



[1] These applications for leave are appropriately dealt with together raising as they do the same issue.

[2] The appeal to this Court by Anderson & O'Leary Limited in ACR 231/19 was against a direction of the Reviewer that it provide financial details of its operations. That direction was set aside by this Court. In that proceeding and the other two the corporation has sought leave to appeal.

[3] The three appeals were heard by Judge A A Sinclair on 23 September 2020. In each case her decision was issued on 1 March 2021.

[4] By minute of Judge Henare in each matter of 25 March 2021 the applications for leave to appeal to the High Court were directed to be determined on the papers. Further directions as to the filing of submissions were made, all of which have been complied with.

### **The issue**

[5] The three companies are members of the Independent Timber Merchants Cooperative (ITM) which sells timber, hardware and building supplies to businesses and to the general public. The three companies operate separate business units in different parts of New Zealand.

[6] In each case the business activities of the companies for levy purposes pursuant to the Act received a classification unit (CU) number of 45310 - Timber Wholesaling. The companies objected to that classification because CU 45310 attracted a basic levy rate of \$1.91. They sought a CU of 52330 - Hardware and Building Supplies Retailing which attracts a levy rate of 86 cents. The setting of levies requires the correct interpretation of s 170 of the Act. It provides:

#### **170 Classification of industries or risks**

- (1) For the purpose of setting levies payable under sections 168, 168B, and 211, the Corporation must classify an employer and a self-employed person in an industry or risk class that most accurately describes their activity, being an industry or risk class set out in regulations made under this Act.

- (2) If an employer is engaged in 2 or more activities, the Corporation must classify all the employer's employees in the classification unit for whichever of those activities attracts the highest levy rate under the regulations.
- (3) Despite subsection (2), the Corporation may classify the employer's employees in separate classification units for different activities if the employer meets the threshold (if any) specified in regulations and if—
  - (a) the employer so requests; and
  - (b) the employer is engaged in 2 or more distinct and independent activities; and
  - (c) each of those activities provides services or products to external customers in such a way that each activity could, without adaptation, continue on its own without the other activities; and
  - (d) accounting records are maintained by the employer to the satisfaction of the Corporation that—
    - (i) demonstrate the separate management and operation of each activity; and
    - (ii) allocate to each activity the earnings of employees engaged solely in that activity.
- (4) Regulations made under this Act must prescribe a Work Account levy for each industry or risk class defined under subsection (1).
- ...
- (5) The Corporation must decide which industry or risk class is appropriate in relation to any employer [or self-employed person] by whom a levy is payable, and section 239 applies if the classes defined by the regulations do not specifically cover a particular activity.

[7] In each judgment the Judge sets out in detail how the levies are calculated in practice by the Commission.

[8] A major consideration is the Australian and New Zealand Standard Industrial Classification 2006 (ANZSIC) which is a joint development between Statistics New Zealand and its Australian counterpart, the Australian Bureau of Statistics, which was created in 1993 and amended in 2006.

[9] The Judge described ANZSIC as follows:

- [27] ANZSIC contains a hierarchical classification system with four levels, comprising 19 divisions, which are then in turn broken down into subdivisions, groups and classes. Under each class, there is a general description of the class, a list of primary activities which fall within that class, and a list of

exclusions/references. The classification units which appear in the regulations co-relate with a class within ANZSIC, in most cases using identical wording.

[10] She then referred to the decision of Simon France J in *On the Go (New Zealand) Limited v Accident Compensation Corporation*<sup>1</sup> as determining that it was “beyond dispute” that the regulations uplift the classification units from the ANZSIC document but in the end it is the wording of the regulations that prevails while ANZSIC is an obvious interpretation aid.

### **The determination**

[11] The Judge then considered carefully the operation of the ITM outlets and how their business was directed to wholesale customers, account holders and cash purchasers. She considered their opening hours, advertising and other relevant aspects of their operations and determined in each case that the correct CU was 52330 – Hardware and Building Supplies Retail.

### **Does the appeal involve a question of law?**

[12] In my view it does. The question broadly is what factors a Court may take into account when interpreting s 170 of the Act in determining the risk class applicable to the employer in question.

[13] There is no doubt that the proper construction or interpretation of a statutory provision when applied to the facts is a question of law – *Commissioner of Inland Revenue v Walker*<sup>2</sup>, *Edwards v Bairstow*.<sup>3</sup>

### **Conclusion**

[14] Leave is therefore granted to the Corporation to appeal to the High Court on each proceeding, on the broad legal question of what factors a Court may take into account in determining the risk class to be applied to employers pursuant to s 170 of the Act.

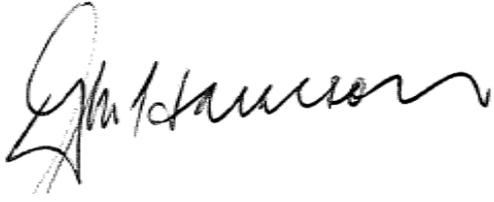
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<sup>1</sup> High Court Wellington CIV-2011-485-736, 16 September 2011.

<sup>2</sup> [1963] NZLR 339 (CA353-354).

<sup>3</sup> [1956] AC14.

[15] Costs are reserved.

A handwritten signature in black ink, appearing to read "G M Harrison". The signature is written in a cursive, flowing style with a large initial "G" and "M".

G M Harrison  
District Court Judge