



## **Background**

[3] On 5 October 2020, ACC contacted the appellant, Spray Marks NZ Limited, as part of a review to determine whether Spray Marks was correctly classified for levy purposes. Spray Marks advised ACC that it was a road pavement marking company which undertook traffic management as part of its work.

[4] On the basis of that advice, ACC advised that Spray Marks NZ Limited's existing levy classification was inaccurate and that the most appropriate classification was CU42590 – Construction Services (not elsewhere classified).

[5] On 11 November 2020, ACC issued a formal decision which advised:

The most accurate classification for Spray Marks NZ Limited's business activities is 42590 – Construction Services (not elsewhere classified).

This decision is based on the understanding that the company is engaged in the provision of traffic management and road marking services. Please advise if this is incorrect or if you have additional information.

When a company is engaged in two or more business activities, the Act directs ACC to apply the levy classification for whichever activity attracts the highest levy rate.

Classification 42590 – Construction Services (not elsewhere classified) specifically includes those providing lane or road marking services and is the highest rated applicable and most accurate classification.

The requested classification 96360 – Public Order and Safety Services (not elsewhere classified) is accurate for the company's traffic management services, but as this classification attracts a lower levy rate, it is excluded.

[6] ACC wrote again on 11 November 2020 advising Spray Marks of the ability to apply for multiple classification units under s 170(3) of the Act. ACC advised that if the company wished to pursue this option, it would need to provide further information including clarification of the company's structure, the activities of each division and the provision of accounting records demonstrating the separate management and operation of those activities.

[7] On 16 November 2020, Spray Marks responded confirming that the company operated the following business activities:

- a. Traffic management
- b. Road marking
- c. Road services
- d. Signal installs

[8] Spray Marks provided information relating to the specific activities carried out by each division and advised that:

- a. Staff are not shared between the divisions.
- b. There is no reliance or provision of goods and services between the divisions. Each division can operate solely on its own.
- c. Attaching profit and loss counts for each different division and the most recent October management report.

[9] On 2 December 2020, ACC issued its decision in which it advised that the Spray Marks' business activities did not satisfy the criteria to hold the multiple classification units. In particular, the decision letter advised:

In this instance, Spray Marks NZ Ltd has not satisfied Part 4a of the multiple classification criteria. Accounting records are not maintained to adequately demonstrate the separate management and operation of activities. Not all expenses relating to the activities have been attributed to the activities at source, this includes general overhead expenses and occupancy costs (i.e. ACC levies, accounting fees, cleaning, insurance, power, repair and maintenance – buildings), expenses that are essential for the operation of any stand alone business.

The rationale is confirmed on page 8 of ACC's Levy Rate Guidebook (attached for your reference) where it states:

- All income and expense items should be attributed to the activity at source (reallocation on a percentage or share basis is usually unsatisfactory).
- The accounting records must contain all relevant income and expenses, including overheads.

[10] ACC therefore confirmed the Spray Marks classification as CU42590 – Construction Services (not elsewhere classified).

[11] Spray Marks subsequently applied to review ACC's decision and for the review, it obtained a letter from its accountants Bellingham Wallace Accountancy dated 29 June 2011 which advised that:

- a. Spray Marks accounting records demonstrate the separate management and operation of each activity;
- b. All expenses are recorded directly against the department related to;
- c. Some expenses (namely: bank fees and financing lending costs) applied to both business activities and therefore cannot reasonably be allocated to a single department;

d. Those expenses are therefore allocated on a percentage/shared basis.

[12] In a decision dated 17 August 2021, the reviewer dismissed the application and upheld ACC's decision.

[13] The appellant subsequently filed a notice of appeal in respect of that decision.

[14] The appellant obtained a report dated 25 May 2022 from Lynda Smart, Director of Rodgers Reidy, a forensic chartered accountancy firm. In preparing the report, Mrs Smart had access to the appellant's Xero accounting and payroll system and thereby analysed the appellant's operations, accounting, and business records.

[15] On 2 September 2022, the respondent obtained a report in response by Ngarangi Bidois, Director and Accountant at He Kakano Iti Ltd.

[16] The reports identified that Spray Marks operates four separate business activities, traffic management, road marking, road services and sign installs – which separates into two divisions:

- a. Traffic management; and
- b. Road services

[17] The expert reports focus on the appellant's management and operation and accounting records as they pertain to each activity.

[18] Ms Smart's report includes the following:

#### Stock system

34 The financial records of the company indicate that the company retains separate stock records for its road marking, signage and traffic management divisions. A physical stock take is undertaken on a monthly basis and results of this are entered into the accounting system by way of monthly journal. The physical stock take records from the road marking division are uploaded into the Xero system and were available for review. This division accounts for the majority of stock held with other divisions holding very limited stock supplies.

#### Revenue and workflow

35 Revenue is recorded against the appropriate division at the time the invoice is raised. For the month of February 2022, 70% of the revenue was attributable to traffic

control, 25% to Road Marking and the remaining 5% split between signs and road services.

36 My analysis has indicated that all invoicing is undertaken as part of a central finance function, with the same Xero login being utilised to prepare invoices for all divisions.

37 Within the sales revenue of the company are a mix of invoices which are prepared solely for a specific division to a particular customer, and other invoices where the customer is invoiced for services across different divisions. In each instance, the revenue attributable to each division is easily identifiable...

...

39 I am advised that each division raises a work order number for any job that it has quoted and that the division's staff then code their timesheets to the job via an online system "Workflow". ...

40 Each division manager, manages their own staff, plant and vehicle fleet in delivering the contracted services to their customers. It has been correctly recognised by fairway and ACC that the services being provided are somewhat complimentary. Both road marking and traffic management may each be contracted to work on the same road project for instance. I am advised by the Director that with only one minor exception (a contract more than ten years old originally just for road marking) in each instance this would be under two separate contractual arrangements.

....

#### Expenses

43 All direct costs relating to each division are recognised and coded at the time of acquisition. This includes permanent staff who are allocated to each division within the payroll system and temporary/contract staff whose invoices are coded to the appropriate division upon receipt.

...

46 Staff related costs are coded against the appropriate division to which the staff member is employed. Such expenses include travel and accommodation, staff training costs, ACC levies and protective clothing.

...

48 I understand that Spray Marks currently leases two sites, across the road from one another, each with separate landlords. In an attempt to address the concerns raised by ACC with regard to the need to attribute costs at source, the company has allocated one lease and associated occupancy costs (power, rates, insurance) to one division, and the other lease to the other division. It is my understanding from my discussions with the company director however that this does not truly reflect how the sites are utilised; Office space is used to house both road marking and traffic management staff and the other is used to store vehicles from both divisions. Previously, the company had allocated occupancy costs on a percentage basis by way of journal between the two divisions. Both myself and the company director agree that this would provide a more accurate allocation of these costs.

...

53 Individual invoices for overhead items such as cleaning costs, computer expenses, office expenses, stationery etc appeared to have been coded to the appropriate division at source. I understand that these are recognised at the time of the order by the use of job codes allocated to each division.

[19] The report goes on to note that each months' expenses in relation to insurance costs is allocated to the appropriate division with Ms Smart being advised that this was based on the division of assets that are included in the insurance policy. And:

55 Bank fees, loan interest, interest paid to the shareholder and shareholder salaries, are all split in a proportion of 58% to traffic management and 42% to road marking at the time of payment. I am advised that this is an allocation that is deemed appropriate by the company director and have not attempted to further analyse how this split arose. I believe that it would be particularly difficult for any organisation, with multiple divisions, to allocate these treasury expenses at source. Ultimately, it is legal entity, Spray Marks Ltd that would be legally liable for any borrowing and loans (except those related to specific assets) and it would therefore be unusual for these to be allocated against particular divisions.

#### Payroll

56 The company utilises the payroll facility with Xero which allows the employees to be allocated to employee groups used represent the division that they work for.

...

#### Assets

63 Assets are purchased to be utilised within a specific division and are identified as such at the time that they are entered into the fixed register. Expenses related to those specific assets are then able to be allocated, in turn, to the appropriate division.

#### Liabilities

64 All liabilities are recognised at company level and are not specific to a certain division. I believe that it would be appropriate that the tracing on such items would be at a corporate rather than a divisional level.

[20] Ms Smart concluded her report as follows:

71 Within the more detailed criteria provided, I consider the only areas where issues might arise (from the guidelines) are as follows:

*-All income and expense items should be attributed to the activity at source (reallocation on a percentage or share basis is usually unsatisfactory). As discussed above there are some expenses items which are not attributed at source. The use of the word "all" within the guidance makes it difficult for me to consider any entity being able to meet this criteria given that a single corporate entity should always have certain obligations which would set above a divisional level. The further guidance within the guidebook with respect to*

payroll activities in particular envisages some sharing of resources noting a de minimis rule for staff who work less than 5% across divisions.

*-Separate activities cannot exist if all staff are shared.* As noted it appears that the Guidebook envisaged some sharing of staff between divisions. For Spray Marks this was only a small number of staff (6 of a total of 80), which in accordance with the guidebook should be accounted for at the higher levy rate for road marking. I believe that there are some improvements that the company could make as to how it allocates these shared staff costs between the two divisions but do not consider that this prevents the overall requirement having been met.

[72] The alternative option for the company to explore if its application remains unsuccessful would be the formation of a separate company to operate the road marking division. That entity could then employ all road marking staff directly and could be invoiced by Spray Marks for any of the expense items that have been identified as not being allocated at source (e.g. occupancy costs and certain staff costs).

[21] On 2 September 2022, Ms Bidoris of He Kakano Iti Ltd provided ACC with a commentary on Ms Smart's report.

[22] Ms Bidois said that she agreed with much of what Ms Smart had to say but there were areas of disagreement.

[23] She also noted that she had not had the same opportunity to examine the source records of the business nor speak to the staff. She acknowledged however that there was nothing that would indicate that the company's operations have not be described accurately by Ms Smart.

[24] In her opinion, the statement that the company was able to prepare and analyse divisional reports on a monthly basis, was only partially correct as Ms Smart's report did not include a separate balance sheet for each of the divisions.

[25] She disagreed with the statement that "it would be particularly difficult for any organisation with multiple divisions to allocate treasury expenses at source". She noted that many organisations that she worked for or had been involved with do allocate treasury expenses at source.

[26] She referred to page 8 of the ACC Levy Guidebook that for multiple classification units to be assigned "the accounting records must demonstrate separate management and

operation of each activity... a good practical test is whether the accounting records would establish a value for the activity, if it were sold.”

[27] Mr Bidois said:

In my opinion, without a separate balance sheet for each of the divisions, this would be very difficult to do. An indicative value of an unlisted business can be quickly established by knowing its assets, liabilities and equity. If a division of their business is to be sold, the assets and liabilities of that segment would need to be identified and separated from the other activities of the business. The way Spray Marks’ accounting records are currently kept does not provide that information. This is evident from the management reports which don’t identify borrowings, cashflows, debtors or creditors for each division but only at corporate level.

[28] Under the heading “Conclusion”, Ms Bidois said:

...

I believe that Ms Smart’s opinions are generally correct for smaller businesses, however, for larger businesses, the opposite is true and these business units and their activities are usually well separated not just with management and finance functions but often computer software and IT systems can also be quite different.

Therefore, it seems apparent to me that any small to medium sized business would have difficulty meeting the criteria set out in the ACC Levy Guidebook as the cost and complexity of maintaining an accounting system and records at the level required would be too onerous. However, larger businesses are more likely to be able to meet the requirements.

[29] On 8 November 2022, ACC’s Commercial Advisor, Aaron Robertson provided a memorandum to Mr Hlavac referring to the requirement in the ACC Levy Guidebook that “all income and expense items should be attributed to the activity at source”.

[30] He also said:

As noted earlier, larger businesses or those located on separate sites are more likely to meet ACC’s accounting records operational policy, including attributing all income and costs at source.

This is reflected in ACC’s data, where approximately 800 ACC employers have been approved to have multiple classification units, with a median liable payroll of \$6.5 million each.

[31] Ms Smart provided a second report on 27 January 2023.



[32] She said:

[4] Ms Bidois' view as expressed within the first paragraph of page 3 of her report is that Spray Marks' divisional monthly reporting does not fully demonstrate the separation of management and operation of each activity as a separate balance sheet is not prepared for each of the divisions. I agree that separate balance sheets aren't prepared, however assets utilised in each activity are tracked so that costs associated with them (depreciation etc) are likely to be allocated to each division.

[33] Ms Smart also said:

[18] I disagree that it would be difficult to ascertain a value of the activity in the absence of a balance sheet. I also disagree with the assertion that "an indicative value of an unlisted business can be quickly established by knowing its assets, liabilities, and equity. I am regularly engaged to complete business evaluations for listed companies, often in the context of relationship property disputes. There are number of different valuation methods which can be utilised for conducting a valuation of a business or company. ...

[34] Ms Bidois provided brief comment on 2 March 2023 saying that she continued to hold the view "that the business operations of Spray Marks do not meet the test for separation for the reasons outlined in my previous letter."

[35] Also produced to the Court was the ACC Levy Guidebook which provides guidelines for multiple classification units to be assigned. It includes the requirement that "all income and expense items should be attributed to the activity at source (reallocation on a percentage or share basis is usually unsatisfactory)".

### **Appellant's submissions**

[36] Ms Jirkowsky told the Court that the appellant relies on the analysis of Ms Smart and she highlighted the paragraphs of Ms Smart's report referred to in the background section of this judgment. In particular:

- Separate stock records for each division
- Revenue being recorded against the appropriate division at the time an invoice is raised.
- The fact that there are a mix of invoices prepared solely for a specific division to a particular customer and other invoices where the customer is invoiced for services across different divisions.
- The fact that each division manager manages their own staff, plant and vehicle fleet and delivering contracted services to customer.

- All direct costs relating to each division are recognised and coded at the time of acquisition.
- The staff related costs are coded to the appropriate division
- Individual invoices for overhead items are coded to the appropriate division at source. Insurance costs are allocated to the appropriate division.
- Bank fees, loan interest, interest paid to the shareholder, and shareholder salaries are all split in a proportion of 58% to traffic management and 42% to road marking at the time of payment.
- Assets purchased to be utilised within a specific division are identified and entered onto the fixed asset register.

[37] She does acknowledge however that some expense items are not attributed at source.

[38] She acknowledges that separate balance sheets are not prepared, however, assets utilised activity attracts costs associated with them are able to be allocated to each division.

[39] She submits that separate balance sheets are not necessary for the purposes of s 170(3) of the Accident Compensation Act 2001 (the 2001 Act).

[40] She also submits that a shared lease does not mean the lack of a separate management and operation.

[41] She refers to the case of *Accident Rehabilitation and Compensation Insurance Corporation v C Lund & Son Limited*,<sup>1</sup> a judgment of Judge Beattie. In finding in favour of the appellant, Judge Beattie said:

Each division has its own separate personnel and the abilities and tasks of those groups of employees are quite separate and not practically interchangeable. Each undertaking operates from different premises as its headquarters, and the only time they are together would be where the building and construction division is engaged as one of the subcontracting parties on a construction project being administered by the main contracting administration division. Each division can and does operate separately and independently without the need of the support or assistance of the other. This I find is a key factor in establishing that they are more than just parts of one undertaking.

[42] Ms Jirkowsky submits that s 170(3) does not require a separate balance sheet for each division and she submits that ACC's approach would allow for only very large businesses to be able to qualify for multiple classifications.

## **Respondent's submissions**

[43] Mr Hlavac submits that the accounting evidence before the Court does not provide a complete answer. Ultimately the issue is a legal one.

[44] He says the starting point is s 170(2) where the employer is engaged in two or more activities. In that case, the legislation is clear that the Corporation must classify all the employees in the classification unit for which of those activities attracts the highest levy rate under the regulations.

[45] He says that where employees are potentially exposed to risks of more than one activity, they are classified to the most risky activity. Here, he says the “road marking activity” is a higher risk activity than traffic management.

[46] He notes that under the s 170(3), ACC has its discretion to classify the employer employees separate classification units for different activities but specific and strict requirements have to be satisfied.

[47] He refers to s 170(3)(d) that requires accounting records to be 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.

[48] He says therefore that s 170(3) gives ACC a discretion where two or more activities are involved and the principles to be applied to the exercise of a statutory discretion are therefore engaged.

[49] He refers to *May v May*.<sup>2</sup> He also refers to the Supreme Court decision in *Kacem v Bashir* which refers to *May v May*.<sup>3</sup>

---

<sup>1</sup> *Accident Rehabilitation and Compensation Insurance Corporation v C Lund & Son Ltd*, [1998] NZACC 84 (30 April 1998)

<sup>2</sup> *May v May* (1982) 1 NZFLR 165.

<sup>3</sup> *Kacem v Bashir* [2011] 2 NZLR 1.

[50] In *Kacem v Bashir*, the Supreme Court said:<sup>4</sup>

...A general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.

[51] Mr Hlavac notes that the 2001 Act contains numerous provisions which require the exercise of a statutory discretion.

[52] Section 170(3) is one such example where Parliament leaves it to ACC to properly exercise that discretion.

[53] He therefore submits that ultimately Ms Smart's opinion is not relevant in that it is what ACC thinks and does and whether or not in so doing ACC is wrong according to the established legal principles relating to the exercise of a discretion.

[54] He says it was for this reason that ACC developed the ACC Levy Guidebook.

[55] He refers to page 8 of the Guidebook where the guidelines for multiple classification units are set out and he notes that the Guidebook says that accounting records must demonstrate the separate management and operation of each activity including that all incoming expense items should be attributed to the activity at source (reallocation on a percentage or share basis being usually unsatisfactory).

[56] He acknowledges that in this regard, employers have modified the way they do business to bring themselves within the guidelines.

[57] He says ultimately that in the present case more separation is needed between the activities of Spray Marks Ltd to bring it within the guidelines.

[58] He refers to ACC's memorandum of 8 November 2022. He notes that the memorandum says:

Integration between activities and accounts, may indicate integration physically between employees onsite, leading to shared risk exposure for employees engaged in

---

<sup>4</sup> Ibid at [32].

different activities. Larger businesses or those located on separate sites are more likely to meet the accounting records operational policy, including attributing all income and costs at source.

[59] The memorandum goes on at paragraph 4.1:

... “all income and expense items should be attributed to the activity at source” is consistent with the other policy criteria contained in the ACC Levy Guidebook, such as a requirement for “accounts to mirror the organisational structure” and that “a good practical test is whether the accounting records would establish a value for the activity if it were sold”. Meeting each part of the policy further illustrates activities independence and is aligned with the Act’s requirement of accounting records that demonstrate the separate management and operation of each activity.

[60] That memorandum concludes at paragraph 5.3:

As noted earlier, larger businesses or those located on separate sites are more likely to meet ACC’s accounting records operational policy, including attributing all income and costs at source. This is reflected in ACC’s data, where approximately 800 ACC employers have been approved to have MCUs (multiple classification units), with a median liable payroll of \$6.5 M each.

[61] Mr Hlavac accordingly submits that ACC has not taken into account irrelevant matters; that it has taken into account relevant matters; and its decision is not plainly wrong.

[62] In this case, there are profit and loss statements between the divisions of the company but there are no balance sheets for each division. The profit and loss statements do not include the assets and liabilities of each division.

[63] Here there is a shared lease and not only are costs not allocated at source but both divisions share the same office space and the use of the yard containing the equipment.

[64] He says that the underlying rationale of ss 2 is to assess the risks to the staff from more than one activity.

[65] Looking at the divisional profit and loss revenue breakdown for October 2020 included in the bundle at page 9 from Spray Marks Ltd, there are a range of items that are not “allocated at source” including accountancy fees cleaning, insurance, light heat and power, office expenses, professional fees, repairs and maintenance – buildings, and the rental of the office yard.

[66] Mr Hlavac says the fact of their shared premises means that the requirements of s 170(3)(c) probably cannot be satisfied, that is to say that services or products to external customers are provided in such a way that each activity could, without adaptation, continue on its own without the other activity.

[67] He notes that both of the accounting experts agree that Spray Marks could split and allocate treasury costs but have not done so.

[68] Mr Hlavac says that the criteria set out in the s 170(3) cannot be read to mean that Parliament intended to penalise small businesses who could not meet the criteria. He says that in applying s 170, it is relevant to note that self-employed persons are specifically included. It follows that in their cases the same separation criteria must be applied if two or more activities are engaged.

[69] Mr Hlavac refers to s 171 dealing with classification of self-employed persons and employees engaged in two or more activities.

[70] Section 171 simply recites that where self-employed person is engaged in two or more activities, that person must be classified in the industry or risk class for whichever of those activities attracts the highest levy rate under the regulations.

[71] Mr Hlavac points out there is no equivalent to s 170(3) in respect of self-employed person so if s 170(3) were not applied as parliament intended with a policy included attributing all income and costs at source, ACC would be holding larger businesses to a different standard from those applying to self-employed persons.

[72] Dealing with *Lund*, Mr Hlavac points out that the 1992 Act did not have equivalent of s 170(d) which in effect provides a discretion to the Corporation by saying that accounting records are maintained by the employer to the satisfaction of the Corporation that demonstrate the separate management and operation of each activity and allocate to each activity the earnings of employees engaged solely in that activity.

[73] Mr Hlavac also points out that when *Lund* was decided there was no ACC Levy Guidebook.

[74] Mr Hlavac concludes his submissions by saying that ACC has applied the Guidebook for over 20 years and in this case has decided that the accounting used by the appellant did not establish separate activity and the costs were not apportioned at source.

[75] He submits that in this case there is nothing in ACC's decision-making process that was wrong when applying the tests set out in *May v May* and *Kacem v Bashir*.

### **Appellant's reply**

[76] In reply, Ms Jirkowsky acknowledges that the Court here is dealing with the exercise of a discretion and the tests set out in *May v May* apply. However she submits that the respondent's decision is clearly wrong and does not comply with the Act.

### **Decision**

[77] This is an appeal against ACC's decision of 2 December 2020 determining that the appellant's business activities did not satisfy the criteria to hold multiple classification units and upholding the single classification unit CU42590 (Construction Services not elsewhere classified). As of the time of ACC's decision in December 2020, the appellant confirmed that it operated the following business activities:

- a traffic management
- b road marking
- c road services
- d sign installs

[78] Ms Jirkowsky told the Court that the classification unit that applies to road marking results in an ACC levy of 2.03 cents per 100 dollars whereas the remaining activities would result in an ACC levy of 0.19 cents per 100 dollars.

[79] It is common ground that s 170(3) invests the Corporation with a discretion to 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.

[80] It is common ground that in this regard, ACC is exercising a discretion and decided cases including *May v May* and *Kacem v Bashir* to make it clear that the exercise of the discretion can only be challenged and set aside by the Court where it is established that ACC has:

- a. Made an error of law;
- b. Failed to take into account some relevant matter;
- c. Taken into account a irrelevant matter;
- d. Made a decision which is plainly wrong.

[81] Mr Hlavac notes that prior to the 2001 Act, the legislative requirements relating to levy classification were contained in relevant regulations issued under earlier Accident Compensation Acts.

[82] He notes that Regulation 6 of the Accident Rehabilitation and Compensation Insurance (Employment Premiums) Regulations 1995, while recognising that the regulations were designed to discourage rather than encourage multiple classifications, nevertheless provided for multiple classification:

...

Where an employer is engaged in two or more distinct and independent activity; and

- a. Maintains accounting records which demonstrate the separate management and operation of each activity; and



- b. Maintains records which clearly and accurately separate to each activity the earnings of employees engaged solely in that activity...

[83] To assist in applying those regulations, ACC developed the Employer Premium Rates Guidebook as an operational policy in 1995.

[84] The Guidebook provided that:

Separate accounting records including trading accounts, profit and loss accounts and costing records which demonstrate the management and operation of the separate classification unit. This requires more than keeping separate bank accounts. Separate accounting records must demonstrate that the business could operate on its own as a stand alone entity.

[85] The requirement for separate accounting records was followed through into the 2001 Act where s 170(3)(d) requires that:

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.

[86] These guidelines, as Mr Hlavac submits, have been carried through substantially unchanged and are now contain within the ACC Levy Guidebook.

[87] The ACC Levy Guidebook provides that all income and expense items should be attributed to the activity at source, and that reallocation on a percentage or share basis is usually unsatisfactory.

[88] In my view, such a requirement simply applies what s 170(3)(d) requires, namely:

Accounting records...maintain 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.

[89] It is acknowledged in this case that the appellant does not allocate expenses at source for its various activities. Ms Smart on behalf of the appellant says that it would be

particularly difficult for any organisation with multiple divisions to allocate treasury expenses at source. ACC's management accounting adviser disagrees, saying that many organisations that she has worked or been involved with do allocate treasury expenses at source.

[90] Ms Bidois goes on to say:

I believe that Ms Smart's opinions are generally correct for smaller businesses however for larger businesses, the opposite is true and these business units and their activities are usually well separated not just with management and financial functions but often computer software and IT systems can be quite different.

[91] Ms Bidois goes on:

Therefore, it seems apparent to me that any small to medium size business would have difficulty meeting the criteria set out in the ACC Levy Guidebook as the cost and complexity of maintaining an accounting system and records at the level required would be too onerous. However, larger businesses are more likely to be able to meet the requirements.

[92] Given that the Accident Compensation Corporation provides cover to all citizens whether self-employed or working for small company or large company. Section 3 of the 2001 Act provides that its purpose is to enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing a fair and sustainable scheme for managing personal injury. Understandably therefore, ACC will be slow to make decisions relating to the application of the Act that may be perceived as eroding the fairness of the system by applying an interpretation of s 170(3) that could be seen as slanting the fairness principle by willingness to consider an "advantage" to large businesses that could not be enjoyed, or as readily enjoyed, by small ones.

[93] In other words, where a company has, as here, four activities, if it is able to satisfy the criteria of s 170(3), it is rewarded with some of its activities attracting a lower ACC levy,- a reward not available to a self-employed person, as s 171 makes clear. In my view that calls for a strict interpretation of s170(3) to ensure that any perceived unfair difference in treatment in terms of levies between the self employed and multi activity companies is minimised.

[94] Each case obviously turns on its own facts and in *Accident Rehabilitation and Compensation Insurance Corporation v Lund*, referred by Ms Jirkowsky, Judge Beattie said:

Each division at its own separate personnel and the abilities and tasks of those groups of employees are quite separate and not practically interchangeable. Each undertaking

operates from different premises as the headquarters, and the only they are together would be where the building and construction division is engaged as one of the subcontracting parties on a construction project being administered by the main contracting administration division. Each division can and does operate separately and independently without the need of the support or assistance of the other. This I find is a key factor in establishing that they are more than just parts of one undertaking.

[95] I note in that case Judge Beattie said:

Although accounts for taxation purposes were not prepared separately or do not identify the different divisions, the company does prepare management accounts for various purposes and these are separate internal accounts for management reporting purposes.

[96] The 1995 Regulations that were applicable to that case contained wording very similar to that in s 170(3), however, I find I am unable to apply the *Lund* decision in this case as I do not believe, for the reasons set out in paragraphs [92] and [93] above, the Judge has properly acknowledged and taken account of the need to ensure that the fairness of the system. In my view regard always requires to be had to treating self-employed person, small businesses and large businesses in a manner that does not advantage one over the other any more than the Act as properly interpreted allows.

[97] In short, I conclude that for s 170(3) to be applied to a company like the appellant, then not only must the further activity or activities be distinct and independent and as s 170(3)(c) provide – namely providing services or products to external customers in such a way that each activity could without adaption continue on its own without the other activity, but also that expenses of the independent activities be allocated at source with profit and loss accounts and balance sheets.

[98] The fact that divisions of the appellant shared the same premises, while not decisive, prima facie makes task of the appellant to establish a further distinct an independent activity, more difficult.

[99] It follows therefore that I find that ACC, in determining on 2 December 2020 that the appellant's business activities did not satisfy the criteria to hold multiple classification units, correctly exercised its discretion under s 170(3).

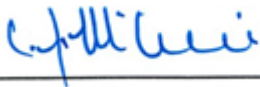
[100] In determining that the appellant's business activities did not satisfy the criteria to uphold multiple classification units, and therefore upholding the single classification unit of

CU42590 – Construction Services (not elsewhere classified), ACC correctly exercised the discretion that the Act had given it and in so doing:

- a. It did not make an error of law;
- b. It did not fail to take into account some relevant matter;
- c. It did not take into account an irrelevant matter;
- d. It did not make a decision which is plainly wrong.

[101] Accordingly, ACC’s decision of 2 December 2020 upholding the single classification unit of CU42590 – Construction Services (not elsewhere classified) stands, and the appeal against that decision is dismissed.

[102] Costs are reserved.



---

CJ McGuire  
District Court Judge

Solicitors: Anthony Harper, Auckland  
Young Hunter, Christchurch