SUPREME COURT OF QUEENSLAND

CITATION:	*Greenall v Amaca Pty Ltd (No 2)* [2026] QSC 188
PARTIES:	**PHILIP NIGEL GREENALL AS LEGAL PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE WALTER GREENALL** (plaintiff) **v** **AMACA PTY LTD (FORMERLY JAMES HARDIE AND COY PTY LTD)** (defendant)
FILE NO/S:	BS 14063/21
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 August 2026
DELIVERED AT:	Brisbane
HEARING DATE:	11 May 2026. Defendant's further written submissions dated 1 June 2026. Plaintiff's further written submissions dated 15 June 2026. Defendant's reply dated 26 June 2026.
JUDGE:	Smith J
ORDER:	**1. It is ordered the defendant pay the plaintiff's costs of the proceedings on the standard basis except for the costs referred to in paragraph 3.** **2. It is declared the plaintiff is entitled to receive its costs under the *Workers' Compensation and Rehabilitation Regulation 2014* (Qld).** **3. It is ordered the defendant pay the costs of the plaintiff's application for costs with respect to the section 318A *Workers Compensation and Rehabilitation Act 2003* (Qld) issue on the indemnity basis and with respect to the *Workers' Compensation and Rehabilitation Regulation 2025* (Qld) issue on the standard basis.**
CATCHWORDS:	WORKERS' COMPENSATION – ALTERNATIVE RIGHTS AGAINST EMPLOYER AND THIRD PARTIES – Actions for damages against employer – costs – whether the provisions of the *Workers Compensation and Rehabilitation Act 2003* (Qld) (**WCRA**) prevent the court from ordering the

defendant to pay the plaintiff's costs – whether costs should be ordered on the standard basis

STATUTES – ACTS OF PARLIAMENT – CONSTRUCTION – whether the WCRA has removed the rights of a plaintiff to costs where they have a terminal illness and no written final offers have been made – where there was no expressed intention of the legislation to remove the right to costs – where the context and history of the legislation supports the plaintiff's contention that there is a right to costs

STATUTES – ACTS OF PARLIAMENT – CONSTRUCTION – whether the *Workers Compensation and Rehabilitation Regulation 2014* (Qld) or the *Workers Compensation and Rehabilitation Regulation 2025* (Qld) applied to the assessment of the plaintiff's costs – where the 2025 Regulation removed the plaintiff's right to claim counsel's fees – whether the 2025 Regulation acted retrospectively

Acts Interpretation Act 1954 (Qld) s 14, s 14A, s 14B, s 15A, s 20
Civil Proceedings Act 2011 (Qld) s 15
Statutory Instruments Act 1992 (Qld) s 4, s 14, s 32, s 34
Supreme Court Act 1995 (Qld) s 221
Uniform Civil Procedure Rules 1999 (Qld) r 360, r 361, r 362, r 681, r 726, r 731, r 743
Vicious Lawlessness Association Disestablishment Act 2013 (Qld)
WorkCover Queensland Act 1996 (Qld) s 320, s 321, s 324, s 325
WorkCover Queensland Amendment Act 2001 (Qld) s 320, s 321, s 322, s 323, s 324, s 325
Workers' Compensation and Rehabilitation and Other Acts Amendment Act 2005 (Qld) s 36
Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2010 (Qld)
Workers' Compensation and Rehabilitation Act 1981 (WA)
Workers' Compensation and Rehabilitation Act 2003 (Qld) s 4, s 5, s 11, s 39A, s 237, s 238, s 239, s 240, s 275, s 283, s 289, s 292, s 310, s 311, s 312, s 313, s 314, s 316, s 316A, s 318A, s 318B
Workers' Compensation and Rehabilitation Regulation 2014 (Qld) reg 135, reg 136, reg 137
Workers' Compensation and Rehabilitation Regulation 2025 (Qld) reg 195, reg 196, reg 220, reg 221

Explanatory Notes to *WorkCover Queensland Amendment Bill 2001* (Qld)
Explanatory Notes to *Workers Compensation and Rehabilitation Bill 2003* (Qld)

Explanatory Notes to *Workers' Compensation and Rehabilitation and Other Acts Amendment Bill 2005* (Qld)
Explanatory Notes to *Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2010* (Qld)
Explanatory Notes to *Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2013* (Qld)
Explanatory Notes to *Workers' Compensation and Rehabilitation Regulation 2025* (Qld)

ADCO Constructions Pty Ltd v Goudappel [2014] HCA 18; (2014) 254 CLR 1, applied
Anderson v Pickles Auctions Pty Ltd [2023] QCA 205; (2023) 17 QR 134, applied
Attorney General of New South Wales v World Best Holdings Limited (2005) 63 NSWLR 557, cited
Attorney-General (Qld) v Australian Industrial Relations Commission [2002] HCA 42; (2002) 213 CLR 485, applied
Australand Corporation (Qld) Pty Ltd v Johnson [2007] QCA 302; [2008] 1 Qd R 203, considered
Barminco Investments Pty Ltd v O'Brien [2006] WASCA 88, considered
Bell Lawyers Pty Ltd v Pentelow [2019] HCA 29; (2019) 269 CLR 333, cited
Berowra Holdings Pty Ltd v Gordon [2006] HCA 32; (2006) 225 CLR 364, cited
Black v Warwick Shire Council (No 2) [2009] QSC 140, cited
Bilson v Vatsonic Communications Pty Ltd (No 2) [2024] QCA 220, applied
Bird v The Commonwealth [1988] HCA 23; (1988) 165 CLR 1, cited
Burns v Minister for Health [2012] WASCA 267; (2012) 45 WAR 276, cited
Calvert v Mayne Nickless Ltd (No 2) [2005] QCA 303; [2006] 1 Qd R 141, considered
Chang v Laidley Shire Council [2007] HCA 37; (2007) 234 CLR 1, applied
Coffey v State of Queensland [2010] QCA 291, cited
Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation [1981] HCA 26; (1981) 147 CLR 297, applied
Daly v Thiering and Others [2013] HCA 45; (2013) 249 CLR 381, distinguished
Digby v Compass Institute Inc (No 2) [2015] QSC 361, distinguished
Dossett v TKJ Nominees Pty Ltd [2003] HCA 69; (2003) 218 CLR 1, cited
Fisher v Hebburn Ltd [1960] HCA 80; (1960) 105 CLR 188, applied

Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33; (2003) 214 CLR 269, cited
Greenall v Amaca Pty Ltd [2026] QSC 16, cited
Karanfilov v Inghams Enterprises Pty Ltd [2000] QCA 348; [2001] 2 Qd R 273, applied
Kelly v WorkCover (Qld) [2002] 1 Qd R 496, not followed
Latoudis v Casey [1990] HCA 59; (1990) 170 CLR 534, applied
Maxwell v Murphy [1957] HCA 7; (1957) 96 CLR 261, applied
Millard v RI-CO (2004) Pty Ltd (in Liq) (No 2) [2014] QSC 100, cited
Minogue v Victoria [2018] HCA 27; (2018) 264 CLR 252, cited
Muto v Shepparton City Council [2018] VSCA 73; (2018) 228 LGERA 188, considered
NSW Food Authority v Nutricia Australia Pty Ltd [2008] NSWCA 252; (2008) 72 NSWLR 456, cited
Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72, applied
Pfeiffer v Stevens [2001] HCA 71; (2001) 209 CLR 57, cited
Plaintiff S157/2002 v Commonwealth [2003] HCA 2; (2003) 211 CLR 476, cited
R v A2 [2019] HCA 35; (2019) 269 CLR 507, applied
Sargood Brothers v The Commonwealth [1910] HCA 45; (1910) 11 CLR 258, applied
R v CZN [2021] QSC 182; (2021) 8 QR 370, considered
Reid v Reid (1886) 31 Ch D 402, cited
Rodway v R [1990] HCA 19; (1990) 169 CLR 515, applied
Scott v Commercial Hotel Merbein [1930] VLR 25; (1929) 35 ALR 297, cited
Sheridan v Warrina Community Co-operative Ltd & Anor [2004] QCA 308; [2005] 1 Qd R 187, distinguished
Sykes v Queensland Gas Company & Anor [2009] QCA 163, distinguished
Speziali v Nortask Pty Ltd (No 2) [2023] QSC 204, considered
Sweeney v Fitzhardinge [1906] HCA 73; (1906) 4 CLR 716, cited
Thaina Town (On Goulburn) Pty Ltd v City of Sydney Council [2007] NSWCA 300; (2007) 71 NSWLR 230, considered
Universal Property Group Pty Ltd v Blacktown City Council [2020] NSWCA 106, cited
Wallaby Grip (BAE) Pty Ltd (in Liq) v WorkCover Queensland [2022] QCA 204; (2022) 12 QR 189, cited
WorkCover Queensland v Yang [No 2] [2023] QCA 38, applied
WorkCover Queensland v Wallaby Grip Ltd [2021] QCA 11; (2021) 7 QR 63, considered

COUNSEL:	H Blattman KC and J Hewson for the plaintiff K Holyoak for the defendant
SOLICITORS:	Segelov Taylor Lawyers for the plaintiff BT Lawyers for the defendant

INTRODUCTION

[1] This is the costs decision consequent to the decision given in *Greenall v Amaca Pty Ltd*.[1] After a trial, judgment was given for the plaintiff against the defendant in the sum of $157,598.18 clear of the refund to WorkCover Queensland.

[2] The plaintiff submits that the defendant should be ordered to pay the plaintiff's costs of the proceeding on the standard basis pursuant to s 15 of the *Civil Proceedings Act 2011* (Qld) (**CPA**) and/or r 681(1) of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**).

[3] The defendant on the other hand submits that no order as to costs should be made.

[4] The first issue between the parties relates to the construction of s 318A of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) (**WCRA**).

[5] The defendant submits that the effect of s 318A of the WCRA in this case is that no order can be made for costs except the orders for costs provided for in Division 1, despite the success of the plaintiff.

[6] The plaintiff on the other hand submits that s 311 of the WCRA is not engaged because the plaintiff (as he was entitled to) did not act under s 312 or s 313 of the WCRA. In those circumstances Division 1 is not engaged, and costs should be ordered under the general power contained in s 15 of the CPA or r 681 of the UCPR.

[7] For the reasons which follow, the plaintiff's contentions are accepted as to the first issue.

[8] The second issue is whether counsel's fees may be claimed. For the reasons later given I accept the plaintiff's contentions.

THE FIRST ISSUE – CAN COSTS BE AWARDED?

SUBMISSIONS

Plaintiff's submissions

[9] The plaintiff submits that its interpretation should be preferred. First, it submits that s 318A of the WCRA is not relevant as none of the events in s 312 or s 311 of the WCRA occurred.

[10] Second, it submits it would not be fair and would be contrary to the aim of the legislation to deprive a successful litigant of their costs.

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1 [2026] QSC 16.

[11] Third, it is submitted that the historical context of the legislation demonstrates the Parliament intended that those with more serious injuries receive their costs.

[12] Fourth, it is submitted that case authority supports the plaintiff's interpretation of the WCRA.

[13] Fifth, it is submitted there is a lack of express legislative intent to remove an existing right to costs.

[14] Sixth, it is submitted the defendant has always conducted its case on the basis that costs are payable.

Defendant's submissions

[15] The defendant submits it is common ground that Mr Greenall was a "worker"[2] who had a "terminal condition"[3] within the meaning of those terms in the WCRA.

[16] First, it is submitted that the approach taken in *Sheridan v Warrina Community Co-operative Ltd & Anor*[4] applies by analogy.

[17] Second, it is submitted that s 311 of the WCRA requires the court to apply the principles set out in ss 312 to 314 of the WCRA. It is submitted that this section does not deal with interlocutory costs. In this case there were no written final offers. No other form of order for costs is covered by Division 1.

[18] Third, it is submitted that s 318A of the WCRA is clear in its terms. The section specifically refers to "to which Division 1 applies." This is clear, as is the exception. Also, s 318B of the WCRA supports this contention.

[19] Fourth, as neither s 312 nor s 313 have application, the plaintiff cannot bring himself within the exception to the general prohibition. The plain text is to be given effect.

[20] Fifth, the legislature by enacting s 318A of the WCRA must have intended to remove costs unless there was voluntary compliance under s 283(3) of the WCRA.

[21] Sixth, the cases relied on by the plaintiff did not consider the section.

[22] Seventh, the regulations cannot be used to assist in the interpretation of the Act.

PRINCIPLES OF STATUTORY INTERPRETATION

[23] In *R v A2*,[5] the High Court set out the relevant principles of statutory interpretation as follows:

(a) A literal approach to construction which requires the court to obey the ordinary meaning of words even if the result is improbable is to be avoided.

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2 Section 11 of the WCRA.
3 Section 39A of the WCRA.
4 [2004] QCA 308; [2005] 1 Qd R 187.
5 [2019] HCA 35; (2019) 269 CLR 507 at [32]-[37].

(b) Even words with an apparently clear meaning may be given a different meaning after the process of construction is complete. This is because the context of the provision may point to other factors.

(c) Consideration of the context of the provision is undertaken at the first stage. The provision is to be understood in its widest sense.

(d) It extends to consideration of the mischief the statute intends to remove.

(e) The words of the provision should not be lost sight of. The text of the statute is important.

(f) If the apparent plain words of a provision are read in light of the mischief which the statute is designed to overcome and of the objects of the statute, they may "wear a very different appearance."

(g) When the literal meaning of the statute does not conform to the evident policy or purpose of the provision it is entirely appropriate for the court to depart from the literal meaning.

(h) A construction which promotes the purpose of the statute is to be preferred.

[24] It should be observed that a provision in an Act of parliament is not to be regarded as so uncertain as to have no meaning and a court is bound to find some meaning.[6]

[25] There are also provisions of the *Acts Interpretation Act 1954* (Qld) (**AIA**) of relevance:

(a) Section 14A of the AIA provides that in the interpretation of an Act, the interpretation that will achieve the purpose of the Act is to be preferred to any other interpretation.

(b) Section 14B of the AIA permits the use of extrinsic material in interpretation if a provision is ambiguous or obscure.

(c) Section 20(2)(c) of the AIA provides that the repeal or amendment of an Act does not affect a right or privilege acquired or accrued under the Act.

THE STATUTE

[26] It is first necessary to analyse the context of the provisions of the WCRA.

[27] The WCRA is an Act to establish a workers' compensation scheme for the State of Queensland. Section 4 of the WCRA refers to the objects of the Act. Section 5 of the WCRA notes that the Act establishes a workers' compensation scheme for Queensland and that the scheme provides as to compensation and regulation of access to damages.

[28] Section 5(4) of the WCRA provides:

"**5 Workers' compensation scheme**

(4) It is intended that the scheme should—

(a) maintain a balance between—

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6 *Karanfilov v Inghams Enterprises Pty Ltd* [2000] QCA 348; [2001] 2 Qd R 273 at p 281.

(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) ensure that injured workers or dependants are treated fairly by insurers; and

(c) provide for the protection of employers' interests in relation to claims for damages for workers' injuries; and

(d) provide for employers and injured workers to participate in effective return to work programs; and

(da) provide for workers or prospective workers not to be prejudiced in employment because they have sustained injury to which this Act or a former Act applies; and

(e) provide for flexible insurance arrangements suited to the particular needs of industry."

[29] It is also intended that compulsory insurance should not impose too heavy a burden on the community (see s 5(6) of the WCRA).

[30] Section 237 of the WCRA provides as to those persons who are entitled to seek damages for an injury sustained by a worker. This includes a worker who has a terminal condition.

[31] Section 238 of the WCRA provides:

"238 Worker with terminal condition

(1) This section applies to a worker who has a terminal condition and wishes to seek damages.

(2) The following provisions of this chapter do not apply to the worker—

(a) section 239;

(b) part 2, division 4;

(c) section 267(2) or (3);

(d) part 6, other than section 293;

(e) part 7, other than sections 300 to 302.

(3) However, this section does not stop the worker from voluntarily complying with the provisions mentioned in subsection (2)."

[32] Relevantly it may be seen that a worker with a terminal condition:

(a) Does not have to make an election to seek damages under s 239.

(b) Does not have to have a compulsory conference under s 289 of the WCRA and does not have to make a written final offer (**WFO**) under s 292 of the WCRA.

(c) Does not have to comply with pre-court procedures under Part 7 of Chapter 5.

[33] Section 240 of the WCRA provides:

> “**240 Consequences, to costs, of seeking damages**
>
> (1) If the claimant is a worker who does not have a terminal condition and the claimant’s notice of assessment states that the claimant’s DPI is 20% or more, part 12, division 1 applies in relation to costs in the claimant’s proceeding for damages.
>
> (2) If the claimant is a worker who does not have a terminal condition and the claimant’s notice of assessment states that the claimant’s DPI is less than 20%, part 12, division 2 applies in relation to costs in the claimant’s proceeding for damages.
>
> (3) If the claimant is a worker who has a terminal condition, part 12, division 1 applies in relation to costs in the claimant’s proceeding for damages.
>
> (4) If the claimant is a dependant, part 12, division 1 applies in relation to costs in the claimant’s proceeding for damages.”

[34] As can be seen with respect to a person in the position of Mr Greenall, Chapter 5 Part 12 Division 1 of the WCRA applies in relation to costs.

[35] Section 318A of the WCRA provides:

> “**318A General application of costs provisions in part**
>
> (1) A court may make no order about costs to which division 1, 2 or 2A applies except the orders for costs provided for in the division.
>
> (2) Subsection (1) applies subject to this division.”

[36] Turning to Division 1, the heading makes it clear that it applies to a worker with a terminal condition. This is also clear from s 310(b). Sections 311, 312, 313 and 314 provide as follows:

> “**311 Principles about orders as to costs**
>
> If a court dismisses the claim, makes no award of damages or makes an award of damages in the claimant’s proceeding for damages, it must apply the principles set out in sections 312 to 314.
>
> **312 Costs if written final offer by claimant**
>
> (1) This section applies if—

(a) the claimant makes a written final offer that is not accepted by the insurer; and

(b) the court later awards an amount of damages to the claimant that is equal to or more than the written final offer; and

(c) the court is satisfied that the claimant was at all material times willing and able to carry out what was proposed in the written final offer.

(2) The court must order the insurer to pay the claimant's costs, calculated on the indemnity basis.

313 Costs if written final offer by insurer

(1) This section applies if—

(a) the insurer makes a written final offer that is not accepted by the claimant; and

(b) the claim is dismissed, the court makes no award of damages or makes an award of damages that is equal to or less than the insurer's written final offer; and

(c) the court is satisfied that the insurer was at all material times willing and able to carry out what was proposed in the written final offer.

(2) The court must—

(a) order the insurer to pay the claimant's costs, calculated on the standard basis, up to and including the day of service of the written final offer; and

(b) order the claimant to pay the insurer's costs, calculated on the standard basis, after the day of service of the written final offer.

314 Interest after service of written final offer

(1) This section applies if the court gives judgment for the claimant for the recovery of a debt or damages and—

(a) the judgment includes interest or damages in the nature of interest; or

(b) under an Act, the court awards the claimant interest or damages in the nature of interest.

(2) For giving judgment for costs under section 312 or 313, the court must disregard the interest or damages in the nature of interest relating to the period after the day the written final offer is given."

[37] Section 318B of the WCRA provides:

> **"318B Court may make an alternative order in particular circumstances**
>
> (1) Subsection (2) applies to an order for costs a court is required to make under the following sections (a ***prescribed order***)—
>
> (a) section 312(2);
>
> (b) section 313(2);
>
> (c) section 316A(3) or (4).
>
> (2) The court may make an order for costs other than the prescribed order if the party ordered to pay costs shows the other order is appropriate in the circumstances.
>
> (3) Subsection (4) applies if an award of damages is affected by factors that were not reasonably foreseeable by a party at the time of making or failing to accept a written final offer.
>
> (4) The court may, if satisfied that it is just to do so, make an order for costs under divisions 1, 2 or 2A as if the reference to a written final offer or a failure to accept a written final offer were a reference to a later offer made, or a failure to accept a later offer made, in the light of the factors that became apparent after the parties completed the exchange of written final offers.
>
> *Example—*
>
> A claimant's medical condition suddenly and unexpectedly deteriorates after the date of the written final offers and the court makes a much higher award of damages than would have been reasonably expected at that time. In that case, the court may ignore the written final offers and award costs on the basis of later offers of settlement."

[38] It may be seen that there is no express provision which governs either of the following situations:

(a) If the award by a court falls between the two offers.

(b) If a person with a terminal condition or the insurer makes no WFOs.

DISCUSSION

[39] I accept the plaintiff submissions here for the following reasons:

(a) Section 318A of the WCRA is not engaged in this case.

(b) Court of Appeal authority is contrary to the defendant's submissions.

(c) The defendant's construction of the provision does not achieve the Act's purposes.

(d) The historical context supports the plaintiff's contentions.

(e) There is a lack of legislative intent to remove the right to costs.

[40] I turn to each of these matters.

Section 318A of the WCRA is not engaged in this case

[41] First, I consider on the facts of this case s 318A was not engaged. Section 318A of the WCRA is engaged if Division 1 applies. In this case it may be accepted that Division 1 applied to Mr Greenall by reason of s 310 of the WCRA. However, the operative part of the Division did not. As no WFOs were made under ss 312 and 313, they are inapplicable. Therefore, the principles in the Division could not in fact be applied as required by s 311 of the WCRA. The plain meaning of the word "apply" is "make use of as relevant or suitable; employ [apply the rules]."[7]

[42] I therefore consider that the operative part of Division 1 did not apply and s 318A of the WCRA is not applicable.

[43] In that circumstance s 15 of the CPA and r 681 of the UCPR applied and costs can be awarded. This is because there is no express provision prohibiting the award of costs in a matter such as this.

Court of Appeal authority is contrary to the defendant's submissions

[44] Second, the above interpretation is supported by Court of Appeal authority.

[45] In *Anderson v Pickles Auctions Pty Ltd*,[8] the Court of Appeal was concerned with a situation where the appellant worker had filed a claim and statement of claim in the Supreme Court. The litigation (as here) was governed by the UCPR. The action was compromised, and it was agreed that WorkCover would pay the plaintiff's costs calculated in accordance with Part 8, Division 2 of the *Workers' Compensation and Rehabilitation Regulation 2014* (Qld) (**2014 Regulations**).

[46] Regulations 135 to 137 of the 2014 Regulations provided as to the quantum. Counsel's fees were not specified. The costs assessor accepted the objection to payment of counsel's fees. The primary judge accepted this argument. However, the primary decision was set aside in the Court of Appeal.

[47] The Court of Appeal held:

(a) Counsel's fees are ordinarily recoverable under the UCPR [29].

(b) It did not matter that counsel's fees were not provided for in the 2014 regulations because they were provided for in the UCPR [30].

(c) Regulation 137 of the WCRA should not be considered to contain an exhaustive list of the outlays recoverable [34].

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7 The Australian Concise Oxford Dictionary 2nd ed.

8 [2023] QCA 205; (2023) 17 QR 134.

(d) The WCRA made no provision for the circumstance in which an award of damages is made for an amount less than the claim, its final written offer, but more than the insurer's final written offer. "In such circumstances, the UCPR would operate so that costs would be assessed on the standard basis" [33].

(e) The operation of the UCPR has not been displaced expressly or by necessary implication by the operation of Chapter 5 Part 12 Division 1 of the Act [33].

(f) This is to be contrasted with s 316(3) of the WCRA [33].

[48] I consider that *Anderson* is materially indistinguishable from the present case. The present case is also a matter where neither s 312 nor s 313 of the WCRA applies. There is no express provision excluding costs (or by necessary implication) in such a situation.

[49] It was argued by the defendant that the court did not consider s 318A of the WCRA.[9] It is unlikely the Court of Appeal did not consider all of the cost provisions of the WCRA and Regulations. I consider *Anderson* binds this court.[10]

[50] The second decision to be considered is *Bilson v Vatsonic Communications Pty Ltd (No 2).*[11] In *Bilson*, the plaintiff had a Degree of Permanent Impairment (DPI) of more than 20 per cent. As a result of s 311 of the WCRA, the court had to apply the principles in ss 312 to 314 of the WCRA. The plaintiff argued that he should receive indemnity costs under the UCPR because the outcome was better than the UCPR offer but not the WCRA offer. The court at [20] did not accept the WCRA displaced the provisions of the UCPR expressly and clear words were not used.

[51] Again, this case supports the contention that s 318A of the WCRA does not exclude the UCPR or s 15 of the CPA in the present situation.

[52] There is also the single judge decision of *Speziali v Nortask Pty Ltd (No 2).*[12] In *Speziali*, an offer of $455,177.31 (inclusive of the refund) was made by the first defendant pursuant to the WCRA. It was submitted that this offer was "beaten."

[53] A second offer was made by the first defendant to the second defendant to each pay 50 per cent of the damages.

[54] A third offer was made jointly by the plaintiff and the first defendant. The terms of this offer were that the first defendant would pay the plaintiff $600,000 and the second defendant would pay $1,000,000 plus costs.

[55] Hindman J was not satisfied the first offer was pursuant to s 313 of the WCRA as the plaintiff received an award against the first defendant of $899,254. Accordingly, her Honour ordered the first defendant pay the plaintiff's costs on the standard basis. This is an example of a costs order made when s 313 of the WCRA was not engaged.

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9 Defendant's submissions [57], [61].

10 The defendant conceded that if the court followed *Anderson* it should lose its argument.

11 [2024] QCA 220.

12 [2023] QSC 204.

[56] The final decision is the single judge decision of *Black v Warwick Shire Council (No 2)*.[13] In this case, the plaintiff's claim was dismissed. At a compulsory conference, the plaintiff made a WFO of $150,000 clear of the refund and the defendant offered nil dollars exclusive of the refund. The plaintiff's work-related impairment exceeded 20 per cent and therefore Chapter 5 Part 12 Division 1 of the WCRA applied. It was held by White J that:

(a) Section 313(1)(b) did not apply as the plaintiff did not obtain a judgment more favourable than the offer.

(b) Unlike Division 2 there was no prohibition on making a costs order "in circumstances not covered by ss 312 to 314."

(c) Accordingly, s 221 of the *Supreme Court Act 1995* (Qld), the general power of the Supreme Court to award costs and r 681 of the UCPR applied i.e. costs should follow the event.

[57] Whilst it is true this case was decided before the insertion of s 318A of the WCRA, the effect of the decision is that once ss 312 to 314 of the WCRA do not apply, the general power to order costs is engaged.

The defendant's construction of the provision does not achieve the Act's purposes

[58] Third, I consider the result contended for by the defendant does not achieve the Act's purposes. Section 14A of the AIA provides that an interpretation of a provision of an Act is one which will best achieve the purpose of the Act.

[59] In this regard, it must be remembered that one of the objects of the WCRA is to ensure fairness to both injured workers and employers (s 5(4)(a)(i)(b)). Under s 4(2) of the WCRA, the objects are an aid to the interpretation of the Act.

[60] In *Oshlack v Richmond River Council*,[14] it was noted that prima facie a successful party is entitled to his or her costs. This principle is grounded in reasons of fairness and policy. Fairness dictates that the unsuccessful party typically bears the costs of the litigation. The order is not made as punishment but to indemnify the successful party.

[61] To insist that a worker who is terminally ill must follow the pre-trial processes before he or she is entitled to any costs would be unfair and in my view contrary to the scheme of the WCRA.

[62] Usually, injured workers must comply with the pre-trial procedures in Chapter 5 Part 5 of the WCRA, including taking part in a compulsory conference under s 289 of the WCRA. Section 292 of the WCRA requires the exchange of WFOs if the matter does not settle at the conference.

[63] Terminally ill workers are in a different position. Section 238 of the WCRA relieves them from the obligation from having to undergo a compulsory conference or from making WFOs. It is true they can voluntarily do this, but they do not have to.

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13 [2009] QSC 140 at [8]. Applied in *Millard v RI-CO (2004) Pty Ltd (in Liq) (No 2)* [2014] QSC 100 at [4], [9].

14 [1998] HCA 11; (1998) 193 CLR 72 at [67].

[64] The statutory intent of s 238 of the WCRA was made clear by the Explanatory Note to the *Workers Compensation and Rehabilitation Bill 2003* (Qld) which stated:[15]

> "Clause 238 identifies those provisions of Chapter 5 (Access to damages) that do not apply to a worker with a terminal condition and allows a worker who has a terminal condition to bypass some of the pre-proceedings requirements of Chapter 5, if they choose, to achieve more speedy resolution of the damages claim due to the extenuating circumstances of their condition."

[65] There is no doubt that this was because terminally ill workers, like Mr Greenall, often have serious life-threatening symptoms which make it difficult to attend a compulsory conference. They may be too sick to do so and there is a real risk they may die before the proceedings are issued.

[66] In my opinion, it would be contrary to fairness and the general legislative intent of the WCRA to deprive a successful plaintiff in Mr Greenall's position of costs because they avail themselves of legislative provisions permitting them to bypass pre-trial procedures. Such an interpretation would not achieve the provision's best purpose.

The historical context of the provisions supports the plaintiff's contentions

[67] Fourth, I consider the historical context of the Act supports the plaintiff's contention.

[68] The legislature has always delineated a difference as to the entitlement to costs as between more serious injuries (greater than 20 per cent DPI and terminal conditions) on the one hand and lesser injuries (less than 20 per cent DPI) on the other.

[69] The legislation in its original form provided that a successful plaintiff with a serious or terminal injury would have their costs, even in the absence of an offer, and sought to limit costs and costs recovery only for less serious claims. There was no intention by the Parliament by any amendment or accompanying Explanatory Note of an intention to abrogate the right to costs in the context of serious and terminal injuries.

WorkCover Queensland Act 1996

[70] Section 320 of the *WorkCover Queensland Act 1996*[16] provided that Part 11 Division 1 only applied if a worker had a work-related impairment of 20 per cent or more, resulting in a certificate injury or if the worker was deceased and a dependant was seeking damages.

[71] Section 321 of the 1996 Act provided:

> **"321 Principles about orders as to costs**
>
> (1) If a court has assessed damages in the claimant's proceeding for damages, it must apply the principles set out in this section when making an order about the costs in the proceeding.

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15 Explanatory Note to the *Workers Compensation and Rehabilitation Bill* 2003 (Qld) at p 68.

16 In force from 1 July 1997.

(2) If the amount of damages is equal to or more than the claimant's written final offer, the court must, unless WorkCover shows that another order for costs is proper in the circumstances, order WorkCover to pay the claimant's costs—

(a) on a party and party basis up to and including the day of final offer; and

(b) on a solicitor-client basis after the day of final offer.

(3) If the amount of damages is not more than WorkCover's written final offer, the court must order—

(a) WorkCover to pay the claimant's costs on a party and party basis up to and including the day of final offer; and

(b) the claimant to pay WorkCover's costs on a solicitor-client basis after the day of final offer.

(4) In any other case, the court may make an order about costs as it considers appropriate." (emphasis added)

[72] By contrast s 324 of the 1996 Act provided that Division 2 applied if a worker had a "non-certificate injury" i.e. a less serious injury. Section 325 provided:

"**325 Principles about orders as to costs**

(1) No order about costs, other than an order allowed under this section, is to be made by the court in the claimant's proceeding. (emphasis added).

(2) If a party to the proceeding makes a written final offer of settlement that is refused and the court later awards damages to the worker, the court must, in the following circumstances, make the order about costs provide for—

(a) if the amount of damages awarded is equal to or more than the worker's final offer—an order that WorkCover pay the worker's party and party costs from the day of the final offer;

(b) if the amount of damages awarded is equal to or less than the WorkCover's final offer—an order that the worker pay WorkCover's party and party costs from the day of the final offer.

(3) If the award of damages is less than the claimant's written final offer but more than WorkCover's final offer, each party bears the party's own costs.

(4) An order about costs for an interlocutory application may be made only if the court is satisfied that the application has been brought because of unreasonable delay by 1 of the parties.

(5) If an entity other than the worker's employer or WorkCover is joined as a defendant in the proceeding, the court may make an order about costs in favour of, or against, the entity according to the proportion of liability of the defendants and the justice of the case.

(6) The court may make an order for costs against the worker's employer or WorkCover under subsection (5) only if—

(a) the order is in favour of the entity; and

(b) the worker's employer or WorkCover joined the entity as a defendant."

[73] It may immediately be seen that there were different cost regimes for serious injuries as compared to less serious injuries.

***WorkCover Qld Amendment Act 2001* (Qld)**

[74] Part 11 Divisions 1 and 2 of the 1996 Act was substituted by the *WorkCover Queensland Amendment Act 2001* (Qld). Sections 320, 321, 322 and 323 of the Act provided as follows:

"**320 Application of div 1**

This division applies only if the claimant is—

(a) a worker, if the worker's WRI is 20% or more; or

(b) a dependant.

321 Principles about orders as to costs

If a court has assessed damages in the claimant's proceeding for damages, it must apply the principles set out in sections 322 to 323A.

322 Costs if written final offer by claimant

(1) This section applies if—

(a) the claimant makes a written final offer that is not accepted by WorkCover; and

(b) the claimant obtains a judgment no less favourable to the claimant than the written final offer; and

(c) the court is satisfied that the claimant was at all material times willing and able to carry out what was proposed in the written final offer.

(2) The court must order WorkCover to pay the claimant's costs, calculated on the indemnity basis, unless WorkCover shows another order for costs is appropriate in the circumstances. (emphasis added)

323 Costs if written final offer by WorkCover

(1) This section applies if—

(a) WorkCover makes a written final offer that is not accepted by the claimant; and

(b) the claimant obtains a judgment that is not more favourable to the claimant than the written final offer; and

(c) the court is satisfied that WorkCover was at all material times willing and able to carry out what was proposed in the written final offer.

(2) Unless a party shows another order for costs is appropriate in the circumstances, the court must—

(a) order WorkCover to pay the claimant's costs, calculated on the standard basis, up to and including the day of service of the written final offer; and

(b) order the claimant to pay WorkCover's costs, calculated on the standard basis, after the day of service of the written final offer."

[75] By way of contrast with respect to less serious injuries, s 324 and s 325 provided as follows:

"**324 Application of div 2**

This division applied if the claimant is a worker who has a WRI of less than 20 % or no WRI.

325 Principles about orders as to costs

(1) No order about costs, other than an order allowed under this section, is to be made by the court in the claimant's proceeding.

(2) If a party to the proceeding makes a written final offer of settlement that is refused and the court later awards damages to the worker, the court must, in the following circumstances, make the order about costs provided for—

(a) if the amount of damages awarded is equal to or more than the worker's written final offer—an order that WorkCover pay the worker's costs on the standard basis from the day of the written final offer;

> (b) if the amount of damages awarded is equal to or less than the WorkCover's written final offer—an order that the worker pay WorkCover's costs on the standard basis from the day of the final offer.
>
> (3) If the award of damages is less than the claimant's written final offer but more than WorkCover's written final offer, each party bears the party's own costs.
>
> (4) An order about costs for an interlocutory application may be made only if the court is satisfied that the application has been brought because of unreasonable delay by 1 of the parties.
>
> (5) If an entity other than the worker's employer or WorkCover is joined as a defendant in the proceeding, the court may make an order about costs in favour of, or against, the entity according to the proportion of liability of the defendants and the justice of the case.
>
> (6) The court may make an order for costs against the worker's employer or WorkCover under subsection (5) only if—
>
> (a) the order is in favour of the entity; and
>
> (b) the worker's employer or WorkCover joined the entity as a defendant."

[76] The Explanatory Notes to the *WorkCover Queensland Amendment Bill 2001* (Qld) stated that the amendment to the Act was required to meet the Government's commitment to the WorkCover Queensland – Leading Australia Policy 2001, including to "maintain full common law access including the 20 per cent threshold test, while reducing legal costs for those less seriously injured"[17] and to "allow the court to have a discretion to make awards for costs, interests on damages and loss of consortium."[18]

[77] The Explanatory Notes also stated:

(a) Section 321 was amended by adopting UCPR rr 360 to 362 to encourage the early settlement of claims.[19]

(b) The language used for costs in s 321 was updated to reflect UCPR r 743.[20]

(c) For s 325 (less serious injuries) where the judgment falls between the parties' WFOs, both parties bear their own costs. This would provide an incentive to reach agreement in the mid-ground rather than proceeding to trial with no certainty of being successful in an application for costs.[21]

WCRA 2003

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17 Explanatory Notes to the *Workers Compensation and Rehabilitation Bill 2003* (Qld) at p 1.
18 Explanatory Notes to the *Workers Compensation and Rehabilitation Bill 2003* (Qld) at p 2.
19 Explanatory Notes to the *Workers Compensation and Rehabilitation Bill 2003* (Qld) at p 40.
20 Explanatory Notes to the *Workers Compensation and Rehabilitation Bill 2003* (Qld) at p 40.
21 Explanatory Notes to the *Workers Compensation and Rehabilitation Bill 2003* (Qld) at p 41.

[78] The Explanatory Notes to the *Workers Compensation and Rehabilitation Bill 2003* (Qld) noted that the purpose of the Bill was to give effect to the model approved by the Government for the separation of WorkCover's insurance and regulatory functions.

[79] It is important to note that the Bill, which became the WCRA, intended to preserve Chapter 5 of the 1996 Act (as amended).[22] By implication this was to preserve the purpose of s 321 of the *WorkCover Queensland Act 1996* (Qld) as substituted, namely the adoption of the rules regulating formal offers under the UCPR set against the other cost provisions contained in the UCPR at that time relating to the usual rule as to standard costs.[23]

[80] As originally enacted,[24] ss 310 to 312 of the WCRA provided as follows:

> "**310 Application of div 1**
>
> This division applies only if the claimant is—
>
> (a) a worker, if the worker's WRI is 20% or more; or
>
> (b) a dependant.
>
> **311 Principles about orders as to costs**
>
> If a court has assessed damages in the claimant's proceeding for damages, it must apply the principles set out in sections 312 to 314.
>
> **312 Costs if written final offer by claimant**
>
> (1) This section applies if—
>
> (a) the claimant makes a written final offer that is not accepted by the insurer; and
>
> (b) the claimant obtains a judgment no less favourable to the claimant than the written final offer; and
>
> (c) the court is satisfied that the claimant was at all material times willing and able to carry out what was proposed in the written final offer.
>
> (2) <u>The court must order the insurer to pay the claimant's costs, calculated on the indemnity basis, unless the insurer shows another order for costs is appropriate in the circumstances</u>." (emphasis added)

[81] Section 316(1) of the WCRA preserved the position as to no order as to costs for less serious injuries.

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22 Explanatory Notes to the *Workers Compensation and Rehabilitation Bill 2003* (Qld) at p 65.

23 That s 312 of the WCRA mirrored r 360 of the UCPR is acknowledged in *Anderson v Pickles Auctions Pty Ltd* [2023] QCA 205; (2023) 17 QR 134 at [33].

24 Effective 1 July 2003.

***Workers Compensation and Rehabilitation and Other Acts Amendment Act 2005* (Qld)**

[82] When originally enacted, s 310 did not refer to or apply Division 1 to terminal conditions.

[83] Section 310 was substituted by s 36 of the *Workers Compensation and Rehabilitation and Other Acts Amendment Act 2005* (Qld). As amended, s 310 provided:

> "**310 Application of div 1**
>
> This division applies only if the claimant is—
>
> (a) a worker, if the worker's WRI is 20% or more; or
>
> (b) a worker, if a latent onset injury sustained by the worker is a terminal condition; or
>
> (c) a dependant." (emphasis added)

[84] It is evident from its terms and the Explanatory Notes that the amendment provided that Division 1 of Part 12 also applied to a worker with a terminal "latent onset injury."[25] This coincided with the insertion of Chapter 3 Part 3 Division 5 which provided for compensation payable to workers with terminal conditions that are latent onset injuries.

***Workers Compensation and Rehabilitation and Other Legislation Amendment Act 2010* (Qld)**

[85] The WCRA was further amended by the *Workers Compensation and Rehabilitation and Other Legislation Amendment Act 2010* (Qld) which amended ss 311 to 313 and s 316 to their current form and inserted ss 318A to 318E. There is no support from the Explanatory Notes[26] that the amendments including the insertion of s 318A were intended to cut down the court's power to award standard costs in any circumstances not prescribed by the provisions of Division 1 of Part 12 of Chapter 5.

[86] According to the Explanatory Notes,[27] s 311 of the WCRA was amended to expand the range of instances under which a court must make orders as to costs to overturn the decision in *Sheridan v Warrina Community Co-operative Ltd & Anor.*[28] As to the new s 318A, all the Explanatory Notes stated was:[29]

> "*Clause 32* inserts new sections 318A to 318E regarding the awarding of costs in particular circumstances. A court may make an order for costs other than the prescribed order if the party ordered to pay costs shows the other order is appropriate in the circumstances, or if an award of damages is affected by factors that were not reasonably

[25] Explanatory Notes to the *Workers' Compensation and Rehabilitation and Other Acts Amendment Bill 2005* (Qld) at pp 15, 16.

[26] Explanatory Notes to the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2010* (Qld).

[27] Explanatory Notes to the W*orkers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2010* (Qld) at pp 2, 15.

[28] [2004] QCA 308; [2005] 1 Qd R 187.

[29] Explanatory Notes to the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2010* (Qld) at pp 15-16.

> foreseeable by a party at the time of making or failing to accept a written final offer. A failure to accept a written final offer or later offer includes a refusal to accept the offer. The clause also prescribes conditions for cost orders for interlocutory applications and orders where an entity was not a party at a compulsory conference. These provisions were previously located in section 316."

[87] In my view there is no suggestion in the Explanatory Notes to extinguish an entitlement to standard costs to workers with a serious injury (more than 20 per cent DPI) or terminal conditions. In my view whilst the amendments expanded the circumstances in which a court must make orders as to costs, that is circumstances where a costs order was prescribed, those prescribed circumstances did not cover the field.

***Workers Compensation and Rehabilitation and Other Legislation Amendment Act 2013* (Qld)**

[88] Section 310 of the WCRA was further amended by the *Workers Compensation and Rehabilitation and Other Legislation Amendment Act 2013* (Qld). Section 310 provided:

> "**310 Application of div 1**
>
> This division applies only if the claimant is—
>
> (a) a worker who does not have a terminal condition, if the worker's DPI is 20% or more; or
>
> (b) a worker who has a terminal condition; or
>
> (c) a dependant."

[89] The Explanatory Notes to the *Workers' Compensation and Other Legislation Amendment Bill 2013* (Qld) relevantly stated:[30]

> "*Clause 30* amends section 310 to remove references to work related impairment and latent onset injury. This extends special costs provisions to all damages claims involving a terminal condition, whereby an insurer must pay a claimant's costs, calculated on the standard basis, in certain circumstances."

[90] The Explanatory Notes also provided:[31]

> "*Clause 18* amends section 238 to provide that certain claims procedures do not apply to workers with terminal conditions."

[91] It may be thought the Explanatory Notes to the 2013 amendments expressly acknowledge and comprehend a basic entitlement to standard costs where a worker suffers a terminal condition.

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[30] Explanatory Notes to the *Workers' Compensation and Other Legislation Amendment Bill 2013* (Qld) at p 6.

[31] Explanatory Notes to the *Workers' Compensation and Other Legislation Amendment Bill 2013* (Qld) at p 5.

[92] In my opinion the historical analysis supports the plaintiff's contention here. If the legislature had intended to fundamentally alter the entitlement to costs of a worker with a serious injury or terminal condition, it would have expressly done so and it has not.

[93] The legislative intention to limit costs where there are less serious injuries has continued to the present Act.

[94] Further, s 316 of the WCRA mandates that a plaintiff with a less serious injury (less than 20 per cent DPI) is entitled to an order for standard costs in circumstances where the court later awards an amount equal to or greater than their final written offer (s 316 (2)(a)) of the WCRA). Section 316(3) of the WCRA expressly provides as to when the parties are to bear their own costs.

[95] Textually s 318A of the WCRA is quite different to s 316(1). It would have been simple for the legislature to enact a provision in the same terms as that contained within Division 2 if it had so intended. The employment of different language in s 318A and s 316(1) of the WCRA show that the legislature had in view quite different objects.[32]

[96] Also, as noted above, the 2010 amendments (including the insertion of s 318A) were directed at expanding the range of cases in which a court could make costs orders including by overturning the result in *Sheridan v Warrina Community Co-operative Ltd & Anor.*[33] The notes to the 2013 amendments concerning s 310 of the WCRA tend to indicate there was a requirement on an insurer to pay costs on a standard basis.

[97] In my opinion the defendant's construction of s 318A of the WCRA produces untenable results. It contends that neither s 312 nor s 313 which relate to more serious injuries and terminal conditions provide for an order for costs on the standard basis at all. All that a plaintiff could be awarded are indemnity costs if the plaintiff beats his or her own offer under s 312. The only alternative is an adverse costs order under s 313 where the plaintiff is entitled to standard costs to the date of his or her final offer but must be ordered to pay the defendant's costs thereafter.

[98] The defendant's construction would also have the effect of enabling costs to be awarded in interlocutory applications in relation to serious injuries and terminal conditions but limiting the types of orders that can be made. For example, the court could not order costs in the cause or costs reserved. Limiting the power of the court to make an order as to costs only to interlocutory matters is unworkable given the modern principles of case management.

[99] Ultimately, I conclude the statutory context is consistent with the construction for which the plaintiff contends.

There is a lack of legislative intent to remove the right to costs

[100] I also consider that there is a lack of express legislative intent to remove the existing right to costs.

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32 *Scott v Commercial Hotel Merbein* [1930] VLR 25 at p 30.

33 [2004] QCA 308; [2005] 1 Qd R 187.

[101] Section 15 of the CPA provides that a court may award costs in all proceedings unless otherwise provided. UCPR r 681 provides that:

> "**681 General rule about costs**
>
> (1) Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise.
>
> (2) Subrule (1) applies unless these rules provide otherwise."

[102] These sections clearly provided a right to costs prior to the insertion of s 318A of the WCRA. In this matter the negligence which caused the plaintiff's condition occurred in the 1970s. The plaintiff had a right to costs, if successful, certainly under the *Workcover Queensland Act 1996* (Qld) and under the WCRA until 2010.

[103] In *Sargood Brothers v The Commonwealth,*[34] it was said that "it is a well-recognised rule in the interpretation of Statutes that an Act will never be construed as taking away an existing right unless its language is reasonably capable of no other construction."

[104] Even though in 2003 McHugh J described this presumption as "weak",[35] in 2006 the plurality in *Berowra Holdings Pty Ltd v Gordon* stated,[36] "The approach of the courts has consistently been to require very clear legislative intent before treating a statutory provision as taking away common law rights of a plaintiff, where there is an alternative construction available."

[105] Thus, general words are normally insufficient to take away such rights. There must be "unmistakable and unambiguous language."[37]

[106] Contrary to the defence submissions, in my opinion the WCRA is remedial legislation and should be beneficially construed.[38] In this regard I prefer the reasoning of the High Court in *Bird v The Commonwealth*[39] as compared to *Kelly v WorkCover (Qld).*[40] Indeed, I am bound by the High Court decision.

[107] It might be true that the right to costs is not a common law right[41] but the fact is on my analysis there was certainly a right to costs in a terminal illness action prior to the insertion of s 318A of the WCRA.

[108] It is my view that s 318A of the WCRA does not clearly and unmistakably remove a plaintiff's right to costs where ss 312 to 314 of the WCRA do not apply. It does not specify what the situation is where WFOs are not made or where the award falls between the offers. Clear language would be required before s 318A of the WCRA could be construed as removing the court's power to award costs to a worker who

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34 [1910] HCA 45; (1910) 11 CLR 258 at p 279. Also see *Berowra Holdings Pty Ltd v Gordon* [2006] HCA 32; (2006) 225 CLR 364 at [23].

35 *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33; (2003) 214 CLR 269 at [36].

36 [2006] HCA 32; (2006) 225 CLR 364 at [23].

37 *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476 at [30].

38 *WorkCover Queensland v Wallaby Grip Ltd* [2021] QCA 11; (2021) 7 QR 63 at [25]; *Bird v The Commonwealth* [1988] HCA 23; (1988) 165 CLR 1 at p 6.

39 [1988] HCA 23; (1988) 165 CLR 1 at p 6.

40 [2002] 1 Qd R 496.

41 *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29; (2019) 269 CLR 333 at [59]. Hence the defendant's reliance on *Coffey v State of Queensland* [2010] QCA 291 at [13].

suffered a terminal condition. This is not the case here. There is an alternative construction available.

OTHER MATTERS

Sheridan v Warrina Community Co-operative Ltd

[109] The defendant relies on the case of *Sheridan v Warrina Community Co-operative Ltd.*[42] In that case, the plaintiff had issued proceedings in the District Court claiming damages for personal injuries. After a trial, the trial judge found in favour of the defendants and dismissed the action. The trial judge made no order as to costs as to the first defendant. The appellant submitted s 325 of the *WorkCover Queensland Act 1996* (Qld) that the judge should have made an order for costs in favour of the first defendant. The appeal was dismissed.

[110] In my opinion, s 325 of the *WorkCover Queensland Act 1996* (Qld) was unambiguous and clear in its terms.

[111] It provided:

> "(1) No order about costs, other than an order allowed under this section, is to be made by the court in the claimant's proceeding. (emphasis added)
>
> (2) If a party to the proceeding makes a written final offer of settlement that is refused and the court later awards damages to the worker, the court must, in the following circumstances, make the order about costs provided for —
>
> (a) if the amount of damages awarded is equal to or more than the worker's final offer - an order that WorkCover pay the worker's party and party costs from the day of the final offer;
>
> (b) if the amount of damages awarded is equal to or less than the WorkCover's final offer - an order that the worker pay WorkCover's party and party costs from the day of the final offer.
>
> (3) If the award of damages is less than the claimant's written final offer but more than WorkCover's final offer, each party bears the party's own costs.
>
> (4) An order about costs for an interlocutory application may be made only if the court is satisfied that the application has been brought because of unreasonable delay by one of the parties.
>
> (5) If an entity other than the worker's employer or WorkCover is joined as a defendant in the proceeding, the court may make an order about costs in favour of, or against, the entity according to the proportion of liability of the defendants and the justice of the case.

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42 [2004] QCA 308; [2005] 1 Qd R 187. Defendant's submissions [10]-[15].

(6) The court may make an order for costs against the worker's employer or WorkCover under subsection (5) only if —

(a) the order is in favour of the entity; and

(b) the worker's employer or WorkCover joined the entity as a defendant."

[112] Williams JA noted at [6] that s 325 was an all-embracing provision as to costs and much more restrictive than Division 1. There was no room for ambiguity. There was no power to award costs where proceedings were dismissed.

[113] I consider the wording of s 318A of the WCRA is different to s 325. Section 325 made it clear that there was to be "no order about costs other than an order allowed under this section." Section 318A is to be contrasted as it refers back to whether Division 1 applies. Then when one goes to the Division, the principles cannot apply under s 311 as ss 312 to 314 are not engaged. In that way unlike s 325, s 318A is ambiguous and not clear in its terms.

[114] I therefore consider that *Sheridan* may be distinguished and should be confined to the particular provision under consideration in that case.

[115] Insofar as the defendant relies on *Daly v Thiering and Others*[43] I consider that case may be distinguished as the provision under consideration was unmistakable and unambiguous unlike s 318A of the WCRA.

Defendants' submission as to the reduction of the burden on employers and the community

[116] Insofar as the defendant in its submissions relies on the legislative aim to reduce the increasing costs of claims, to protect employers' interests and to ensure that compulsory insurance should not impose too heavy a burden on employers and the community,[44] I consider this submission ignores the fairness objectives and the important legislative context for the more serious injuries to which I have referred earlier.

Defendant's submission as to voluntary compliance with pre-trial procedures

[117] The defendant also submits that the legislature may have intended that a s 310(b) worker who wished to protect their costs, could do so by voluntarily complying with Chapter 5 Part 2 as provided for in s 283(3) of the WCRA. As WorkCover could not protect itself by a WFO, then there would be no order as to costs.[45] I consider this is unlikely. I consider the submission ignores the difference between Chapter 5 Part 12 Division 1 and Division 2.

[118] As previously noted, Division 1 relates to the more serious injuries and Division 2 to the less serious ones. Section 316(3) of the WCRA specifically provides that there is to be no order as to costs where the award is in the gap of offers. It is unlikely to have been the Parliament's intention that a similar situation would occur where there was

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43 [2013] HCA 45; (2013) 249 CLR 381 at [32]-[33].

44 Defendant's submissions at [42], [47] and [51].

45 Defendant's submissions at [45].

a more serious injury – otherwise the Parliament would have said so. Indeed, as noted above, the Explanatory Note to the 2013 amending Act specifically acknowledged a basic entitlement to standard costs where a worker suffers from a terminal condition.

Defendant's submission that section 318B of the WCRA reinforces the inability of the Court to make any other order as to costs

[119] The defendant submits that s 318B of the WCRA reinforces the inability of the court to make any other orders as to costs.[46] I do not agree. The existence of s 318B of the WCRA does not alter the fact that s 318A of the WCRA is a stand-alone clause and for the reasons expressed earlier was not engaged because ss 312 to 314 of the WCRA were not engaged. Second, s 318B of the WCRA provides as to particular circumstances. This is clear from its heading.[47] I do not consider the section provides an exhaustive list of circumstances; only particular ones. Third, s 318B of the WCRA only applies where the court is required to make an order under ss 312, 313 or 316A of the WCRA.[48] It was not required to do so here because ss 312 and 313 of the WCRA were not engaged.

Defendant's submission that section 318A does not apply to the costs of interlocutory applications or costs of an appeal

[120] The defendant has submitted that the section does not apply to the costs of interlocutory applications or the costs of an appeal.[49]

[121] In my view, this submission is contrary to the ultimate contention of the defendant. If the defendant was correct that s 318A was clear in its terms, then no order for costs could be made in interlocutory applications or in appeals. This is because Division 1 applies. But the concession is correct because s 311 is not engaged. Likewise, s 311 is not engaged in this case as there were no WFOs.

[122] Indeed, cases like *Calvert v Mayne Nickless Ltd (No 2)*[50] support this contention. In that case s 325 of the *WorkCover Queensland Act 1996* (Qld) was considered. It was argued by the unsuccessful party that the section prohibited an award of costs in respect of the appeal. The argument was rejected with the court finding that the language in s 325 was inapplicable to appeal proceedings.

Plaintiff's submission that the defendant has approached the issue on the basis that costs were payable

[123] The final point is whether it is relevant that the defendant has until now approached the issue on the basis that costs were payable. The plaintiff had made submissions that it is relevant,[51] the defendant submits to the contrary.

[124] The defendant has objected to various correspondence contained in Ms Segelov's affidavit on this question.

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46 Defendant's submissions at [33]-[34].
47 Section 14(2) of the AIA provides that a heading to a section is part of the Act if inserted after 30 June 1991.
48 Section 318B(1) of the WCRA.
49 Defendant's submissions at [21].
50 [2005] QCA 303; [2006] 1 Qd R 141 at [10].
51 Plaintiff's reply submissions at [58]-[65].

[125] I accept the defendant's submissions on this point and exclude the evidence objected to. I do not think it is relevant as to what the defendant's thoughts were about the provision. Estoppel is not relied on by the plaintiff.

[126] At the end of the day, the meaning of the provision comes down to a matter of interpretation by the court.

THE SECOND ISSUE – WHICH REGULATION IS TO BE APPLIED?

[127] The second issue which is raised between the parties is whether the *Workers' Compensation and Rehabilitation Regulation 2014* (Qld) (**the 2014 Regulation**) or the *Workers' Compensation and Rehabilitation Regulation 2025* (Qld) (**the 2025 Regulation**) applies in this matter.

[128] There is a significant difference between the two, because the latter Regulation which commenced on 1 September 2025 by reg 196(4) removed the right to claim counsel's fees. The explanatory note reveals that this change was made to overturn the decision of *Anderson v Pickles Auctions Pty Ltd*.[52]

Defendant's Submissions

[129] The defendant submits that the 2025 Regulation applies here. It is submitted that the power to award costs is a procedural matter and not a substantive right. Therefore, the changes to the power of a court to award costs operates retrospectively. It is also submitted that there was no legal right to costs in this matter until a costs order was made. This was when the right crystallised. It is submitted that under reg 221(2) of the 2025 Regulation, the new reg 196 applies as no notice of claim was given by the plaintiff under s 275 of the WCRA. It is submitted that reg 220 of the 2025 Regulation is of no assistance. The cases of *Sykes v Queensland Gas Company & Anor*[53] and *Digby v Compass Institute Inc (No 2)*[54] are relied on.

[130] It is further submitted that if a costs order is permitted, and it is found they should be assessed in accordance with the 2025 Regulation, the plaintiff should pay the costs.

[131] It is accepted that, should the plaintiff succeed on both issues the defendant should pay the plaintiff's costs on an indemnity basis regarding the costs issues only and not the action generally.

Plaintiff's submissions

[132] The plaintiff submits that the cost of the proceeding should be assessed in accordance with the UCPR and the 2014 Regulation. It is submitted that before the enactment of the 2025 Regulation the plaintiff had an accrued right to seek costs including counsel's costs; there is a presumption the legislature did not intend to remove the existing right, and the right was a substantive one. It is submitted that at all times the plaintiff had a right to seek counsel's costs under s 15 of the CPA; and rr 681, 726 and 731 of the UCPR.

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52 [2023] QCA 205; (2023) 17 QR 134.
53 [2009] QCA 163.
54 [2015] QSC 361.

[133] It is submitted this right was an accrued right relying in particular on *Barminco Investments Pty Ltd v O'Brien.*[55] It is submitted that by reason of ss 15A and 20 of the AIA and s 14 of the *Statutory Instruments Act 1992* (Qld) (**SIA**) that the 2025 Regulation did not affect the right which accrued under the 2014 Regulation. These sections operate against retrospectivity. The plaintiff relies on *ADCO Constructions Pty Ltd v Goudappel,*[56] *Rodway v R,*[57] *Chang v Laidley Shire Council,*[58] and *Maxwell v Murphy*.[59] It is also submitted that *Thaina Town (On Goulburn) Pty Ltd v City of Sydney Council*[60] supports the plaintiff's position. The plaintiff also submits that the right to seek costs is substantive and not procedural. It is submitted that to insist on retrospectivity for the 2025 Regulation would be unjust. There was a legitimate expectation as to counsel's costs when the proceedings commenced in 2021.

[134] It is relevant that:

(a) On 8 December 2021, an order was made that the costs of an application be costs in the proceedings.

(b) The trial was scheduled to commence on 1 March 2022 but was adjourned because of a flood event.

(c) On 21 June 2022, a further order was made that the plaintiff's costs be costs in the proceeding.

(d) Costs were reserved on 23 February 2023 and 10 May 2023.

[135] The plaintiff also submits that regs 220 and 221 of the 2025 Regulation, evince a clear parliamentary intention to not affect an accrued right to seek costs or of the court's power to make a costs order with respect to existing claims. It is submitted that s 275 of the WCRA provides that a claimant must give a notice of claim before starting a proceeding in court. Section 238(2)(d) of the WCRA exempts a worker with a terminal illness from giving such a notice. It is submitted that reg 220 does not contemplate a situation where court procedures are commenced where no notice of claim has been given. If applied literally this would mean, there would be no right for a terminally ill worker to receive counsel's costs. It is also submitted that a strict application of reg 221 would mean that a terminally ill plaintiff would lose an entitlement to counsel's fees.

[136] It is submitted that the intent of the legislation was not to deprive a worker with a terminal condition the entitlement to seek counsel's fees. The Parliament did not intend that the 2025 Regulation applied to existing claims.

Defendant's reply

[137] By way of reply the defendant submits:

(a) There was no legal right to costs until a costs order is made in that party's favour.

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55 [2006] WASCA 88.
56 [2014] HCA 18; (2014) 254 CLR 1.
57 [1990] HCA 19; (1990) 169 CLR 515.
58 [2007] HCA 37; (2007) 234 CLR 1.
59 [1957] HCA 7; (1957) 96 CLR 261.
60 [2007] NSWCA 300; (2007) 71 NSWLR 230.

(b) There is no accrued right to an award for costs.

(c) The 2025 Regulation is clear, and it is not for the court to rewrite legislation.

(d) The right to costs is not substantive.

Discussion

The regulations

[138] The 2025 Regulation contains the following relevant provisions:

> "**195 Costs after proceeding started**
>
> (1) This section prescribes the legal professional costs of a claim incurred after a proceeding in a court is started.
>
> (2) The costs are in accordance with the scale of costs for work done for or in a proceeding in the court.
>
> *Note—*
>
> See the *Uniform Civil Procedure Rules 1999*, chapter 17A.
>
> (3) Despite subsection (2), the costs do not include counsel's fees.
>
> (4) Also, the costs do not include—
>
> (a) the cost of work performed before the proceeding was started; or
>
> (b) the cost of work performed before the proceeding was started that is performed again after the proceeding was started."
>
> **196 Outlays**
>
> (1) In addition to the costs mentioned in section 194 or 195, the following outlays incurred by the claimant are allowed—
>
> (a) 1 hospital report fee for each hospital that treated the worker's injury;
>
> (b) 1 report fee for each doctor in general practice who treated the worker's injury;
>
> (c) 1 medical specialist's report fee for each medical discipline reasonably relevant and necessary for understanding the worker's injury;
>
> (d) 1 report fee of an expert investigating liability, of not more than $1,000, less any proportion of the fee agreed to be paid by the insurer;
>
> (e) Australian Taxation Office or tax agents' fees for supplying copies of income tax returns;

(f) fees charged by the claimant's previous employers for giving information necessary for the claimant to complete the notice of claim, but not more than $50 for each employer;

(g) fees charged by a mediator of an amount previously agreed to by the insurer;

(h) filing fees or other necessary charges incurred in relation to an application to the court before the proceeding is started;

(i) reasonable fees for sundry items properly incurred, other than photocopying costs.

(2) The fees mentioned in subsection (1)(a) to (d) are allowable only for reports disclosed before the start of the proceeding.

(3) The fees mentioned in subsection (1)(a) to (c) are payable in accordance with the scale of fees recommended by the Australian Medical Association.

(4) Counsel's fees are not allowed under this section or under the Uniform Civil Procedure Rules 1999, chapter 17A.

…

220 Legal professional costs of claim incurred in relation to proceeding in court

(1) Section 195 applies in relation to legal professional costs of a claim incurred in relation to a proceeding in a court only if the notice of claim given under section 275 of the Act in relation to the injury the subject of the proceeding is given after the commencement.

(2) Subsection (1) applies even if the injury the subject of the proceeding was sustained before the commencement.

(3) If the notice of claim given under section 275 of the Act in relation to the injury the subject of the proceeding was given before the commencement, section 136 of the expired regulation continues to apply in relation to the proceeding as if this regulation had not been made.

221 Outlays incurred in relation to claim

(1) Section 137 of the expired regulation continues to apply in relation to a current claim as if this regulation had not been made.

(2) Section 196 applies in relation to all other claims, even if the claim relates to an injury sustained before the commencement.

(3) In this section—

current claim means a claim in relation to which—

(a) a notice of claim was given under section 275 of the Act in relation to the injury the subject of the claim before the commencement; and

(b) costs and outlays have not been finalised before the commencement."

[139] The central question in this matter is whether the Parliament intended that the 2025 Regulation should operate retrospectively to apply to claims issued before 1 September 2025.

The common law

[140] At common law, there is a presumption that a statute should have prospective operation only. This was particularly so concerning amending statutes relating to workers' compensation.[61]

[141] In *Maxwell v Murphy*,[62] Dixon CJ said that there was a presumption against a retrospective operation of a statute or regulation to the extent that the regulation operates to alter rights or liabilities that came into existence by operation of the prior law. On the other hand, statutes dealing with procedural matters can operate retrospectively "provided no injustice is done."

[142] Likewise in *Rodway v R*,[63] it was said that generally a statute ought not to be given retrospective operation which would affect an existing right or obligation, unless the language of the statute expressly or by necessary implication requires such construction. An exception to this are statutes dealing with procedure which should be given a retrospective operation. However, it was noted that the distinction between substantive and procedural statutes can be difficult to apply e.g. statutes of limitation.[64]

[143] More recently, in *Chang v Laidley Shire Council*,[65] Kirby J noted that the presumption against retrospective abolition or qualification of existing interests is not one which has been given a narrow application. His Honour referred to an "entitlement" being protected by the presumption rather than a right which falls short of an immediately enforceable legal right in the strict sense. His Honour said, "The search is one for the overall effect and operation of the legislation."

[144] It is my view that the right to seek costs in this particular case was an entitlement (as contemplated by Kirby J) which existed prior to the commencement of the 2025 Regulation. This is particularly so when one considers the costs orders made during the course of the litigation here.

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61 See *Fisher v Hebburn Ltd* [1960] HCA 80; (1960) 105 CLR 188 at p 194.
62 [1957] HCA 7; (1957) 96 CLR 261 at p 267.
63 [1990] HCA 19; (1990) 169 CLR 515 at p 518.
64 Also see *Attorney-General (Qld) v Australian Industrial Relations Commission* [2002] HCA 42; (2002) 213 CLR 485 at [6].
65 [2007] HCA 37; (2007) 234 CLR 1 at [38]-[41].

[145] Even if an Act is intended to operate retrospectively, it may only be given such operation to the extent required by its text, context and purpose and the question of injustice is relevant.[66]

[146] In *Thaina Town (On Goulburn) Pty Ltd v City of Sydney Council*[67] the New South Wales Court of Appeal was concerned with a situation where the appellants had sought to appeal a decision of the Land and Environment Court refusing to order costs in their favour. Pending the hearing of the appeal, the court's rules were amended to introduce a provision containing a presumption against an order for costs.

[147] Spigelman CJ at [123] noted the matter was one which always involved a question of statutory interpretation. His Honour then referred to *Attorney-General (Qld) v Australian Industrial Relations Commission*[68] where Gleeson CJ noted that the distinction between substantive and procedural provisions is not always clear cut.

[148] Ultimately the Chief Justice said:

> "[127] All the normal rules of statutory interpretation apply when deciding how an amending Act operates upon past events. Even an Act which is clearly intended to operate retrospectively may only be given such an operation to the extent necessitated by text, context and purpose. (See *Reid v Reid* (1886) 31 Ch D 402 at 408 – 409; *Lauri v Renad* (1892) 3 Ch 402 at 421; *Attorney General of New South Wales v World Best Holdings Limited* (2005) 63 NSWLR 557 at [48].
>
> [128] Where litigants have pursued their legal rights in a court, the extent to which that has occurred will have created expectations about matters that may transform an element from merely the manner in which the enjoyment of a right is to be secured (*Maxwell v Murphy* at 267) into a right which the Parliament would be expected to respect.
>
> [129] The qualification that "no injustice is done" in the terms of the judgment of *Erlanger* quoted above, should be given effect when interpreting a power to award costs. The manner in which such effect is given is to recognise that what is involved is a process of statutory interpretation. The issue is not whether it is appropriate to attach a label such as "procedural" or "substantive." The issue is what the relevant enacting body intended to be the effect of the provision upon the matter that has arisen.
>
> …
>
> [131] Where proceedings are pending, particularly as in *Zainal* where an appeal had already been instituted, the formulation from *Erlanger* may require the Court, when interpreting a statutory provision, to consider the degree of injustice that

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66 *Burns v Minister for Health* [2012] WASCA 267; (2012) 45 WAR 276 at [16]; *Thaina Town (On Goulburn) Pty Ltd v City of Sydney Council* [2007] NSWCA 300; (2007) 71 NSWLR 230 at [127].

67 [2007] NSWCA 300; (2007) 71 NSWLR 230.

68 [2002] HCA 42; (2002) 213 CLR 485 at [6].

arises. As Kirby J said in *Chang v Laidley Shire Council* (2007) 81 ALJR 1598 at [83]:

> It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather, it may well be a matter of degree — the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."

[149] His Honour concluded at [134]-[135] that the costs rules as they existed at the time the appeal was instituted were applicable.

[150] *Thaina* was applied in *NSW Food Authority v Nutricia Australia Pty Ltd*[69]and by the Victorian Court of Appeal in *Muto v Shepparton City Council*.[70]

[151] If the 2025 Regulation was found to apply, it would have two consequences:

(a) It would upset the otherwise settled expectations of the parties, particularly the plaintiff, who acted on the basis that counsel's fees would be sought and therefore engaged counsel.[71]

(b) It would be a serious incursion into the important principles established by the High Court in *Latoudis v Casey*[72] and *Oshlack v Richmond River Council*[73] i.e. the principle that it is just and reasonable that a successful party should be compensated for the costs they have incurred in the litigation.

[152] I find that injustice would be caused which tells against retrospectivity.

Statutory interpretation provisions

[153] There are statutory provisions relevant to interpretation to be considered also. Section 4 of the AIA provides that the application of the AIA may be displaced wholly or partly by a contrary intention appearing in any Act. An Act under s 7 of the AIA includes a Regulation.

[154] Section 15A of the AIA provides:

> "**15A Commencement of Acts on date of assent**
>
> An Act commences on the date of assent except so far as the Act otherwise expressly provides."

[155] Section 20 of the AIA provides:

> **"20 Saving of operation of repealed Act etc.**
>
> (1) In this section—
>
> ***Act*** includes a provision of an Act.

69 [2008] NSWCA 252; (2008) 72 NSWLR 456 at [130]-[132].
70 [2018] VSCA 73; (2018) 228 LGERA 188 at [55].
71 *Minogue v Victoria* [2018] HCA 27; (2018) 264 CLR 252 at [111].
72 [1990] HCA 59; (1990) 170 CLR 534 at pp 543 and 567.
73 [1998] HCA 11; (1998) 193 CLR 72 at [67].

repeal includes expiry.

(2) The repeal or amendment of an Act does not—

(a) revive anything not in force or existing at the time the repeal or amendment takes effect; or

(b) affect the previous operation of the Act or anything suffered, done or begun under the Act; or

(c) affect a right, privilege or liability acquired, accrued or incurred under the Act; or

(d) affect a penalty incurred in relation to an offence arising under the Act; or

(e) affect an investigation, proceeding or remedy in relation to a right, privilege, liability or penalty mentioned in paragraph (c) or (d).

(3) The investigation, proceeding or remedy may be started, continued or completed, and the right, privilege or liability may be enforced and the penalty imposed, as if the repeal or amendment had not happened.

…"

[156] It is also to be noted that s 14(1)(a) of the SIA relevantly provides that a provision of the AIA mentioned in Schedule 1 applies to a statutory instrument. There is no doubt that the 2014 and 2025 Regulations are statutory instruments. Section 4 of the SIA provides:

"**4 Displacement of Act by contrary intention**

The application of this Act may be displaced, wholly or partly, by a contrary intention appearing in any instrument."

[157] Section 32 of the SIA provides:

"**32 Prospective commencement**

(1) Subject to section 34, a statutory instrument commences—

(a) if it is required to be notified under section 47 or published in the gazette—on the day on which it is notified or published; or

(b) if it is not required to be notified under section 47 or published in the gazette—on the day on which it is made; or

(c) if a later day or time is fixed in the statutory instrument—on that day or at that time.

(2) If a statutory instrument that is required to be notified under section 47 or published in the gazette is notified or published on a day after the day or time fixed by the

statutory instrument for its commencement, the statutory instrument is valid, but commences on the day on which it is notified or published."

[158] Section 34 of the SIA provides:

"**34 Beneficial retrospective commencement**

(1) A beneficial provision of a statutory instrument may be given retrospective operation if the statutory instrument expressly provides for that operation.

(2) In this section—

beneficial provision means a provision that does not operate to the disadvantage of a person (other than the State, a State authority or a local government) by—

(a) decreasing the person's rights; or

(b) imposing liabilities on the person."

[159] These sections reflect the approach taken at common law. As Gageler J (as his honour then was) said in *ADCO Constructions Pty Ltd v Goudappel,*[74] "unless the contrary intention appears with reasonable certainty the empowering statute is construed so as not to confer power to make regulations which alter existing rights or liabilities."

Conclusions

[160] I conclude that at all material times the plaintiff in this particular matter had a right [or at the least an entitlement] to seek to recover counsel's costs under s 15 of the CPA, rr 681, 726[75] and 731[76] of the UCPR and the 2014 Regulations.

[161] I form the view that although the right was contingent upon the plaintiff succeeding in the claim, it was nevertheless an accrued right. It was a contingent entitlement to costs as the plaintiff had taken steps towards exercising that right by suing. An entitlement, even if inchoate or contingent, suffices.[77]

[162] By way of example in *Barminco Investments Pty Ltd v O'Brien*[78] the Western Australian Court of Appeal was concerned with a situation where the respondent had suffered a disability at the time the *Workers' Compensation and Rehabilitation Act 1981* (WA) provided that the right to recover common law damages was conditional on leave being given to commence proceedings which could only be given if the degree of disability was likely to be 30 per cent or more. Prior to the respondent commencing proceedings or seeking leave to do so, the Act imposed a different regime with different restrictions. The amending Act stated it did not affect proceedings in respect of claims for damages which had been commenced or in

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74 [2014] HCA 18; (2014) 254 CLR 1 at [51].

75 The costs of a proceeding may include the cost of counsel's advice and drawing and settling pleadings.

76 Counsel's refresher fees.

77 *Wallaby Grip (BAE) Pty Ltd (in Liq) v WorkCover Queensland* [2022] QCA 204; (2022) 12 QR 189 at [48]; *Australand Corporation (Qld) Pty Ltd v Johnson* [2007] QCA 302; [2008] 1 Qd R 203 at [132]-[133].

78 [2006] WASCA 88 at [76]-[78] and [81].

respect of which leave had been given prior to its repeal. Notwithstanding that no application had been made for leave to bring proceedings, it was held that the respondent had an accrued right under the earlier provision. Pullin JA noted that the right to sue for damages had accrued prior to the repeal. The court also noted at [81] that to characterise a provision as procedural is not the end of the matter, a statutory provision may be characterised as procedural but may also have a substantive operation.

[163] I form the view, as in *Thaina,* that there would be an injustice to the plaintiff if the new costs regime imposed by the 2025 Regulation was treated as a mere matter of procedure and applied to all matters commenced prior to its enactment.

[164] The plaintiff here would be deprived of counsel's fees incurred since 2021, notwithstanding the fact that the proceedings were commenced in that year. There was an otherwise legitimate and settled expectation that the plaintiff would recover costs including counsel's costs if he succeeded in his claim.

[165] It must be observed that this legitimate expectation as to costs was reinforced by various orders made in the course of the proceedings including:

(a) An order made on 8 December 2021 that the costs of the applications before the court be the parties' costs in the proceedings.

(b) The fact that the matter was to proceed to trial on 1 March 2022 but was delayed because of a flood event. Mr Greenall had died in the intervening days and the trial was adjourned on commencement.

(c) On 21 June 2022, an order was made that the costs of the plaintiff's application were costs in the proceedings.

(d) Reserved cost orders were made on 23 February 2023 and 10 May 2023.

[166] I find that the injustice arising from the plaintiff's legitimate expectation leads one to a conclusion that the provision should not be read to be retrospective.

[167] One should also have regard to how regs 220 and 221 of the 2025 Regulation should be construed. Under the 2025 Regulation, reg 195 describes as to the legal professional costs of a claim incurred after a proceeding in a court is started. Regulation 196 addresses outlays.

[168] I have referred to the principles of statutory construction earlier in this judgment. It is to be noted that where a literal meaning does not conform to the evident purpose or policy of a particular provision, it is appropriate for courts to depart from the literal meaning.[79] Also where there is an anomaly raising an absurdity in operation the court may give the text a meaning other than the ordinary grammatical meaning.[80]

[169] The Explanatory Notes to the 2025 Regulation state that: "the policy objective of the 2025 Regulation is to maintain the efficient operation and regulation of the Workers' Compensation Scheme following the expiry of the 2014 Regulation." It made it clear

79 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297 at p 320; *R v A2* [2019] HCA 35; (2019) 269 CLR 507 at [32]-[37].

80 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297 at pp 306, 311 and 320-322.

that the 2025 Regulation insofar as counsel's fees were concerned, was to overturn the decision in *Anderson v Pickles Auctions*. It was not stated this was to apply to existing claims.

[170] In my opinion, regs 220 and 221 of the 2025 Regulation evince a clear parliamentary intention that the 2025 Regulation was not to affect an accrued right to seek costs with respect to existing claims.

[171] Regulation 220(1) of the 2025 Regulation relates to legal professional costs and applies by reference to whether the notice of claim was given after commencement. The drafting assumes that a notice of claim will be given. The only issue pertains to the timing of that notice of claim. Section 275 of the WCRA relevantly provides that before starting a proceeding in a court for damages, a claimant must give a notice of claim. However, with respect to workers with a terminal condition such as Mr Greenall, s 238(2)(d) of the WCRA exempts them from complying with pre-court procedures including the requirement to serve a s 275 notice. The language of reg 220 does not contemplate a situation where court proceedings are commenced without a notice of claim. It may be seen there is a significant gap in the drafting of the Regulation. If literally applied, this would mean in cases where no notice of claim was given such as the present, reg 195 would not apply nor would its predecessor namely reg 136 of the 2014 Regulation. It would follow there would be no restriction on the quantum of costs recovery, save for as prescribed by the UCPR. It seems unlikely this is what the legislature intended. The Explanatory Notes did not suggest any change to the recoverability of solicitor's fees.

[172] Also, a strict literal approach to reg 221 would mean:

(a) Any plaintiff with a non-terminal injury who is required to give a notice of claim under s 275 of the WCRA has the benefit of the transitional provision preserving the entitlement to seek counsel's fees.

(b) But a terminally ill plaintiff because of his terminal illness (who is not required to give a notice of claim) would lose that entitlement. The Explanatory Notes did not reveal this was the Parliament's intention.

[173] It must be recognised that the statutory intent of s 238 of the WCRA was to allow a worker with a terminal condition to bypass the pre-proceeding requirements of Chapter 5 to achieve a speedy resolution of a damages claim because of their condition. It would be contrary to the legislative intent of ensuring access to justice for such workers to interpret reg 221 in a way which results in a loss of an entitlement to seek counsel's fees.

[174] It would appear that both regs 220 and 221 of the 2025 Regulations have been drafted based on a failure to appreciate that in terminal illness claims there is no requirement to give a notice of claim.

[175] I conclude, given the language of the regulations, the Parliament intended that the 2025 Regulation was not to apply to existing claims, premised on the fact that ordinarily a claimant must give a notice of claim prior to the commencement of court proceedings. The Parliament made sure that the entitlement to legal professional costs and outlays under the 2014 Regulation including counsel's fees was preserved in cases which had not yet been completed. One cannot conclude that the Parliament

intended that those with less serious injuries would receive counsel's costs as compared to workers with terminal conditions. It follows that there is no "contrary intention" demonstrated for the purpose of s 4 of the AIA to displace the application of s 20(2)(c) of the AIA or from s 4 of the SIA to displace ss 32 and 34 of the SIA.

[176] In *R v CZN,*[81] Jackson J considered a situation where transitional provisions purported to cause a partial retrospective change in the law which were beneficial to offenders before the repeal, but not those who were yet to be sentenced.

[177] The law, namely the *Vicious Lawlessness Association Disestablishment Act 2013* (Qld), required a further sentence of 15 years imprisonment in addition to a sentence for a "declared offence." This section was repealed in 2016, but the repealing section made no express provision as to an offender who had committed a declared offence and was a vicious lawless associate and had not been sentenced before the repeal.

[178] Ultimately his Honour held:

> "[20] Although a contrary intention may appear from the general character of legislation, in addition to appearing from the express terms or necessary implication of a provision,[82] it cannot appear from mere conjecture,[83] as opposed to an inconsistency or incompatibility.[84] The accepted principle is that actual contrariety must be apparent.[85] It is a principle recently traced in the general context of the implied repeal of a provision by an inconsistent later Act to Lord Blackburn in 1878,[86] and may be expressed to be a consequence of the "principle of harmonious operation", that a legislature does not intend to contradict itself but intends that both relevant enactments should operate.[87] An analogous principle is that where there is an anomaly raising an absurdity in operation that must have been a drafting mistake, the court may give the text a meaning other than the ordinary grammatical meaning.[88]"

[179] In my opinion, the transitional provisions in regs 220 and 221 of the 2025 Regulation evince a clear parliamentary intention that regs 195 and 196 of the 2025 Regulation were not to apply retrospectively to existing claims, and rather regs 136 and 137 of the 2014 Regulation continued to apply to existing claims.

[180] It therefore follows:

(a) The expiry of the 2014 Regulation was a repeal within the meaning of s 20(1) of the AIA.

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81 [2021] QSC 182; (2021) 8 QR 370.
82 *Pfeiffer v Stevens* [2001] HCA 71; (2001) 209 CLR 57, 73 at [56].
83 *Sweeney v Fitzhardinge* [1906] HCA 73; (1906) 4 CLR 716, 727.
84 *Sweeney v Fitzhardinge* [1906] HCA 73; (1906) 4 CLR 716, 735.
85 *Dossett v TKJ Nominees Pty Ltd* [2003] HCA 69; (2003) 218 CLR 1, 14 at [43]
86 *Universal Property Group Pty Ltd v Blacktown City Council* [2020] NSWCA 106 at [8].
87 *Universal Property Group Pty Ltd v Blacktown City Council* [2020] NSWCA 106 at [11]–[13].
88 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297, 306, 311 and 321–322.

(b) Pursuant to s 20(2)(c) of the AIA the repeal of the 2014 Regulation does not affect a right acquired or accrued under the 2014 Regulation.

(c) Pursuant to s 20(2)(e) of the AIA the repeal of the 2014 Regulation does not affect a proceeding or remedy in relation to the right.

(d) Pursuant to s 20(3) of the AIA this proceeding may be started, continued or completed and the right may be enforced as if the repeal or amendment had not happened.

[181] Alternatively, applying common law principles, regs 220 and 221 should be construed as excluding terminal illness claims from the operation of the 2025 Regulation.

Defendant's cases

[182] I consider the cases relied upon by the defendant may be distinguished.

[183] As regards *Sykes v Queensland Gas Company & Anor*[89] this pre-dated the cases of *Chang, Thaina* and *Muto.* Additionally, the case did not consider the question of injustice. It did not consider the costs regime the subject of argument in this matter. It should be confined to the facts it considered.

[184] As regards *Digby v Compass Institute Inc (No 2)*[90] the case of *Thaina* was not considered and the decision was based on the accepted positions of the parties. Again, it should be confined to the facts it considered.

[185] Ultimately, I accept that the plaintiff should be awarded indemnity costs with respect to the section 318A issue consistent with *WorkCover Queensland v Yang (No 2)*.[91] The costs of the 2025 Regulation issue should be on the standard basis for the reasons given at the time of judgment delivery.

ORDERS

[186] For the reasons given, I make the following orders:

1. It is ordered the defendant pay the plaintiff's costs of the proceedings on the standard basis except for the costs referred to in paragraph 3.

2. It is declared the plaintiff is entitled to receive its costs under the Workers' Compensation and Rehabilitation Regulation 2014 (Qld).

3. It is ordered the defendant pay the costs of the plaintiff's application for costs with respect to the section 318A *Workers Compensation and Rehabilitation Act 2003* (Qld) issue on the indemnity basis and with respect to *Workers' Compensation and Rehabilitation Regulation* 2025 (Qld) issue on the standard basis.

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89 [2009] QCA 163

90 [2015] QSC 361.

91 [2023] QCA 38.