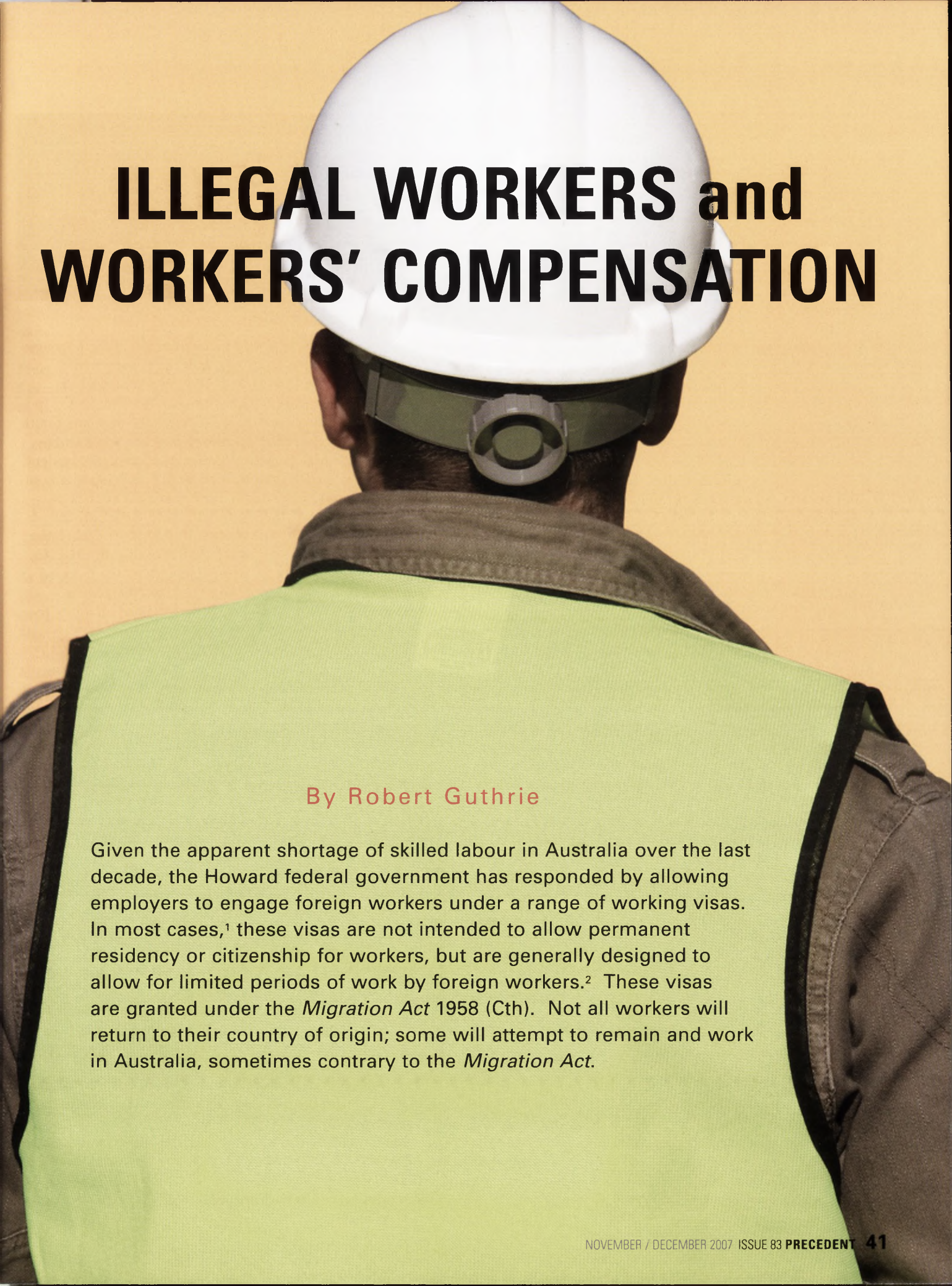

ILLEGAL WORKERS and WORKERS' COMPENSATION

By Robert Guthrie

Given the apparent shortage of skilled labour in Australia over the last decade, the Howard federal government has responded by allowing employers to engage foreign workers under a range of working visas. In most cases,[1] these visas are not intended to allow permanent residency or citizenship for workers, but are generally designed to allow for limited periods of work by foreign workers.[2] These visas are granted under the *Migration Act* 1958 (Cth). Not all workers will return to their country of origin; some will attempt to remain and work in Australia, sometimes contrary to the *Migration Act*.

Foreign workers may also enter Australia legally with a working holiday visa, which allows a stay of up to 12 months from the date of first entry to Australia, regardless of whether or not the person spends the whole time in Australia. Working holiday visa-holders are allowed to do any kind of work of a temporary or casual nature, but cannot work for more than three months with any one employer. Working holiday visa-holders must leave the country when the visa expires after 12 months. These visas can be issued only once in a lifetime. It is possible to apply for a change of visa status to obtain a tourist visitor visa; this allows a person to remain in Australia for up to six more months but not to work. Considerable numbers of visitors to Australia overstay their visas, work beyond the time allowed under the requirements, or work contrary to the visa. In each case, the person may be in breach of various provisions of the *Migration Act*.

Foreign workers may also work illegally by working contrary to various skilled worker visas. The question as to whether this in some way invalidates the work arrangements or disentitles the worker to protection under Australia's employment laws must start with the common law contract of employment.

ILLEGALITY AND THE CONTRACT OF EMPLOYMENT

The common law requires a contract, including a contract of employment, to be for a legal purpose and be performed in compliance with the law. A contract may be unenforceable if it is drawn up for an illegal purpose or in an illegal manner, or if the contract is prohibited by statute,[3] whether expressly or impliedly. Illegal contracts are those prohibited by law, and those which are unenforceable at common law because their object, performance or underlying purpose is socially undesirable.[4] In the latter case, the contract is said to be void as 'offending public policy'.[5] Illegality may arise from either statute law,[6] where it is established that a contravention of a statute has occurred,[7] or at common law where the courts consider that the terms of the contract offend public policy.[8] Parliament may prohibit particular arrangements, making them illegal, or may declare that if such arrangements occur they are unenforceable. The issue of whether a statutory restriction renders the contract unenforceable is ultimately a matter of determining the intention of the legislature and ascertaining whether a declaration of statutory prohibition would further the objects of the statute.[9] This is particularly important in the case of visa holders who may be contravening the *Migration Act*.

VISA-HOLDERS AND WORKERS' COMPENSATION

A valid contract of employment is a basic requirement for any claim for workers' compensation. The law requires that for a contract to be valid it must, among others things, be for a valid purpose. Therefore, in relation to a person who holds a tourist or working holiday visa, the question arises – can they claim workers' compensation if they are working contrary to those visa requirements?

Does contravention of the *Migration Act* by tourists and visa-holders working illegally render their contracts of employment illegal?

A group of cases relates to the application of the *Migration Act* to compensation laws. The first such case covered an application for compensation by a worker under the *Workers' Rehabilitation and Compensation Act* 1986 (SA). In *WorkCover Corporation v Liang Da Ping*,[10] the Supreme Court of South Australia noted that the respondent was a citizen of China. He had entered Australia on a temporary student visa and commenced employment with San Remo Macaroni Co Pty Ltd on 12 June 1990. He worked 40 hours per week, although his visa permitted him to work only 20 hours per week. The visa expired in July 1990. Thereafter, he was an illegal entrant under s14 (2) of the *Migration Act*. He continued to work for San Remo without the required official permission. On or about 12 May 1992, when performing duties for San Remo, he sustained an injury to his right hand.

> Section 83(2) of the *Migration Act* provides:
> 'Where a person who is an illegal entrant performs any work in Australia without permission, in writing, of the Secretary of the Department of Immigration the person commits an offence…'

The Court found, on the basis of s83(2), that any contract entered into by an illegal entrant was illegal and therefore void. If the agreement was void, the applicant could not be a *worker*, as no contract existed.[11] The Court noted that, in order to claim compensation, the applicant had to establish an enforceable contract of employment to satisfy the requirement that he be a *worker*.

However, in a later decision on almost identical facts, the NSW Court of Appeal held in *Non-Ferral (NSW) Pty Ltd v Taufia*[12] that an applicant was entitled to workers' compensation even though he was an illegal entrant at the time that he became disabled. In *Taufia*, it was held that the contract of employment was not illegal; the court being satisfied that the purpose of s83(2) of the *Migration Act* was to impose a penalty for non-compliance, but not to make any contract of employment void. The penalty is a maximum $5,000 fine. It was observed that a failure to allow compensation would be disproportionate to the seriousness of the unlawful conduct. Rendering the contract of employment illegal would not further the objects of the *Migration Act*.

Taufia sits more comfortably with the High Court decision in *Fitzgerald v FJ Leonhardt Pty Ltd*[13] and the earlier decision of the High Court of *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd & Ors*.[14] These two cases essentially decided

that the question of illegality by reason of a statutory prohibition was a matter of statutory interpretation. *Yango*, referred to in *Fitzgerald*, was important because Gibbs ACJ and Mason J determined that statutes that impliedly or expressly prohibited contracts (such as the *Migration Act*) led only to a *prima facie* conclusion that the contract was illegal, void or unenforceable. It was open for the court to examine the statute more closely to ascertain a contrary legislative intention.[15] This was precisely what occurred in *Taufia*, when the court considered that the intention of the relevant provisions of the *Migration Act* was to impose a penalty rather than to make the contract of employment void.

In *Viliami v National Springs, A Division of Hendersons Federal Springworks Pty Ltd*,[16] which predates *Da Ping*, Burke J presiding in the NSW Compensation Court noted the facts of the case:

> '[T]he applicant had one big problem. He had come to Australia on a visitor's visa and, after injury, while performing this light work, the Department of Immigration appeared at the employer's premises and pointed out that the provisions of the *Migration Act 1958* (Cth), particularly section 83, precluded a person on a visitor's visa from working in Australia. Mr Mau's employment was thereby terminated.'

As in *Taufia*, Burke J found that there was nothing illegal about the objects of a contract for unskilled labouring work entered into by a worker who was in breach of s83 of the *Migration Act*.

The differences between compensation legislation in South Australia and NSW do not explain the different outcomes in the above compensation cases.[17] The issues were identical; namely, whether the *Migration Act* rendered the contract of employment in each case illegal. The High Court's recent decisions suggest that mere breach of a statute does not lead to an illegal contract. The disparity in authorities between South Australia and NSW was apparently reconciled in the South Australian decision of Olsson AJ in *Riley v WorkCover/ Alliance Australia (Robinvale Transport Group (SA) Pty Ltd)*.[18] Although the case is not about an illegal worker, it does clarify the rights of a worker where illegality is involved. A workers' compensation insurer argued that the applicant, a long-distance heavy vehicle driver, was not entitled to compensation because at the time of suffering a disability he had been disqualified from holding a driver's licence due to non-payment of certain fines. It was argued that the disqualification made the contract of employment invalid. The disqualification occurred under the *Criminal Law (Sentencing) Act* 1988 (SA).[19] Olsson AJ referred to the above authorities in detail. The decision of *Da Ping* was of considerable significance, having been decided by a superior court in the South Australian jurisdiction. Although the driver of the vehicle was suspended at the time of his accident, his contract of employment was not rendered illegal; as in the immigration cases referred to above, the *Criminal Law (Sentencing) Act* 1988 (SA) should be interpreted so as to impose a penalty only, rather than to destroy the employment relationship.

The decision in *Riley* follows the line of reasoning in the High Court and in NSW. Any similar arguments in other jurisdictions would be likely to have similar outcomes. The matter might have been put beyond doubt, when Mullins J of the Queensland Supreme Court held, in *Australia Meat Holdings Pty Ltd v Kazi*,[20] that the respondent, who was an unlawful non-citizen within the meaning of s14 of the *Migration Act*, was a *worker* within the meaning of the *WorkCover Queensland Act* 1996 (Qld) when he injured his knee in the course of his employment. Mullins J observed the following facts (at paras 3 and 4):

> 'Between December 1996 and January 2002 the respondent did not hold a valid visa to reside in Australia. He was therefore an unlawful non-citizen within the meaning of s14 of the *Migration Act* 1958 (Cth) during this period. The applicant was granted a bridging visa on 9 January 2002 which did not permit the respondent to work in Australia. That visa was cancelled on 1 October 2002, as a result of the respondent working in Australia. The respondent departed Australia on 30 October 2002. The question which therefore arose for determination on this application was whether the respondent who was an unlawful non-citizen at the time of sustaining the injury at work was a "worker" within the meaning of s 12 of the WQA.'

In *Kazi*, (at first instance) the issues were much the same as were before the courts in *Da Ping, Taufia and Viliami*. Mullins J noted that nothing in the *Migration Act* expressly made the contract of employment of a non-citizen illegal and, therefore, it was a matter of statutory interpretation to determine whether any such term could be implied in the Act. On this point, Mullins J followed the process outlined in the majority decisions in *Taufia* and declined to follow *Da Ping*. Consistent with *Taufia*, Mullins J found there was no public policy reason for declaring the contract of employment to be void. On the contrary, Mullins J noted the respondent undertook work in the course of a normal employee-employer relationship. However, it is important to note that Mullins J was dealing with s235 of the *Migration Act* which, unlike s83 of that Act (discussed in *Da Ping, Taufia and Viliami*), did not allow for permission to work to be obtained from the Secretary of the Department of Social Security.

The employer in *Australia Meat Holdings Pty Ltd v Kazi*[21] took the matter on appeal to the full Court of the Supreme Court of Queensland. On appeal, the decision of Mullins J was overturned by a majority of Davies and Williams JA, with the president of the Court of Appeal, McMurdo J, dissenting. All three judges delivered reasons for their decision. The Full Court noted that the central issue was the construction of s235(3) of the *Migration Act*. Davies and Williams JA held that, on a proper construction of that section, a contract to perform work was invalid. Davies JA said (at paras 23-4):

> 'If it is in the national interest to prohibit unlawful non-citizens from performing work it must also be in that interest, it seems to me, to prohibit any such person obtaining rights under a contract to perform work. To do so would conduce to the object of the statute. I do not >>

think therefore that the Act intended that a penalty should be the only consequence of a breach of s235(3).

For the reasons which I have given, that a contract to perform work has as its whole object of doing the very act which the statute prohibits, and that validity of a contract by a non-citizen to perform work is within the object stated in s 4(1), I think that the contract is invalid.'

Williams JA agreed with Davies JA, but also specifically addressed some issues concerning whether it is appropriate for a court to take into account the consequences of holding a contract to be invalid due to illegality. Williams JA, after a review of the authorities, concluded (at para 44):

'None of those passages supports the proposition that the court may conclude that the statute does not impliedly make the contract illegal merely because there are consequences perceived to be unjust, unreasonable or inconvenient...In my view recognising this contract as enforceable would frustrate the primary object of the statute...'

McMurdo JA gave detailed reasons in dissent. He agreed that the central issue was the construction of the *Migration Act*, but emphasised the judgment of Stein JA in *Taufia*. He observed (at para 69) that Stein JA had said (at 319) 'the court should not find an implied prohibition in a statute if it would lead to an unjust, unreasonable, inconvenient or absurd result'. Stein JA had relied on statements to the effect in *Fitzgerald* (above). Clearly this is where McMurdo J and Williams JA part company. McMurdo J (at para 72) noted that to hold a contract of this kind to be invalid could have extensive consequences to persons whose rights depended on the contract having legal effect. This could also prejudice an employer or a third party. A putative employer might not be able to enforce various common law duties, such as good faith and fidelity, and a third party might not be able to rely on vicarious liability. Added to these matters are questions relating to the collection of workers' compensation insurance premiums, safety at work issues and underpayment of workers. The logic of *Australia Meat Holdings Pty Ltd v Kazi* if extended might mean a contract of service could never exist in the above circumstances. Ultimately McMurdo J held (at para 77) that:

'My conclusion that contracts requiring the performance of work, inevitably by some contravention of s235(3), are not impliedly void comes from the apprehended impact upon the rights of innocent parties assessed against the policy of the Act...'

Following the Court of Appeal's decision in *Australia Meat Holdings Pty Ltd v Kazi*, the terrain in relation to contracts for work engaged in by illegal non-citizens, or persons who are not the holders of appropriate visas, is much more uncertain. An appeal to the High Court on these issues may be needed to finally settle the matter.[22] If a tourist or a working visa-holder or skilled worker visa-holder works contrary to a visa requirement and suffers a work-related injury or disease, there may be some legal impediments to receiving workers' compensation on the grounds that the work was contrary to the *Migration Act*. However, in Western Australia and NSW, workers' compensation authorities can order the payment of workers' compensation, even if the contract of employment is illegal. The effect of the Court of Appeal decision in *Australia Meat Holdings Pty Ltd v Kazi* may be felt most in those states where the discretion does not apply.

DISCRETION TO PAY COMPENSATION WHERE THERE IS AN ILLEGAL CONTRACT OF EMPLOYMENT

Western Australia and NSW have legislated to allow compensation, in certain circumstances, to persons employed under apparently illegal contracts of employment,[23] giving compensation courts or tribunals discretion to treat these contracts as if they were legal.[24] Therefore, in these two states,[25] even if a contract is illegal and therefore void, the tribunal can still award compensation if it considers that there are grounds to exercise this discretion.

In *Erisir v Kellogg (Australia) Pty Ltd*,[26] Burke J outlined the genesis of the discretion provisions. He noted that a contract would historically be held to be *void ab initio* because it was illegal at the outset, because the terms and conditions of the employment were forbidden by statute. He also noted that even where the English courts, exercising jurisdiction under similar provisions of the English compensation legislation, were given discretion to treat an illegal contract as valid, the discretion might not have been exercised in the worker's favour if the worker had full knowledge that the contract was illegal and had actively sought the arrangement.[27] The early English workers' compensation cases suggest that the discretion was not exercised if there was an element of 'moral turpitude' on the part of the worker. Burke J referred to the Australian case of *Cluff v Finemores Transport Pty Ltd*,[28] in which a policeman had obtained additional employment contrary to the *Police Regulations Act* 1899 (NSW), and Jacobs JA had observed (at 357) that the fact that the *Act* proscribed the applicant from doing a particular activity, such as entering into another contract of employment, did not necessarily make that contract illegal. It was a proscription qua the worker's employment as a policeman and did not affect the other contract of employment, which was otherwise lawful.[29] In *Erisir*, the applicant was employed by the Department of Immigration as a welfare worker but also worked on a casual basis for Kelloggs. Burke J observed, 'The Commonwealth Public Service Act contains a proscription against public servants moonlighting, engaging in other employment, either concurrently or intermittently, or at any time.'[30] The contract of employment with Kelloggs was not, according to Burke J, illegal, and consequently there was no need to exercise the statutory discretion.

In *Viliami*, Burke J also observed, 'surprising, but I do not think there is one case (in Australia) where the discretion has ever failed to be exercised in favour of a worker'. In *Taufia*, Sheppard AJA (at 336) listed various matters that might be taken into account in exercising the discretion. Consideration should be given to fact that the legislators, in allowing discretion, permitted the question of illegality to be overlooked; whether the worker disadvantaged any person by undertaking the employment; whether the work itself was illegal; and whether the employer was aware of the worker's breach of statute or law. In most workers' compensation cases involving visa-holders or illegal entrants, the employer would be well aware of the breach of immigration laws and willingly enters into the contract, usually on the basis that the worker take a reduced wage. The contract does not directly disadvantage other persons, save those who might argue that they have missed a job opportunity because it has been taken by someone working contrary to the law. In *Barac v Farnell*,[31] Beaumont J observed (at 207) that:

> 'It would be an unjust outcome, if by shooting the messenger as it were, those who conducted the business should be able to set up a defence that their own immoral purposes carried on for their profits may be relied upon to avoid liability to a worker performing routine duties when the worker is injured in the course of her duties. For the court to permit a claim for compensation to be defeated because of the immoral character of the activities of the employer's business would, in my view be entirely without merit. Put differently, such a defence is itself contrary to the public interest in ensuring that claims for workers' compensation are dealt with fairly and equitably.'

Barac's case involved a worker who was injured while working in a brothel as cleaner and clerk but who did not supply sexual services. The question for the court was whether the contract of employment was void for illegality. The court held (as indicated above) that the contract should not be invalidated by any immoral purpose of the employer. It is clear that if the question of the statutory discretion was raised it is extremely likely that it will be exercised in favour of the worker.

ASSESSMENT OF COMPENSATION FOR INJURED VISA-HOLDERS

An interesting sequel arises in relation to the cases concerning tourist and working visa-holders and illegal non-citizens who have applied for workers' compensation; this is the question of the quantum of workers' compensation payable if the contract is not regarded as illegal. In *Viliami*, Burke J declined to award payments for loss of earnings on the basis that the worker was not entitled to work in Australia. He noted that, by reason of the *Migration Act*, the worker was not entitled to work and therefore could not earn any wages. In considering whether the worker was entitled to compensation for loss of earnings Burke J held that:

> 'The man really has not lost anything because he is >>

precluded from earning anything in any event injured or uninjured. For those reasons, I do not think he is entitled to a weekly payment.'

An award for permanent impairment was made, however, on the basis that this did not require a calculation that took into account earning capacity, but is based on the percentage loss of use of body part function. This approach was applied again by Burke J in *Taufia*, but was not followed by Armitage J in *Kaufusi v Supre Pty Ltd*,[32] who calculated the worker's loss of earnings as if he was working under a valid contract in Australia. The latter approach appears consistent with the finding that the contract of employment was not illegal.[33] The approach of Burke J, on its face, seems inconsistent, given that the contracts in each case were found to be legal. However, payment for incapacity is linked to the inability to work. The question is vexed, as in the case of illegal entrants, non-citizens and expired visa-holders, the inability to work is a consequence of the combination of statutory restrictions and the work injury. The statutory restrictions are relevant to the consideration.

While this article has not addressed the rights of illegal workers to seek common law damages, a brief comment is warranted. The impediments that apply to injured workers in relation to workers' compensation may not apply in relation to a claim for negligence. While the law recognises a duty of care as between employer and employer, the right to claim damages is based on relationships of duty of care generally recognised by the courts. Even if a worker has been working contrary to the *Migration Act*, there is almost certainly a duty of care owed to that worker not to do them harm. Thus, a worker injured through negligence may be denied the opportunity to bring a compensation claim, but may be able to sustain a claim for damages for negligence. Of course, the ability to proceed with such a claim may be hampered by the plaintiff's ability to remain in the jurisdiction and bear the costs of litigation, and at the end of the day the issue of the appropriate level of damages may be tricky business.

CONCLUSION

The question of the rights of illegal workers is increasingly pertinent, given the rise in the use of foreign workers as skilled labour in the Australian workforce. The current state of the law in relation to workers injured at work while working contrary to the *Migration Act* is that they should not be regarded as 'workers', and that they are unlikely to be able to claim workers' compensation unless they are covered by the Western Australian or NSW legislation, which provides a discretion for the dispute bodies to make an award. The line of cases in relation to that discretion suggests that the worker will be successful. Those workers not falling within the jurisdictions of Western Australia and NSW may nevertheless have rights at common law to damages for negligence. Ironically, given that they are not regarded as 'workers' within the meaning of the relevant legislation, they may avoid some of the limitations imposed within those jurisdictions that prevent or restrict claims at common law by employees/workers. ■

Notes: **1** The most common is the 457 visa. The exception is the Skilled – Independent Visa 136, which allows for permanent residency and ultimately citizenship. **2** Skilled – State/Territory Nominated Independent 137 and Skilled Independent Regional 495 Visas. **3** *Wilkinson v Osborne* (1915) 21 CLR 89 per Issacs J at 98. **4** *Holman v Johnson* (1775) 1 Cowp 341 at 343; 98 ER 1120 at 1121. **5** Public policy is not fixed and may vary according to the state and development of society and the conditions of life in a community. See Dixon J in *Stevens v Keogh* (1946) 72 CLR 1 at 28. **6** *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454 per Brennan and Dawson JJ at 462. **7** It is a pre-condition of the doctrine that a statute be breached. See, for example, *Cunningham v Cannon* (1983) 1 VR 641, which will be discussed in more detail below. **8** See, for example, *Fender v St John-Mildmay* (1938) AC 1, but note that Lord Aitkin in that case cautioned against the application of the principle too freely, urging that the doctrine should be invoked in clear cases where the harm to the public is incontestable (at 12). **9** *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 71 ALJR 653 and *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd & Ors* (1978) 139 CLR 410. **10** Unreported SC (SA) 30 March 1994. **11** Catanzariti predicted that, notwithstanding the result of *WorkCover Corporation v Liang Da Ping*, it was likely that unlawful non-citizens would continue to pursue compensation claims, given that they often have a poor grasp of English, limited resources and may need to hastily regularise their visa status. The results of the more recent cases have been more favourable to the applicants, suggesting that there are even more incentives for non-citizens to make claims. J Catanzariti, 'Workers compensation for an illegal worker?' (1998) 36 (1) February *Law Society Journal*, 30. **12** (1998) 43 NSWLR 312. **13** (1997) 71 ALJR 653. **14** (1978) 139 CLR 410. **15** Gibbs ACJ at 413 and Mason J at 423. **16** (1993) NSWCC 22. **17** Although the NSW legislation allows discretion to award compensation in the same manner as the Western Australian legislation, even if the contract is illegal. **18** [2002] SAWCT 79. **19** Sections 70E and 70F. **20** [2003] QSC 225. **21** [2004] QCA 147 (7 May 2004). **22** I am grateful to Graeme Orr, senior lecturer at Griffith University Queensland and solicitor in the *Kazi* matter, who advised that there will be no appeal to the High Court in this case. **23** This is the suggested origin as noted by the learned author of Mills, *Workers' Compensation New South Wales*, Butterworths, 1996, pp1961-3. **24** Section 84H of the *Workers' Compensation and Rehabilitation Act* 1981 (WA), formerly s128 of the Act. It would appear that these provisions were first introduced in Western Australia in 1981; the writer has been unable to find similar provisions in earlier Western Australian legislation. The inclusion of the provisions in 1981 does not appear to have been the subject of any specific debate at that time. **25** NSW has a similar provision to the Western Australian section but other states do not. **26** [1987] NSWCC 4. **27** *Hardcastle v Smithson* (1933) 26 BWCC 15. **28** [1972] 1 NSWLR 354. **29** It would appear that the appropriate remedy was not to imperil the contract under which the injury was suffered, but rather to take disciplinary proceeding in relation to the primary contract of employment under the Police Regulations. **30** [1987] NSWCC 4 (11 June 1987); (1987) NSWCCR 92. **31** (1994) 53 FCR 193. **32** (1999) 18 NSWCCR 607. **33** Of some interest is the decision of Latham J in *Henwood v Municipal Tramways Trust (SA)* (1938) 60 CLR 438, who observed (at 446) that 'a person who is engaged in some unlawful act is (not) disabled from complaining of injury done to him by other persons, either deliberately or accidentally...Other persons still owe him a duty of care...' It follows that if a duty of care exists despite some illegal act, damages would be assessed in the normal way, taking account of the plaintiff's loss of earning capacity.

Robert Guthrie *is Professor of Workers' Compensation and Workplace Laws at Curtin University, WA.*
PHONE *(08) 9266 7626* **EMAIL** *rob.guthrie@cbs.curtin.edu.au*

This paper first appeared in a more detailed form in the Curtin University of Technology School of Business Law, *Legal Issues in Business – The Tourism Industry*, Volume 6, 2004 as Guthrie R, 'Tourists Overstaying Their Welcome: When the Visa Runs Out and the Workers Stay On'.