could not be challenged. It would not be difficult even in extreme cases of racial, gender or other unfair discrimination causing a stress illness, for an employer to have it accepted that management actions were reasonable in all the circumstances even though they might well be motivated in fact by the same form of discrimination that caused the original stress. A conjunctive construction increases the opportunities for such behaviour. A disjunctive construction limits such opportunities.

Conclusion

35. The disjunctive construction is to be preferred. The following points may be made:

- The provision is designed to limit compensation in the case of a person who is otherwise entitled to compensation;
- On the authorities, unless the context indicates otherwise, 'or' will normally be interpreted disjunctively;
- As counsel for Mr Leck explained, "or" is extensively used in a disjunctive manner in the sub-section;
- Assuming that the obtuse language preceding the relevant paragraph was deliberately and carefully chosen, it was probably intended to emphasise that the use of 'or' is disjunctive;
- If Parliament had intended a conjunctive approach, it could easily have said so, particularly where 'or' is plainly used in a disjunctive way elsewhere in the relevant section;
- Arguments based on the potential consequences of each interpretation favour the disjunctive approach.

36 The *prima facie* disjunctive interpretation should prevail. The learned Magistrate was correct in his interpretation of s82(2A) by giving 'or' a wholly disjunctive meaning. The appeal should be dismissed.

37. Before leaving this matter, I should note an aspect which emerged during my consideration of the case after the hearing had concluded.

38. As already mentioned, the argument below, and before me, proceeded on the basis that the section required an analysis and weighing up of all the causal factors which led to the stress that in turn led to the illness. I have therefore proceeded on that basis. The fact that I have determined the case on the above common basis, however, should not be seen as confirmation by me as to the correctness of that approach.

39. The critical question under the section is whether "the **stress** did not **arise** wholly or predominantly from" the reasonable actions described. Arguably, the question is not whether the stress was caused wholly or predominantly by such actions. Rather the question is what predominantly caused the **stress** to **arise** – that is, to spring or originate from.

40. Applying this construction, the issue to be determined would be:

- from what actions did the relevant stress arise,
- whether such actions or any of them can be classified as one of the types listed and, if so,
- whether the relevant stress arose wholly or predominantly from one of those actions.

41. Applying that construction in the present case the question arguably would be whether the onset of the illness occurred as a result of a state of stress that arguably arose prior to the actions of "discipline "and "transfer". If that was so, the stress arguably, "did not **arise..** from" those actions.[8]

42. It is not necessary, however, to pursue this analysis. It was not argued and it appears to me that the facts as found by his Honour would lead to the same conclusion under this alternative interpretation. I also bear in mind Lush J's advice to judges that if a point has not been raised by counsel it is probably wrong. If this alternative analysis is valid, but was overlooked, that is understandable because of the inevitable paraphrasing of the almost incomprehensible critical language used in the preliminary parts of s82(2A).

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[1] I note that the issue was not raised as to whether it was possible that the actions of discipline and transfer, being themselves a response to the results of the initial stress-inducing incidents, ought to be rated as less predominant for the purposes of s82(2A) in comparison with the initial stress-inducing incidents.
[2] "Arise" is a critical word in the sub-section but was, I suggest, used in the hearing below as a term referring to causation generally.
[3] Section 3(d); see also s3(e) and (f).
[4] For example where transfer and discipline actions each constituted 50% of the cause.
[5] See *Unity APA Ltd v Humes Ltd (No.2)* [1987] VicRp 43; [1987] VR 474, Beach J at pp481-2; (1987) 11 ACLR 647; (1987) 5 ACLC 64; *Electricity Trust of South Australia v Krone (Australia) Technique Pty Ltd* [1994] FCA 1209; (1994) 51 FCR 540; (1994) 123 ALR 202 at p208; [1994] ASC 58; *Minister for Immigration and Ethnic Affairs v Baker* (1997) 73 FCR 187; (1997) 153 ALR 463, particularly at pp469-70; (1997) 45 ALD 136; (1997) 24 AAR 457; and *FCT and Anor v Industrial Equity* [2000] FCA 420; 98 FCR 573; (2000) 171 ALR 1, particularly at p5; 44 ATR 135.
[6] See particularly *FCI v IEL* [2000] FCA 420; 98 FCR 573; (2000) 171 ALR 1, 5; 44 ATR 135.
[7] Section 3(d).
[8] Another construction issue that may arise is the scope of the word "action"(s37 *Interpretation of Legislation Act* 1984).

APPEARANCES: For the appellant State of Victoria: Mr M Fleming, counsel. Wisewoulds, solicitors. For the respondent Leck: Mr M O'Loghlen QC and Mr C Miles, counsel. Maurice Blackburn, solicitors.
