Deemed to be 'workers' for common law actions

A diverse group of independent contractors will now have their existing right to bring common law damages claims for work-related incidents restricted by the provisions of the workers compensation legislation.

By Neil Foster

Neil Foster is a lecturer at the School of Law, University of Newcastle.

The NSW Court of Appeal has now offered a definitive view on a question which has been uncertain for some years: who are treated as "workers" under the common law provisions of the Workers Compensation Act 1987 (the WCA 1987)?

More precisely, the question is: are those categories of non-employees (workers who are not "employed" under the common law), who are "deemed" to be "workers" for the purposes of receiving statutory compensation under Schedule 1 to the Workplace Injury Management and Workers Compensation Act 1998 (the 1998 Act), subject to the limits placed on common law damages actions by the 1998 Act and by Part 5 of the WCA 1987?

In Ebb v Fast Fix Steel Fixing Pty Ltd [2007] NSWCA 238 (6 Sept 2007) the Court of Appeal (Santow, Basten and Hislop JJA, Basten JA delivering the substantive judgment) holds that they are. This apparently technical issue has some far-reaching consequences for contractors who may be seeking common law damages following an injury at work.

Who does this decision affect?

The decision will affect all those contractors who fall within the deeming provisions of Schedule 1 of the 1998 Act. It is impossible to summarise these provisions briefly, but broadly speaking, one overall theme of the schedule is that contractors who are engaged for the purposes of other people’s business, but do not themselves run a business in their own name (or employ anybody else), may be regarded as employees of the business owner. So, the provision which was specifically considered in Ebb was cl.2(1):

"(1) Where a contract:

(a) to perform any work exceeding $10 in value (not being work incidental to a trade or business regularly carried on by the contractor in the contractor's own name, or under a business or firm name) ... is made with the contractor, who neither sublets the contract nor employs any worker, the contractor is, for the purposes of this Act, taken to be a worker employed by the person who made the contract with the contractor."

But, no doubt, for good historical reasons, the schedule covers a wide range of other types of contractors: rural labourers, timber getters, mine workers (employed by other workers at the mine), jockeys, taxi-drivers and new-car drivers, caddies and others employed by clubs for recreational purposes, shearsers' cooks, firefighters, boxers, wrestlers, entertainers, voluntary ambulance workers, and ministers of religion.

In addition, there are specific provisions deeming outworkers and those engaged through labour-hire agencies (who might otherwise have been thought to be contractors) to be employees.

What impact will it have?

The impact of the decision is that this diverse group of independent contractors will now have their right to bring common law damages claims arising out of work governed by the provisions of the workers compensation legislation, rather than the provisions of the Civil Liability Act 2002 (CLA) (as was previously assumed to be the case).

Broadly speaking, the mainly relevant provisions are contained in Part 5 of the 1987 Act, which imposes fairly strict time limits for damages claims to be made, and caps on the amounts that can be awarded; and Chapter 7 of the 1998 Act, which imposes strict time limits on when claims can be brought, and procedural steps that must be taken.

The limits that apply under the WCA 1987 are far tighter than those applicable to actions governed by the CLA. To take one of the more important differences, no damages for "non-economic loss" (such as pain and suffering) can be recovered in actions governed by the WCA (see s.151G), whereas such damages (while subject to a threshold and a cap) may still be recovered in actions governed by the CLA. An action for economic loss governed by the WCA can only be commenced if the person concerned has suffered a "degree of permanent impairment" of 15 per cent; there is no such restriction under the CLA. There are a number of other ways in which the Acts differ.

How did the court reach this conclusion?

Briefly, the issue that the court had to resolve was the meaning of the phrase "for the purposes of this Act", which is found in all but one of the 21 clauses in Schedule 1 of the 1998 Act. While it has been argued for many years that Schedule 1 is really only intended to extend the definition of "worker" for the purposes of the statutory compensation scheme under the 1987 and 1998 Acts, and not for the purposes of the provisions relating to common law actions, this argument fails when the provisions of the Acts themselves are taken into account, as Basten JA pointed out.

His Honour reviewed the history of the legislation and noted that there were indications in predecessor provisions that both statutory and common law entitlements were affected. But, more importantly, he pointed out that the current 1987 Act contains s.2A, which requires it to be treated "as if it formed a part of" the 1996 Act. Since the deeming provisions in Schedule 1 to the 1998 Act are explicitly said to operate "for the purposes of this Act", and since s.2A requires a reference to "this Act" in the 1998 Act to be read into the 1987 Act, then simple logic requires that a reference to "worker" in the 1987 Act picks up the deeming provisions in the 1998 Act.

Hence, when in Part 5 of the 1987 Act s.151E(1) provides that Part 5 applies "for the purposes of this Act", and since s.2A requires a reference to "this Act" in the 1998 Act to be read into the 1987 Act, then simple logic requires that a reference to "worker" in the 1987 Act picks up the deeming provisions in the 1998 Act.

The judgment reviews a number of decisions which had previously been suggested to have dealt with the issue. Basten JA holds that many of these decisions either did not deal with this specific point, or if comments were made on the point they were not necessary for the previous decision and hence were obiter dicta. He concludes in this way:

of the 1987 Act and Chapter 7 of the 1998 Act do not apply where the injury is suffered in the course of a
deemed employment relationship, as identified in Schedule 1, cl.2 of the 1998 Act. On its proper
construction, these provisions do apply in such circumstances.”

However, it is important to stress that the fact that the definition of “worker” is imported into the provisions
of the legislation limiting common law actions, does not have the effect of “deeming” these relationships
to be employment relationships for other purposes. So a contractor will not have their employment status
changed for the purposes of taxation, or superannuation, or for the purposes of imposing vicarious
liability. Basten JA specifically commented on this point and disapproved of suggestions in a previous
decision that might have implied some wider effect of the deeming provisions:

“58 To the extent that the reasons of the majority in [OP Industries Pty Ltd v MMI Workers Compensation
NSW Ltd (1998) 17 NSWCCR 193] suggest that the deemed employment provisions, now found in
Schedule 1 to the 1998 Act, will affect general law principles as to the relationship between those causing
and suffering injury in the course of work, that approach is not consistent with the statutory deeming
applying only ‘for the purposes of the Act’. To allow such provisions to have, by implication, some greater
effect, would be to contravene the express terms of s.151 of the 1987 Act.”

Section 151 provides simply that the Act “does not affect any liability in respect of an injury to a worker
that exists independently of this Act, except to the extent that this Act otherwise expressly provides”.

But the 1987 and 1998 Acts are now seen to expressly place limits on common law actions by
contractors where they are deemed to be “workers” by Schedule 1 of the 1998 Act.

Endnotes

1. In theory it could now be argued that the exception, cl.14, does not apply for the purposes of the
common law provisions. Clause 14 operates in relation to workers who attend places of “pick-up” for
casual employment. This type of employment arrangement seems not to be very common today, so any
uncertainty surrounding cl.14 may not be a real issue.