

Gun & Davey **Covered**



Volume 1, Issue 23 - March 2001

WELCOME

Welcome to this the 23rd bumper issue of **Gun & Davey Covered**.

This issue is crammed full of important recent developments in case law handed down since December 2000. Amongst the topics covered are:

- Tsimpinos – Section 35(6a);
- Ryan – Section 35(6a);
- Blok – Section 4(8);
- Day – Section 35(2)/Section 36/Section 58B;
- Hines – Section 28B/Section 36;
- Williamson – Section 28B/Section 32(8)

plus more!

Perhaps the most important decision for case managers is that of **Day**. We suggest a careful reading of our summary as it is essential to fully understand its affect and implications in future case management issues and in particular inter-relationship between the legal requirements of the legislation, the industrial needs of the employer and the rights of the worker.

We would be happy to provide further advice on the affects of this decision.

We note that it has been some time since the **Gun & Davey Covered** index was updated and advise that a replacement index will be provided with Issue No. 25.

At that time, we will also commence the publication of Volume 2 of **Gun & Davey Covered**. We will be happy to provide a cover for Volume 2 upon request – contact megs@gundavey.com.au

We take this opportunity to say farewell to Michael Doyle who is leaving the firm to join

the Independent Bar to practice in the area of workers compensation and related jurisdictions. We wish Michael every success.

We are busy interviewing his replacement and will provide details of same in due course.

We trust you will enjoy this edition of **Gun & Davey Covered**.

Regards

Michael Ricketts

In This Issue

Welcome	1	Rehabilitation Wages & Section 58B.	
Section 35(6a) – The Practical Effect	1	Employers Obligations	4
More News on Overtime	3	Covered Cases	7
		Case Snippets	8
		Directory	11

SECTION 35(6a) – THE PRACTICAL EFFECT

Two recent decisions have been handed down by the Workers Compensation Tribunal relating to Section 35(6a) and both have wide reaching effect.

In [Tsimpinos v WorkCover \[2000\] SAWCT 201](#), a decision of His Honour Acting Deputy President Thompson, the issue in dispute was whether the Section 35(6a) figure set by consent within a redemption agreement was

binding on the worker for a limited period only or until aged 65.

The worker had received a lump sum of \$46,500.00 and had agreed to a Section 35(6a) figure of \$287.77. He was subsequently disabled by reason of a work related injury and the Corporation determined that his notional weekly earnings arising out of the subsequent claim were \$800.00. It was argued by the worker that there were two alternate ways of calculating the actuarial value of the capital sum for the purposes of applying it to the subsequent claim:

1. That a weekly sum of \$287.77 will exhaust the capital sum of \$46,500.00 in 3 years and 17 weeks. Therefore after the expiration of this period the Corporation is not entitled to take into account the Section 35(6a) figure.
2. Or to take an alternative view so that the capital sum of \$46,500.00 produced a weekly payment that would be exhausted upon the worker's 65th birthday, namely \$90.59 per week. The Corporation then only being entitled to reduce notional weekly earnings by \$90.59 per week.

It was submitted by the worker that Section 42 does not provide a basis for the parties to agree on a weekly figure that the worker is deemed to have redeemed.

The Corporation submitted that the redemption agreement between the parties is a legitimate contractual document and is binding on both.

His Honour held that the matters about which an agreement can be reached does not have to be prescribed by Section 42. He agreed that there is no express mandate in Section 42 for including a weekly figure but states that there is an implied mandate by the use of the word "agreement". He rejected the worker's submission that the inclusion of such a figure amounts to unconscionable conduct by the Corporation stating that the safeguards contained in

Section 42(2) should sufficiently protect the worker.

In short, His Honour held that the Section 35(6a) figure is as, stated in the redemption agreement:

"The continuing amount the worker is taken to be receiving".

[Ryan v WorkCover \[2000\] SAWCT 196](#), dealt with how the Section 35(6a) figure should be applied following the first anniversary of the second disability. The Corporation had sought to reduce the worker's weekly payments as follows:

New NWE rate (100%)	\$712.57
x 80%	\$570.06
less S35 (6a) (previous redemption)	\$25.73
New Entitlement	\$544.33

It was the Corporation's position that as a result of Section 35(6a) the worker is taken to be receiving a continuing weekly payment of \$25.73 per week and this amount must be deducted from all determinations concerning the calculation of his entitlement to income maintenance.

The Full Bench of the Workers Compensation Tribunal rejected this submission. It was held that had it been Parliament's intention to subtract such amount in all circumstances from a later right to income maintenance, there would have been no need to enact Section 35(6). If the weekly payments for the earlier disability were to be deducted in every case the worker could never receive, in respect of two or more disabilities, weekly payments exceeding his or her notional weekly earnings.

It was further stated that:

"A plain reading of the Act suggests that in the case of two or more disabilities which generate entitlements to weekly income maintenance the only relevance of an entitlement in respect of one disability in connection with the other is that

their combined sum cannot exceed the worker's notional weekly earnings. Subject to that qualification, the receipt of payments in respect of one disability has no impact upon their entitlement to weekly payments in respect of another".

The practical effect of this decision is best seen by considering the following formula and the examples set out below.

Year 1

100% AWE's (disability 2) - Section 35(6a) = weekly payment

Year 2

NWE's (disability 2) x 80% + Section 35(6a) = X

X must not be greater than NWE's (disability 2)

If it is, the amount by which X exceeds notional weekly earnings = Y

NWE's (disability 2) x 80% - Y = weekly payment

Example 1

AWE's for disability 2 amount to \$900.00, the Section 35(6a) figure from the previous redemption is \$320.00

Year 1

\$900.00 - \$320.00 = \$580.00 weekly payment

Year 2

\$923.40 x 80% (\$732.72) + \$320.00 = \$1,058.72 (X)

X (\$1058.72) exceeds notional weekly earnings (\$923.40) by \$135.32 (Y)

Therefore the worker's entitlement to weekly payments of compensation can be calculated as follows:

**\$732.72 (notional weekly earnings x 80%)
- \$135.32 (Y) = \$603.40**

Example 2

AWE from the 2nd disability are \$900.00, the Section 35(6a) figure arising out of the previous redemption is \$100.00.

Year 1

\$900.00 - \$100.00 = \$800.00 weekly payment

Year 2

NWE x 80% (\$732.72) + \$100.00 = \$832.72 (X)

X does not exceed notional weekly earnings. Therefore the worker's entitlement to income maintenance in the second year of incapacity is \$732.72 (notional weekly earnings by 80%).

In the second year of incapacity the Section 35(6a) figure is only taken into account where the sum total of the Section 35(6a) figure and the otherwise ongoing entitlement to income maintenance (notional weekly earnings x 80%) exceeds the notional weekly earnings figure as adjusted by Section 39.

MORE NEWS ON OVERTIME

A recent decision of [WorkCover v Blok \[2000\] SAWCT 199](#) has clarified the meaning of *substantially uniform overtime* as arose in the decision [Phillis](#).

In [Blok](#) Deputy Judge President Parsons stated that the qualifying word "substantially" in Section 4(8) is particularly significant. The word assumes that there would be some fluctuation in overtime hours and signals that the required uniformity depends not on an exact or absolute sameness in the hours worked but on a judgment that there is a high level of conformity in the hours within the pattern.

Her Honour stated that the use of an averaging process may be consistent with [Phillis](#) because it requires consideration of the actual overtime worked. Her Honour stated that a two or three hour variation of overtime hours in particular sessions where the overtime hours in any such session does not exceed four or five hours may suggest

that the overtime although regular and established is unpredictable or greatly fluctuating. On the other hand a variation of one or two hours in particular sessions where the extent of the overtime hours usually worked in any session is in excess of nine or ten hours may not be so regarded.

In this case the worker had performed overtime within a span of 9.75 hours and 11.25 hours in 35 out of 49 weeks. Her Honour held that this did not represent a picture of dramatically fluctuating overtime. Rather she held that this was a pattern of uniformity for the majority of overtime sessions.

Her Honour held that in the circumstances it was appropriate to calculate the worker's overtime entitlement based upon the midway point between 9.75 and 11.25 hours, ie 10.5 hours per week (this happens to also be the average of all overtime hours worked rounded of to the nearest half hour).

The decision of [Warr v WorkCover \[2000\] SAWCT 188](#) also considers the question of *substantial uniformity* and whether overtime should be included in the calculation of average weekly earnings. In this case Deputy President Gilchrist held that a period of 9 weeks was sufficient to determine whether overtime worked was regular and establish and substantially uniform. His Honour appears to have used an averaging process when deciding that the overtime worked on Saturdays was regular and established and substantially uniform. The overtime worked by the worker on Saturdays was as follows:

Week	Overtime
1	0
2	3.5
3	4
4	3
5	4.5
6	2.75
7	4.25
8	5.25
9	Disability

Using the above hours His Honour held that overtime was regular and established and substantially uniform and found that the worker had an entitlement to 3.5 hours for Saturday overtime.

His Honour did state that having found that on Wednesdays and Saturdays the worker performed regular and established and substantially uniform overtime, he must now consider whether this overtime would have continued pursuant to Section 4(8)(a)(iii). His Honour did consider the wage records of the worker's replacement to identify that on Saturdays this overtime would not have continued and must be excluded.

In summary, it appears that there has been an easing in the strict approach applied by the [Phillis](#) decision when considering whether overtime should be included in a worker's average weekly earnings. A small fluctuation in the hours of overtime worked will have a different impact when the overtime worked by the particular worker generally fluctuates between four and five hours as opposed to nine or 10 hours.

REHABILITATION WAGES AND SECTION 58B - THE EMPLOYER'S OBLIGATIONS

Further to our comments made in Volume 1, Issue 17, page 4 Covered, [Day v State of SA \(see \[2000\] SASC 451\)](#) was been appealed to the Full Court of the Supreme Court. Whilst an appeal from the Industrial Relations Court it does have wide reaching effects on the Corporation and its Agents.

To refresh your memories, the worker had been employed by the Department of Education and Children Services as a contract teacher since 1987. The worker entered into annual contracts with the employer in the latter years. The worker sustained a disability in June 1995, causing her to become incapacitated for work from the 13th of November 1995. The worker was totally or partially incapacitated for work until

the 22nd of January 1998 by which date she had fully recovered and resumed normal duties.

The worker received income maintenance payments for the period of the 20th of November 1995 until the 22nd of January 1998 at the full rate of average weekly earnings for the first 12-month period, and thereafter at 80% of that rate. Pursuant to various rehabilitation and return to work plans the worker undertook various duties including the functions usually performed by a School Services Officer. The worker did not receive wages for work performed as a School Services Officer, which would have been \$374.18 gross per week.

The worker sought payment of wages for the work she undertook as a School Services Officer pursuant to Section 14 of the Industrial and Employee Relations Act, 1994, arguing that such wages were payable to her pursuant to the School Services Officer (Government Schools) Award. Section 14 of the Industrial Act confers jurisdiction on the Industrial Relations Court to hear and determine a monetary claim for a sum due to an employee or former employee from an employer or former employer under a contract of employment or an award.

The intention of the worker was to increase the amount received by her from the employer, by arguing that she should have been paid wages for the work she undertook as a School Services Officer of \$374.18 gross per week, as well as compensation by way of top up comprising of 80% of the difference between that amount and her notional weekly earnings.

The total sum would have exceeded 80% of her original notional weekly earnings.

The Full Supreme Court held that an award can only apply to those persons who have entered into a common law contract of employment. The worker needed to establish that she had been employed by the employer under a contract of employment to perform the duties of a School Services Officer. Even in the absence of an award, the worker would need

to establish that she was employed at all relevant times as a teacher, and that there was a variation to her contract of employment whereby for a limited period of time she would be required to perform only the duties of a School Services Officer, and would be paid at the appropriate award rate, or some other agreed rate.

There was no evidence to support that a contract of employment was entered into between the worker and the employer for the worker to perform the duties of a School Services Officer for the period 1996 and 1997. There was a reasonable expectation on the part of the employer that as soon as the worker was able to return to teaching duties, the worker would be provided with work as a teacher, as indeed occurred in February 1998.

There was however an obligation on the employer pursuant to Section 58B of the Act to provide suitable employment to the worker. The functions of a School Services Officer performed by the worker were not performed under a contract of employment, however pursuant to a series of rehabilitation and return to work plans given statutory force by Section 28A of the Act. As there was no contract to perform such duties, there was nothing from which the Award could operate, and there was no evidence of a variation of any existing contract of employment, whereby the worker would perform the duties of a School Services Officer and would be paid wages for the work performed.

The practical effect of this decision is that all employers will not be under an obligation to pay wages to a worker who has returned to his/her workplace under a Rehabilitation & Return to Work Plan except where the worker returns to normal duties (or only slightly modified), there is a clear new contract of employment entered into between the employer and the worker, or variation of an existing contract, and the worker will be entitled only to income maintenance payments during the period covered by such Rehabilitation & Return to Work Plans (which compensation will be fully met by WorkCover Corporation).

However the fact that the employer would not in those circumstances be obliged to pay wages to a worker may reduce the number of instances when an employer can argue that it is not reasonably practicable to provide employment to accommodate a Rehabilitation & Return to Work Plan and this may potentially result in an earlier "return to work" by a worker than otherwise may have been possible.

In other words this decision does not reduce or modify the employer's liability as set out in Section 58B of the Act to provide suitable employment and the consequences of failing to do so viz a viz the penalty levy which may be imposed by the Corporation.

The effect of this case cannot be ignored by WorkCover Corporation or its agents -

in other words it is appropriate that the impact of this case be recognised and that an employer is not "persuaded" to supplement the Corporation's liability to pay income maintenance to workers by payment of wages where workers undertake a return to work, except in circumstances where there is a return to essentially normal duties, a clear new contract entered into between the employer and the worker or a variation of an existing contract relevant to the duties which a worker is expected to undertake under a Rehabilitation & Return to Work Plan. This is the case whether the duties which an employer can make available are or are not supernumerary, are or are not productive etc.

Additionally, we see the following adverse effects of this decision: -

- (a) A return to work within the meaning of Section 36(1)(c) of the Act may not be achieved until a worker has returned to essentially their normal pre-injury duties or a worker has entered into a new contract of employment with the pre-injury employer or an alternate employer to undertake functions different from those required in his / her original contract of employment - we say this as in determining whether there has been a return to work within the meaning of the Act it is necessary

to look at whether the worker has reintegrated himself / herself into the workforce and this involves, inter alia, the existence of employment under a contract and entitlement to wages.

- (b) Discontinuances pursuant to Section 36(1)(d) of the Act and reductions pursuant to Section 36(2)(b) of the Act will not be appropriate until much later, if at all, than currently is the case.

We do not consider this decision in any way will impact on the application of Section 35(2) of the Act as availability of employment to a worker and receipt of wages by a worker are not relevant to the application of those provisions.

We do not consider a worker can use the effect of this decision to avoid his/her obligations under the Act to undertake suitable employment when it is offered nor avoid the consequences where suitable employment, when offered, is not undertaken by a worker. We do not consider that a worker can argue that it would be unreasonable to expect him/her to attend work to undertake such duties when wages will not be paid. We consider it is highly unlikely that the WCT would sanction such conduct and we do not consider therefore that the WCT would find a refusal to undertake suitable employment to be reasonable, simply because a worker to whom suitable employment is being offered will not be paid wages for undertaking such work. That would defeat the entire purpose of rehabilitation and the main purpose of the Act. In such circumstances the case manager may consider applying Section 36(1)(f) of the Act.

However be aware a worker may now be able to claim (and in fact may have always been able to claim) travelling expenses to and from the place of employment where such is required under an approved Rehabilitation & Return to Work Plan by virtue of the provisions of Section 32(2)(d) of the Act.

RECOMMENDATIONS

In summary, the effect of this decision is likely to be a higher cost to the scheme by increased income maintenance payments, where in the past such liability was reduced by the employer making some payment to a worker by way of wages.

To reduce this impact, Case Managers will need to look at encouraging a variation to an existing contract of employment between an employer and a worker, or a new contract of employment being entered into, even if only temporarily, as is appropriate in each case and this can be approached as part of a rehabilitation and return to work plan.

COVERED CASES

HINES v WORKCOVER CORPORATION (TRANSFER MAINTENANCE P/L) [2000] SAWCT 171

Catchwords:

Section 28B, Section 36, Reasonableness

Facts:

The worker was employed as a casual marine pilot's assistant. The worker accepted the job as he anticipated that the hours he would be required to work would enable him to spend considerable time looking after his seriously ill wife.

In 1996 the worker suffered a right knee injury, and after a period of time off work, resumed his normal duties. On the 6th of July 1999 he suffered a further knee injury, and as a result continues to be partially incapacitated for work.

On the 2nd of March 2000 a Rehabilitation and Return to Work Plan ("second plan") was initiated, from the 3rd of March 2000 to the 1st of June 2000. The plan provided for light administrative duties, for 16 hours per week.

On the 14th of March 2000 the worker was directed to attend a meeting, and was

informed that his employer wished to offer him different duties consisting of 38 hours per week full time. The worker was presented with a further Rehabilitation and Return to Work Plan ("third plan") commencing on the 14th of March 2000 until the 14th of June 2000. At the meeting the worker informed IQ Consultants that due to his personal circumstances i.e. his wife's illness, he was unable to work a full 38-hour week, every week, and was unable to manage what was contemplated in the third plan. The worker declined to sign the plan. The worker's solicitors also corresponded with the employer and confirmed that the worker would not be attending at work in the new position, and advised that the worker was prepared to continue to attend at work undertaking the hours that he had been doing to date.

On the 7th of April 2000 the worker lodged a Notice of Dispute challenging the reasonableness of the third plan. That same day the Corporation made a determination discontinuing the worker's weekly payments on the basis that the worker had refused or failed to participate in a rehabilitation program and therefore breached mutuality pursuant to Section 36(1)(f) and 36(1A)(d) of the Act. (We note that this determination was defective in that it should have referred to rehabilitation and return to work plan, not program, but it was still held to be substantially compliant with the requirements of Section 36 and the Regulations). The worker lodged a Notice of Dispute dated the 11th of April 2000 against this discontinuance.

Issues:

1. Can Section 36 be invoked where a worker fails to comply with a Rehabilitation and Return to Work Plan that was not *reasonable*.
2. Can a Rehabilitation and Return to Work Plan be established despite there being an earlier, still current plan?
3. Should the *personal circumstances* of the worker be taken into account when

establishing a Rehabilitation and Return to Work Plan

1. The relationship between Section 28B and Section 36 of the Act.

It was held that if as a result of a review pursuant to Section 28(B)(3), the Tribunal was of the opinion that the return to work plan was unreasonable, the Section 36 notice based on the asserted refusal or failure to participate in the terms of that plan must fail, and the worker's challenge must succeed. Therefore the fate of the worker's challenge to the Section 36 determination was ultimately held to be contingent upon the outcome of the application for review of the rehabilitation and return to work plan.

2. Is the third plan unlawful?

The third plan was made before the second plan was given the opportunity to run its course. The reason that a rehabilitation and return to work plan has a starting and a completion date, is so that the parties know exactly where they stand, and for the duration of the plan they are bound by its terms. The remedy would therefore have been to file a Notice of Dispute to apply for a review pursuant to Section 28B(1) of the Act.

It was therefore held that the third plan created no obligations on the part of the worker, and the determination discontinuing the worker's weekly payments on the basis of the worker's failure to submit to the terms of the third plan must be set aside.

3. Are the terms of the third plan unreasonable?

In the alternative, it was held that in determining the reasonableness of a return to work plan, the worker's personal circumstances must be taken into account. Even though the worker may have been physically and mentally capable of undertaking the duties proposed in the third plan, considering

all of the circumstances it was held that the plan was *unreasonable*.

The reason why the worker had taken the casual position in the first place, was so that he could work limited hours and has sufficient time to care for his wife. If the worker had to work the hours proposed, he would have to break a system that had been in place for six years, organise care for his wife and leave her unattended for much longer periods of time than she was accustomed to.

Commentary:

This is an important decision in terms of rehabilitation and the question of *reasonableness* has been further clarified in that the personal circumstances of the worker are important to this question. However, the most significant consequence of this decision is that a new Rehabilitation and Return to Work Plan can only be established upon the expiration of the previous Plan.

CASE SNIPPETS

EYL WARD v SELECT STAFF P/L

WCT Full Bench [2000] SAWCT 192

In this matter upon a referral directly to the Full Bench pursuant to Section 94A(ii), it was held that the deemed breaches of mutuality set forth in Section 36(1A)(a)(ii) and (e) apply equally to partially and totally incapacitated workers. However, Section 36(1A)(g) only applies to partially incapacitated workers.

In this case the worker was partially incapacitated at the time of discontinuance of weekly payments pursuant to Section 36(1)(f) when she took unpaid maternity leave. At a later date she became totally incapacitated for some six weeks following surgery consequent to the compensable disability.

The Full Bench stated that no purpose would be served by relieving the compensating authority from paying income maintenance to a totally incapacitated worker, who by reason of the compensable disability was unable to perform suitable duties offered in any event. The worker thus received income maintenance for the periods during which she was totally incapacitated.

WILLIAMSON v STATE OF SOUTH AUSTRALIA IN RIGHT OF SA POLICE

SAWCT [2000] 195

Here, His Honour Deputy President Judge Cawthorne held that a worker does not have an unfettered right to choose their rehabilitation provider.

Having found a refusal of the exempt employer to establish a Rehabilitation and Return to Work Plan (RRTW) was a reviewable decision pursuant to Section 28B(i)(a) of the Act, he found the only ground for review was unreasonableness. The onus then fell upon the worker to show that to establish or not a plan was unreasonable.

In finding that the worker does not have an unfettered right of choice of rehabilitation provider, His Honour was mindful of the law that:

- The RRTW plan is binding on the worker and the employer and a balance must therefore be struck between the interests of both.
- Both worker and employer must be consulted.
- There is a positive requirement on the part of the compensating authority to establish the plan for an incapacitated worker meeting Section 28A(ii) criteria.
- The compensating authority is obliged to prepare a plan and is the driver of such.

His Honour noted that in Williamson, the exempt employer had refused to establish a RRTW plan with the worker's preferred

choice of rehabilitation provider. The employer did provide the worker with a new rehabilitation provider. This provider was on SAPOL's panel of providers. The worker failed to prove the decision was unreasonable in that:

- The rehabilitation provider chosen by the employer was chosen due to its familiarity with SAPOL's operations.
- Costs are costs of approved rehabilitation as defined by Section 32(8).
- Section 32(8) provides that "approved rehabilitation" is only provided by those with an agreement for such provision with the Corporation.
- The Corporation reference in Section 32(8) refers also to an exempt employer.

In this case, as the provider of the rehabilitation service did not have an agreement with SAPOL for provision of those services, the exempt employer did not have to meet the worker's claims for costs of such.

MARINELLO v WORKCOVER CORPORATION (ETM CONSTRUCTIONS PTY LTD)

[2000] SAWCT 83

The question of what constitutes disfigurement has been taken one step further following this decision. In this matter the Corporation had assessed the worker's disfigurement at 4% based upon his surgical scarring. The worker disputed this assessment seeking an increase on the basis that his permanent slouch and limp (each noticeable most but not all of the time) were also disfiguring.

His Honour Acting Deputy President Thompson rejected the Corporation's submissions that there is a distinction between a "fixed" condition, eg an immovable arm, and a "fluid" condition, eg one apparent only on movement such as a

limp. His Honour considered the ordinary meaning of the word "disfigurement" asking would an ordinary person in the street consider a person with a slouch or a limp as disfigured? His Honour then answered yes. He increased the assessment of 4% to 7½% to take into account the slouch and limp.

This decision was appealed to the Full Bench by the Corporation however the appeal was dismissed.

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:

1. The worker's drawings of \$50,500.00 were divided by two, leaving \$25,250.00.
2. 25% was then deducted from the drawings as this was assigned to be the drawings generated by the worker's status as a proprietor.
3. 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.
4. 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!

Gun & Davey Compensation Team

Michael Ricketts LL.B. – Managing Partner - 8228 5217 – *Personal Assistant, Melanie Carroll*
Mark Calligeros BA. LL.B. – Partner - 8228 5208 – *Personal Assistant, Annabel Irrgang*
Tas Carabelas LL.B. – Senior Associate- 8228 5210 – *Personal Assistant, Deb Mitchell*
Paul Gabrynowicz LL.B-Associate–8407 9211-*Personal Assistant, Rosey Weekley*
Carmel Preece LL.B – Associate – *Personal Assistant, Martine Smyth*
Victoria Webster Dip. Physio (AUA) B.A. (Juris) LL.B (Hons) - Associate
Catherine Duncan LL.B – Associate
Paul Tanner LL.B – Senior Consultant – 8407 9213
Sophie Carmen LL.B (Hons) B Com. – Associate
Geoff Wark LL.B – *Personal Assistant, Megan Riley*