



## **COVERED CASES**

### **Case Snippet**

*FOX v WORKCOVER  
(AUSTRALIAN RECREATION EXPORTS PTY LTD)*

*[2000] SAWCT 194*

In the recent decision of Fox Acting Deputy President Thompson held that to calculate the average weekly earnings of a working director the entitlement should be based on the words of Section 4(1), that is “the amount that the worker could reasonably be expected to have earned for a week’s work”.

The respondent’s approach was that the wages declared to the ATO (nil) represented the quantum of the worker’s wages: *nil!* Workers who were involved as directors of business enterprises, who sought to arrange their affairs, in a legitimate way, so as to minimise income tax through family trusts, loan accounts etc, by determining a wage quantification that provided a desirable result, allow themselves flexibility to order their financial affairs to their advantage but should they be forced to take the unforeseen consequences? Could it be submitted that even if it also had a less desirable consequence for the purposes of Section 4 of the Act, the wages as declared to the Australian Taxation Office should be considered the worker’s average weekly earnings for the purpose of the Act.

Acting Deputy President Thompson rejected this argument, and found that he could not consider the information disclosed in a tax return could be put any higher than that the returns were relevant. He considered that this particular case was “one of those rare cases where it is clear that justice would abhor setting the average weekly earnings figures” based entirely on the tax returns. Therefore such assessment should be guided by the authorities, “according to equity, conscience, and the substantial merits of the case, without regard to the technicalities and legal forms”, based on such evidence as is available.

The following approach was taken by Deputy President Thompson in determining the worker’s average weekly earnings:

The worker's drawings of \$50,500.00 were divided by two, leaving \$25,250.00.

25% was then deducted from the drawings as this was assigned to be the drawings generated by the worker's status as a proprietor.

The worker was allowed 50% of the value of non-financial remuneration (i.e. car, phone) to be included in the assessment, equalling to \$3,750.00.

This resulted in the worker's annual salary being \$22,687.50, which translated to an average weekly earnings rate of \$436.00.

Note: This decision has been appealed to the Full Tribunal by the Corporation – we await the outcome with great interest!