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Section 138 Accident Compensation Act - An Update

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Section 138 Accident Compensation Act - An Update

Very few sections of Victorian legislation are as well known (and are as despised by so many!) as s138 **Accident Compensation Act 1985** (Vic) (**ACA**).

The section entitles the Victorian WorkCover Authority (**VWA**), Victoria's statutory WorkCover insurer, to seek an indemnity from a non-employer **third party** (hereafter referred to as a third party in this paper) who has caused or contributed to an injury to a worker for which compensation has been paid under the ACA.

VWA vigorously pursues its entitlements under s138. It has hundreds of claims on foot at any time. It is a vital and growing income stream for its insurance operations. Indeed, in its 2007 financial statements, VWA reported recoveries revenue of \$68 million. By 2011, that figure had risen to almost \$152 million, around 8.5% of its total premium revenue.

Given its broad application, a working knowledge of s138 ACA is not only essential to lawyers practising in personal injury law, but also anybody providing legal or accounting advice to a party (corporate or natural) who has any contact with an employee of another.

This paper provides an overview of s138, changes to legislation and an analysis of the most recent judicial outcomes that impact on the assessment of a party's liability under this section. It also considers some less direct causes for substantially increased liabilities under s.138 in recent years.

Recap on section 138 ACA

Where a worker is injured and payments of compensation are made under the ACA, the VWA may have a right to sue a third party who has caused or contributed to that injury.

A third party's liability is determined, firstly, by applying the same principles of negligence and breach of statutory obligations as would apply if it was the injured worker bringing the claim.

If the VWA establishes that the third party is or would have been liable to a worker in respect of the injury for which compensation has been paid, it is entitled to an indemnity from that third party for the lesser of:

- + the amount of compensation paid or payable in respect of the compensable injury; or
- + an amount calculated in accordance with the formula in s138(3)(b) ACA.

In a practical sense, the first limb of the indemnity cannot be assessed with certainty because compensation payments can, conceivably, continue until death. Even claims that are closed can be re-opened.

The VWA's entitlement to indemnity may therefore be determined, and capped, by a formula.

That formula is as follows:

$$[A - (B + C)] \times \frac{X}{100}$$

The formula requires consideration of three things (as Factor B is no longer relevant).

Factor A This is the worker's hypothetical common law entitlement in relation to the compensable injury. This requires the court to assess what the worker would have received had the

ACA not limited or restricted his or her common law entitlements. All heads of damage must be included.

Factor X This is the third party's proportionate liability taking into account the proportionate responsibility of all other parties.

Factor C This is any amount the third party has paid to a worker to settle common law entitlements.

Accordingly, the Court will take into account all potential heads of damage that a worker could have recovered because of his or her injuries and without reduction because of any legislative amendments such as Part VB or Part VBA **Wrongs Act**¹.

Except in cases where the third party's proportionate liability is small, the formula will usually arrive at a figure that is higher than the VWA's payments to the worker. This is principally because all heads of damage must be included (i.e. medical and like expenses and any gratuitous personal care provided by family, which is assessed at its full commercial cost value – also known as **Griffiths v Kerkemeyer** damages) and because calculations are made adopting the old common law 3% discount rate, whilst workers' actions are assessed on a more favourable 6% rate.

If the matter is litigated and there is a judgment by a Court in the VWA's favour, the Court should assess the extent of the indemnity using the formula. The VWA is then entitled to recover from a third party the amount of compensation it pays to a worker as and when it is paid, until the amount of the indemnity is exhausted.

I have attached to this paper (as Attachment "A") a demonstration of the application of the formula.

Who is a third party?

The VWA's rights to indemnity exist where a third party's negligence, acts or omissions cause or contribute to a worker's injuries.

The most common claims brought by the VWA under s138 involve labour-hire arrangements, occupier's liability or claims against suppliers & manufacturers whose goods have caused injury to a worker.

However, who may constitute a third party is very broad.

In **DSG Pty Ltd v Victorian WorkCover Authority** [2008] VSCA 42 (3 April 2008), Justice Pagone said that whilst "*the Act does not define 'third party'... the natural and ordinary meaning of those words in the context of s138 is any person having a liability but who was not a party to the compensation which was claimed and paid or for whom that payment is or may be payable.*"

In the recent decision of **VWA v Venamis Group Pty Ltd & Anor** [2011] VCC 976, Judge Parrish had to determine whether a receiver and manager of the 'employer' company, F & T Industries Pty Ltd (**F&T**),

1 Part VB Wrongs Act places restrictions on the personal injury damages certain claimants can recover. Part VBA Wrongs Act imposes threshold and procedural requirements on certain claimants who must first establish that they have a permanent physical injury that assesses under AMA Guides at over 5% whole person impairment (WPI) or over 10% psychiatric impairment.

In **Alcoa Portland Aluminum Pty Ltd v VWA** [2007] VSCA 210 (11 October 2007), the Court of Appeal said that the provisions in Part VB and Part VBA were to be taken into account when assessing liability under the formula in s138(3)(b) ACA. Shortly after this decision was handed down, the formula in s138 was amended to expressly provide that these provisions were not to be taken into account (see s138(3)(b)).

was a 'third party' for the purposes of s138 and therefore potentially liable to indemnify the VWA for compensation paid to a worker. The worker had, during the course of his employment with F&T (whilst under receivership), contracted Legionella from its cooling towers.

The receiver contended that he was not a 'third party' for the purposes of s138 as he was simply carrying on the activities of the employer. His Honour Judge Parrish disagreed. Referring to the decision of *DSG v VWA*, he said that at law the receiver was acting as agent for the employer, not as the employer.

Accordingly, he said that consistent with the policy of s138 which "*permits indemnity from any party, other than obviously the payer of the compensation,*" the VWA was entitled to claim against the receiver.

The corollary of these decisions is that a 'third party' can also be directly related to the employer. It does not matter that both have common directors or shareholders.

For instance, if a group of companies has established one company to employ staff and another to occupy premises and operate the business, the latter company can be subject to a s138 recovery action. Thus, if a worker who is employed by the first company is injured doing work at premises owned or controlled by the second company, the second company may be held liable. The VWA will not indemnify it under the WorkCover policy.

Great care must be taken when advising parties on how to structure their commercial and business affairs to ensure that they do not inadvertently expose themselves to claims by the VWA.

Assessing liability under section 138 ACA

I have already indicated that the circumstances in which the VWA can bring a claim under s138 are wide and varied.

However, by far the most common of the claims brought by the VWA involve injuries to labour-hire employees.

The law is clear insofar as a 'host employer' of a labour-hire employee will ordinarily be held to owe a duty of care akin to that of the legal employer. The host employer may also be held liable in certain circumstances for breaching its statutory duties under regulations made pursuant to **Occupational Health & Safety Act 2004** (Vic) (**OH&S**)².

However, the labour-hire employer also owes a non-delegable duty of care and thus, in most cases, where a worker is injured whilst working for a host, both the host and labour-hire company will usually be held liable.

The way in which the liability ought be apportioned between the labour-hire employer and the host will depend on the Court's weighing up of all relevant circumstances and factors; specifically the extent to which each of the parties departed from the standard of conduct reasonably required of them and the relative causal potency of each party's acts or omissions.

The 'high water mark' for apportionment against a labour-hire company is the decision of **Papadopoulos v MC Labour Services & Anor** [2009] VSC 193. A jury held both the labour-hire employer, MC Labour Services (**MC**) and the host employer, Concept Hire Ltd (**Concept**) liable for injuries sustained by Papadopoulos, which he alleged resulted from having to carry heavy rolls of membrane whilst working

2 See for instance **Papadopoulos v MC Labour Hire Services & Anor** (Ruling No. 1) [2009] VSC 175. It is now well established law that whilst the **Occupational Health & Safety Act 2004** (Vic) cannot give rise to a cause of action for breach of statutory duty, the regulations made under the Act can.

as a labourer at Concept's building site. The injury involved a disc prolapse at L5-S1 level. By the time of trial, Papadopoulos had not worked since the incident, some 9 years earlier.

Papadopoulos alleged Concept was negligent and in breach of a statutory duty under OH&S regulations for requiring him to carry the heavy membrane. He claimed Concept should have ensured he had equipment to assist him, such as a trolley.

The claim Papadopoulos brought against MC was more factually complex.

Quite apart from arguing a breach of its non-delegable duty of care, Papadopoulos also alleged that MC knew he might not be fit to carry out heavy labouring work because, as the evidence established, it knew Papadopoulos had recently sustained injury during an earlier placement by MC at another employer's building site. However, MC had decided to 'self-manage' his claim without referral of that injury to the WorkCover insurer. MC had also failed to prepare a Return to Work programme, as required by the provisions of the ACA. Papadopoulos was then sent to work as a labourer at Concept's building site without first obtaining medical clearance that would have likely established that he had also sustained a back injury which rendered him susceptible to further injury.

In apportioning liability, Justice Beach took account of Concept's conduct in directing Papadopoulos to carry the membrane, which was a greater direct cause of his injury than MC's conduct. However, MC's departure from the standard of care expected of it as a labour-hire company was held to be greater than Concept's.

Justice Beach assessed contribution at 50% each.

Concept also argued that it ought to be indemnified because MC had breached its contract for the provision of services and was liable under Trade Practices law. Justice Beach rejected those arguments.

Even though Concept's proportionate liability was therefore held equal to that of MC, the effect of the formula in s138 was that Concept was obliged to reimburse the VWA 100% of the compensation it had paid or would pay Papadopoulos under the ACA. This case thus demonstrates the draconian nature of s138.

This case is not an illustration of the usual apportionment of liability in a labour-hire situation. Rather, it illustrates the extent to which MC's conduct substantially departed from what is usually expected of a labour-hire employer.

Whilst there are no set 'tariffs', more commonly the apportionment against a labour-hire employer is in the range of between 10% and 35%.

This lower apportionment takes into account that, as a rule, the labour-hire company will have limited knowledge of and control over the activity that causes the worker's injury³.

3 A useful summary of the factors that the Court will take into account is set out in paragraph 77 of Justice Beach's decision in **Papadopoulos v MC Labour Services & Anor** [2009] VSC 193. In doing so, Justice Beach quoted the factors listed by Harrison J in **Hoad v Peel Valley Exporters Pty Ltd** [2008] NSWSC [981].

In summary, those factors are as follows:

1. the respective degrees of access to the premises where an employee is working;
2. the control of the premises;
3. the period during which the employee was working at the premises;
4. the responsibility for the employee's training;
5. who supplied any plant and equipment to the employee required for use in carrying out the work;
6. the parties' respective roles in devising, instating and maintaining a system of work that was bound to be unsafe;

In **VWA v Shepparton Terrazzo Works Pty Ltd (STW)** [2011] VSC 464 (29 September 2011), Geoff Dart (**Dart**), an employee of labour-hire company Workforce Extensions, had been placed to work with STW. He had suffered from asthma and eczema since infancy. This was not established before his placement with STW as Workforce Extensions had not inquired. STW was the owner and occupier of a concrete fabrication plant at which Dart worked. STW failed to provide adequate protective clothing, including masks. His asthma and eczema worsened. Dart complained to STW, but STW failed to act on his complaints.

The trial judge, T Forrest J, was critical of Workforce Extensions as it had failed to conduct any regular inspections of STW's workplace, did not provide Dart with any training, did not ask him about his existing health prior to employing or placing him and made no effort to establish if he would be working in a hazardous environment.

However, notwithstanding Workforce Extensions' independent negligence which was a cause of Dart's injuries, STW was responsible for the workplace and the work activities.

The apportionment was 65% against STW and 35% against Workforce Extensions.

The facts in **Popovic v Rodevan Pty Ltd & Anor** [2010] VSC 191 are, perhaps, more representative of a 'standard' labour-hire situation.

Rodevan was the labour-hire company, Australian Air Express (**AaE**) the 'host employer'. Popovic, the worker and an employee of Rodevan, was injured when lifting a heavy box whilst carrying out work for AaE at its warehouse premises. Rodevan had a number of employees working with AaE and the evidence established it worked closely with the company and had regularly undertaken inspections. However, the 'hazard' was not immediately apparent on those inspections.

Both defendants were held liable to Popovic, with Rodevan required to contribute 15% and AaE required to pay the remaining 85%.

Whilst these decisions each establish that the employer has a liability to the worker, the impact of the formula in s138 is such that in each of these cases the negligent third party would be responsible to indemnify the VWA for 100% of the compensation paid to the injured worker.

Why this is the case is best demonstrated by revisiting again those calculations I set out in Appendix A.

Non-labour-hire situations

Second only to labour-hire cases, the most common claims we see that are brought by the VWA are claims involving non-employer defendants who it is alleged were responsible for overseeing or devising the system of work which the worker was following when injured.

The leading decision on liability in these circumstances is **Leighton Contractors Pty Ltd v Fox; Calliden Insurance Limited v Fox** [2009] HCA 35 (2 September 2009).

In that case, the High Court considered whether Leighton Contractors, a head contractor at a building site, owed the employee of its sub-contractor, Fox, a duty of care to protect him from injury that resulted from

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7. whether the employee was injured in the course of their normal duties or when performing different ones;
 8. the parties' respective states of knowledge of a hazard;
 9. the employer's capacity to act independently to avert the hazard and 'shield the employee' from it;
 10. the period of time during which the hazard had been in existence;
 11. whether the hazard had caused any prior injury to the employee or anyone else;
 12. whether the hazardous conditions were constant or varied day by day; and
 13. whether there was any dissimilarity in the employee's ability to draw the hazard to the attention of one party or another.

negligent conduct of a co-subcontractor. Fox was injured operating a concrete pump.

The High Court, in its unanimous decision, referred to and adopted the principles as explained by Brennan J in **Stevens v Brodribb Sawmilling Co Pty Ltd** [1986] HCA 1; (1986) 160 CLR 16 at 47-48:

"An entrepreneur who organises an activity involving a risk of injury to those engaged in it is under a duty to use reasonable care in organising the activity to avoid or minimise that risk, and that duty is imposed whether or not the entrepreneur is under a further duty of care to servants employed by him to carry out that activity. The entrepreneur's duty arises simply because he is creating the risk and his duty is more limited than the duty owed by an employer to an employee. The duty to use reasonable care in organising an activity does not import a duty to avoid any risk of injury; it imports a duty to use reasonable care to avoid unnecessary risks of injury and to minimise other risks of injury. It does not import a duty to retain control of working systems if it is reasonable to engage the services of independent contractors who are competent themselves to control their system of work without supervision by the entrepreneur. The circumstances may make it necessary for the entrepreneur to retain and exercise a supervisory power or to prescribe the respective areas of responsibility of independent contractors if confusion about those areas involves a risk of injury. But once the activity has been organised and its operation is in the hands of independent contractors, liability for negligence by them within the area of their responsibility is not borne vicariously by the entrepreneur. If there is no failure to take reasonable care in the employment of independent contractors competent to control their own systems of work, or in not retaining a supervisory power or in leaving undefined the contractors' respective areas of responsibility, the entrepreneur is not liable for damage caused merely by a negligent failure of an independent contractor to adopt or follow a safe system of work either within his area of responsibility or in an area of shared responsibility."

These principles were recently referred to and applied in the County Court decision of **VWA v Moorabool Shire Council & Anor** [2011] VCC 133.

The defendant Council contracted with Elken Amber Pty Ltd (**Elken**), to collect recyclable rubbish. Roy May (**May**), an employee of Elken, was required to alight from the rubbish truck, collect recyclable rubbish deposited in 60 litre crates provided to the ratepayers by the Council and to empty the contents of the crates into the dumpster. May suffered a serious injury to his lower back during the course of his employment.

His Honour Judge Misso considered whether the Council owed May a duty of care notwithstanding it was not his employer.

Misso J had regard to the fact that the Council required Elken to collect the rubbish from crates it distributed and that this was why the worker had to lift weights of up to 60 kilograms. However, Misso J was also satisfied that, by its contract with Elken, the Council had achieved the result of transferring responsibility for the carrying out of the relevant activity. He also took into account that Elken was a competent independent contractor and that under its contract with the Council it was for Elken to design and implement the system of work that would successfully meet its obligations.

The Council was held not to be liable and thus the VWA's claim for indemnity under s138 was dismissed.

However, there still must be careful assessment of the facts of each case to determine if they disclose circumstances where the liability of a third party may crystallise.

For instance, in **VWA v Intercon Group Pty Ltd** [2010] VCC 315 Intercon was found liable for injuries sustained by an employee of its sub-contractor, Golden Tape. The injured worker fell from an unsafe work platform which had been erected by a site manager employed by Trade Contract Management Australia Pty Ltd (**TCMA**). TCMA had been engaged by Intercon.

In finding Intercon liable, Saccardo J said that it had failed to adequately inspect its site, to detect the erection of the work platform and to have it removed.

Saccardo J also held TCMA liable, vicariously, for its site manager's negligence in erecting an unsafe platform.

Liability was apportioned 21% to Intercon, 39% to TCMA and 40% to Golden Tape, as employer.

A further example of the application of these principles is in **VWA v Bruck Textiles & Anor** [2011] VCC 0141 where a non-employer defendant, Peter and Sharon Villiers (**Villiers**), was held liable because its employee devised the system of work that was a cause of injury to a worker, Geoffrey Fallon (**Fallon**).

The circumstances are such: on 3 October 2000 Fallon, a plumber employed by Golding Plumbing Services Pty Ltd (**GPS**), sustained injuries to his lumbar spine whilst lowering a ladder by rope between levels of the roof at premises owned by Bruck Textiles Pty Ltd (**Bruck**). The lowering of the ladder was not part of Fallon's usual work but was part of the work being performed by Dennis Saunders, an employee of the second-named defendants, Villiers.

Whilst not his employer, Judge S Davis held Villiers owed a duty of care to Fallon.

She said the duty arose because:

- + as a sub-contractor on site, it owed a duty of care on general principles because Fallon was assisting it to perform the work;
- + it had an 'entrepreneurial duty' as referred to in *Stephens v Brodribb Sawmilling* to prescribe and provide a safe system because it was performing the works; and
- + like in labour-hire cases, although Fallon remained an employee of GPS, he came under the control of Saunders and therefore Villiers for the specific purpose of the alleged manoeuvre.

Judge S Davis also accepted the VWA's claims that Villiers had breached its duty to Fallon because the system of work Saunders had devised for lowering the ladder using rope only was unsafe and was a cause of Fallon's injuries.

GPS was also held liable. Judge S Davis said that, quite apart from it having a non-delegable duty, another employee (who was effectively Fallon's supervisor) was quite aware Fallon would be assisting other contractors, including Villiers. No systems were put in place to protect him from injury.

Villiers and GPS were both held 50% responsible.

Another case on point is **Karatjas v Deakin University** [2012] VSCA 5.

Whilst the case was not brought by the VWA, but rather by the injured worker herself, it illustrates circumstances where, applying the principles in *Stevens v Brodribb Sawmilling*, a Court may be satisfied that a non-employee third party is liable. The decision involved an appeal from a judgment and verdict entered in favour of Deakin University in the County Court of Victoria. The main issue was whether Deakin owed Karatjas a duty of care.

Karatjas was an employee of Spotless Catering, a company that ran the University cafeteria. Karatjas was attacked whilst returning on the 'red path' from the cafeteria to her car late on the evening of 29 August

2006. The 'red path' was poorly lit and there had been some previous reports to Deakin of persons seen lurking in the bushes alongside it.

In his reasons, Nettle JA (Hansen JJA and Kyrou AJA concurring) said that Deakin exercised control over that aspect of the system of work by determining where cafeteria employees should be encouraged to park their cars and the paths that should be made available for passage from there to the cafeteria. Deakin had required that Spotless staff use that particular carpark and that particular path. Accordingly, he said, Deakin owed a 'Brodribb type' duty to Spotless's cafeteria employees to take reasonable care to secure the personal safety of those employees when moving to and from the carpark to the cafeteria; and, in particular, to secure those employees against what the judge found was a foreseeable risk of Spotless' employees being attacked as they moved between the car-park and the cafeteria⁴.

It is important to note that Nettle JA did not refer to Brennan J's statement which I have set out above and which was adopted by the High Court in *Leighton Contractors v Fox*. Instead, Nettle JA observed as follows:

34. *In Brodribb, Mason J said that, where a party engages independent contractors to do work which might as readily be done by employees in circumstances where there is a risk to them of injury arising from the nature of the work, and where there is a need for that party to give directions as to when and where the work is to be done, that party has an obligation to prescribe a safe system of work, and the fact that the contractors are not the party's employees or that the party does not retain a right to control them in the manner in which they carry out their work, does not affect the existence of the party's obligation to prescribe a safe system of work. Wilson and Dawson JJ, Brennan J and Deane J expressed similar views.*
35. *Parity of reasoning implies that, where a defendant retains an independent contractor to carry out work; the contractor carries out the work through the agency of employees; and there is a need for the defendant to give directions as to when and where work is to be done by those employees, the defendant owes to the employees an obligation to provide a safe system of work in relation to those aspects of the work.*

Whilst each of these cases were decided on their own facts, the analysis for each demonstrates that what is the essential feature in determining whether a duty of care is owed to a non-employee is whether there has been an assumption of control.

Prohibition against contracting out

An issue commonly raised with me by clients who are subject to a claim by the VWA under s138 is how to protect themselves from such action in the future, particularly where the claim arises from a labour-hire arrangement. I am commonly asked if the employer can be contractually required to indemnify for claims brought by the VWA.

In the past, it was open to parties to contract with the employer so that the employer was obliged to indemnify the potential 'third party' or to arrange public liability insurance on their behalf.

However that right to contract was changed soon after the decision of **VWA v Concept Hire Limited; Concept Hire Limited v MC Labour Services Pty Ltd**. That decision is widely regarded as having promoted the VWA seeking legislative amendment as part of a 'suite' of amendments that were passed by

4 The well known decision of *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; (2000) 205 CLR 254 was distinguished. Nettle JA observed that the High Court held that mere reasonable foreseeability of a criminal attack being made by a third party on a plaintiff on premises occupied by a defendant is not a sufficient basis to impose on the occupier defendant a duty to take reasonable care to prevent that harm. However, that did not prevent Deakin owing a 'Brodribb type' duty, as was found.

the Victorian Parliament in 2010.

In *VWA v Concept*, Justice Beach considered whether MC's WorkCover insurance policy should indemnify it in respect of contractual claims, breaches of duty and Trade Practices Act claims made by the host employer against it as labour-hire employer. As discussed earlier in this paper, MC's employer Papadopoulos had been sent to work as a labourer with Concept despite MC's knowledge that he had recently sustained injuries and that no medical clearance was obtained nor a Return to Work plan developed. Concept alleged that MC had breached its contractual and Trade Practices obligations. Concept did not succeed in these claims. However, Beach J still had to consider MC's counter-claim against the VWA for indemnity under its WorkCover policy of insurance in respect of Concept's claims.

Justice Beach held that the WorkCover Policy did respond and thus MC was entitled to indemnity (including its legal costs).

As part of the reforms introduced by the **Accident Compensation Amendment Act 2010 (ACAA)**, the Victorian Parliament introduced s138(4A) ACA.

That sub-section provides that *"a term of any contract that requires the employer or has the effect of requiring the employer to indemnify the third party in respect of any liability that the third party has or may have under this section is void."*

As a result, any term of a contract entered into on or after 5 April 2010 will be void if it requires an employer to indemnify a negligent third party for its liability under s138. It is unclear on its terms whether this also prevents a third party from requiring it to obtain public liability insurance on its behalf.

It is important therefore that parties who are contracting with employers are aware of this provision when negotiating terms and drafting clauses intended to protect non-employer defendants from liabilities to workers.

Other changes effecting section 138 ACA liabilities

Based on my experience and quite apart from the way in which the formula operates, negligent third party liabilities under s138 have increased over the past two years because compensation payments to workers has, on a 'standard claim', increased.

There are a number of causes and explanations for this but the most obvious is the substantial increase in worker entitlements in 2010 after the ACAA commenced.

The ACAA represented the Victorian Government's response to the recommendations arising from the review of the ACA by Peter Hanks QC in 2007. He recommended an increase in compensation entitlements. As a consequence, a number of entitlements to compensation by injured workers were increased. The weekly payments rate after a worker receives payments for over 13 weeks was changed from 75% of pre-injury income to 80%. The statutory maximum for weekly payments was increased from \$1,300 to twice Victoria's average weekly earnings (\$1,760), overtime and shift allowances would now be taken into account for 52 weeks (previously 26 weeks) and 'no-fault' impairment benefits increased by around 20% to up to \$503,000.

The VWA is also now empowered by s138(6) to recover on behalf of the employer the amount of any compensation it paid to the worker as the excess under its WorkCover policy.

Quite apart from these statutory increases, the cost of services paid for by the VWA, particularly medical and like services, has also substantially increased.

As s138 will, more often than not, entitle the VWA to recover 100% of the compensation paid to injured workers, these amendments have a direct flow-on effect when assessing the liability of negligent third parties. Indeed, I estimate that the cost of an 'average' s138 claim is as much as 20% higher than a similar claim would have been prior to the 2010 amendments.

Other recent Judicial Decisions impacting on section 138 claims

There have been a number of recent judgments that also ought be considered when assessing a third party's liability to the VWA under s138.

These decisions have considered:

- + whether settlements paid by other defendants with a worker should be taken into account when calculating the formula in s138(3)(b);
- + how the VWA's entitlement to statutory interest ought be calculated; and
- + in what circumstances a liable third party will be ordered to pay the costs of a successful defendant.
- + In **VWA v Bruck Textiles & Anor** [2010] VCC 463, S Davis J confirmed that when undertaking the calculation of the formula, Factor C should only include the payment made by the third party for whom that calculation is being performed. Thus, whilst Bruck and co-defendants Villiers had both made a payment to settle the worker's action, when assessing Villiers' liability under the formula in s138(3)(b), S Davis J said only that amount paid by Villiers was to be included as its Factor C.

There have been three recent County Court decisions, two by Saccardo J and one by Coish J, which are relevant to assessing the VWA's entitlement to interest under s60 **Supreme Court Act 1986** (Vic) (**SCA**).⁵

Where the VWA succeeds in a claim for indemnity, it will usually be entitled to be reimbursed both for amounts of compensation paid to a worker before and for payments that were made after the Writ was issued. Interest under s60 SCA only accrues from the date the Writ is issued or once the payment has been made; whichever is the later.

One option is to calculate interest on each payment from the date it is made to the date of judgment. However, in the typical s138 claim, that could involve several hundred separate calculations. If an actuary was engaged to perform the calculations, it would result in experts fees of many thousands of dollars.

Both Saccardo J and Coish J agreed that a 'short-hand' approach should be adopted. However, they adopt substantially different methodologies.

In **VWA v Intercon Group Pty Ltd** [2010] VCC 0482 and **VWA v Playcorp Pty Ltd & Anor** [2011] VCC 139 (4 February 2011), Saccardo J said that it was appropriate he take into account that the VWA's liability to the worker had been accruing over time, both before and after its writ was issued. His methodology was to assess the VWA's entitlement to interest by applying one-half of the statutory rates during the period in which he determined that the interest was recoverable⁶.

⁵ In **VWA v Esso Australia Ltd** [2001] HCA 53; 207 CLR 520; 182 ALR 321; 75 ALJR 1513 (13 September 2001), the High Court said the VWA was entitled to interest under s60 SCA.

⁶ Thus, for example, in **VWA v Playcorp**, Saccardo J observed that payments of compensation subject to interest had increased by 57% from \$69,433.47 at the time of issuing proceedings to \$116,579 being the time at which the judgement was entered. Having been requested by the parties to assess interest based on 1,000 days, Saccardo J applied a rate of 30.2% to the higher amount (\$35,206) and then reduced that by 50%. By doing that, he

In other words, regardless of what proportion of compensation had been paid before the Writ was issued and what was paid after, his method was to calculate interest using the usual penalty rate and then divide the result by two.

In the more recent ruling in **VWA v Sakata Rice Snacks Australia Pty Ltd** (unreported), Coish J rejected Saccardo J's approach.

Coish J agreed that he needed to take into account that payments had been made after the Writ was issued and that interest at the usual penalty rate could therefore not simply be applied to the whole amount of past compensation payments. However, he said the more appropriate method was to take the amount of payments made at the commencement of the proceedings (in that case, \$318,270.86) and at the conclusion of proceedings (\$420,692.04) and apply the average as the principal amount for the calculation of interest (i.e. \$318,270.86 plus \$420,692.04 divided by two is approximately \$370,000). The average penalty interest rate and approximate period over which interest had accrued could then be used to calculate the total amount of interest payable to the VWA for past payments.

Finally, the Court of Appeal recently considered in what circumstances the VWA should be entitled to a *Bullock* or *Sanderson* order where it has won its case against one defendant but lost against another.

A *Bullock* order is a costs order whereby one defendant is ordered to reimburse the plaintiff for the costs it is liable to pay another defendant. A *Sanderson* order is similar, but the defendant becomes liable to pay the costs of the successful defendant directly to that successful defendant.

In **VWA v Kagan Bros Consolidated Pty Ltd** [2011] VSCA] 91, the VWA sought leave to appeal from the refusal by the trial judge, Saccardo J, to grant the VWA a *Bullock* order as against the respondent, Kagan Bros.

In the primary action, the VWA had succeeded against Kagan Bros, but lost against Playcorp. After a 6 day hearing, Saccardo J held that the relationship between Playcorp and Kagan Bros was such that Kagan Bros had undertaken to manage the site and any occupational safety issues that arose at it, including those that resulted in the worker's injuries.

The Court of Appeal declined to interfere with the costs order.⁷

Before coming to this conclusion, the Court of Appeal said that while it could discern nothing in the assessment called for by s138 that would preclude the making of a *Bullock* order as between 'third party' defendants against whom an apportionment is sought by the VWA, if the circumstances justify it, this was not such a case. The Court said there might be situations where the VWA's claims against third parties are independent or alternatives or has a substantial connection, and where the conduct of a third party has induced the VWA's claim against another. In those circumstances, it was said the VWA ought to be entitled to a *Bullock* or *Sanderson* order.

The Court of Appeal went on to say that the claims against Playcorp and Kagan Bros were interdependent or real alternatives and were thus claims that could have supported a *Bullock* order.

However, it said it was also necessary for the VWA to establish that the conduct of the losing respondent had been such that responsibility for the award costs could be placed at its feet. There was, in the circumstances of this case, no evidence of such conduct by Kagan Bros and even

arrived at an interest component of \$17,603.

7 The Court of Appeal also said it was well established that an appellate court would not interfere with the exercise of a discretion as to costs by the court below unless the affected party can demonstrate strong reasons why the Court should do so.

though in final submissions before the trial judge it sought to attribute some responsibility to Playcorp in order to reduce its own liability, that did not alter the fact that the evidence indicated the VWA had always intended to pursue Playcorp regardless of any conduct by Kagan Bros.

The VWA's appeal was dismissed.

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ATTACHMENT "A"

VWA v Sakata Rice Snacks Australia Pty Ltd

An example of a calculation performed using the formula in s138(3)(b) ACA

To demonstrate the application of the formula in s138(3)(b) ACA, I will use a recent decision of **VWA v Sakata Rice Snacks Australia Pty Ltd (Sakata)**[2012] VCC which was determined by Coish J.

On 13 December 2001, Vesna Roza (**Roza**) was injured when she placed her right arm on part of a conveyor whilst working as a packer at Sakata's premises. Her employer was Skilled Group Limited (**Skilled**), a labour-hire company. As a result of her injury, Roza said she developed complex regional pain syndrome Type 1, formerly known as reflex sympathetic dystrophy, as well as an adverse psychiatric reaction. She had not worked since 18 December 2001.

Roza issued common law proceedings against her employer and Sakata. The VWA issued s138 proceedings against Sakata only, as the employer is never a party to a s138 claim.

Roza's claim was heard by a jury.

General damages were \$200,000 and the jury assessed the worker's pecuniary loss damages in the sum of \$243,000 and held her 25% contributorily negligent. Skilled and Sakata were both held 50% liable.

A substantial amount of evidence was led by the VWA to substantiate a claim by it that the formula should have regard to a significant allowance for gratuitous personal attendant care (**Griffiths v Kerkemeyer**).

In the s138 claim, the VWA submitted that that Factor A was \$1,313,556.75 calculated as follows:

General Damages:	\$200,000.00
Economic Loss:	\$243,000.00
Past Medicals	\$71,000.00
Future Medicals	\$89,000.00
Griffiths v Kerkemeyer (past)	\$234,000.00
Griffiths v Kerkemeyer (future)	\$476,556.75

Judge Coish accepted the VWA's submissions.

Accordingly, **Factor A** was \$1,313,556.75.

He noted that Sakata had paid Vesna \$16,877.40 to settle her common law claim. I note it is not apparent from the judgment why that figure was so low when Sakata was held 50% liable in her claim.

Accordingly, **Factor C** was \$16,877.40.

As Sakata's liability was equal with Skilled and there was a 25% reduction for contributory negligence, Sakata's percentage liability for Factor X purposes was reduced to 37.5%.

Accordingly, **Factor X** was 37.5%.

Using the formula, the assessment is as follows:

$$[\$1,313,556.75 - \$16,877.40] \times 37.5\% = \$486,254.76$$

Accordingly, Sakata's liability to indemnify the VWA was **\$486,254.76** plus interest plus costs.

An unreported ruling on interest establishes that at the date of judgment the VWA had paid \$420,692.04 in compensation. Accordingly, as this was less than the amount of the indemnity assessed by using the formula, Sakata would be obliged to pay immediately to the VWA the sum of \$420,692.04 and indemnify it up to a further \$65,562.72.

The VWA was also entitled to interest on past payments, which was assessed under s60 at \$142,500 to the date of judgment.

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