CASE NOTE:

BYRNE AND FREW V. AUSTRALIAN AIRLINES LTD (1995) 69 ALJR 797.

by Jenny Campbell*

In a landmark decision, the Full Federal Court in *Gregory v. Philip Morris Ltd (Gregory)*[1] held that an award term prohibiting the harsh, unjust or unreasonable termination of employment formed part of the contract of employment. This decision opened the way for, *inter alia*, employees dismissed in breach of such an award term to obtain damages for breach of contract.

Prior to this decision compensation was limited to that required to return the dismissed employee to the position they would have occupied had the employment been terminated *lawfully* (ie by providing the requisite notice or equivalent compensation).[2] The decision in *Gregory* broadened the entitlement of the employee dismissed unfairly to contractual damages to compensate for the benefits that would have been obtained had the employment been terminated *fairly*. Such damages were to be assessed on the basis that "were it not for the unlawful dismissal, it was likely that the employment would have continued indefinitely".[3] As a result, damages for breach of an award term prohibiting the harsh, unjust or unreasonable termination of an employee, were assessed as the wages the dismissed employee would have earned had he or she remained with the employer to the age of retirement, discounted for the vicissitudes of life.[4]

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1 (1988) 80 ALR 455.

2 *Gregory* was decided before the enactment of the *Industrial Relations Reform Act* (Cth) 1993 which incorporated s170EE(2)(c) (relating to compensation for termination of employment) into the *Industrial Relations Act* (Cth) 1988.

3 *Bostik (Australia) Pty Ltd v. Gorgevski* (1992) 36 FCR 20 at 33.

4 Naughton R, "Revisiting the Contract of Employment - *Byrne and Frew v. Australian Airlines Limited*", (1995) 17 *Sydney Law Review* 88 at 91.

Six years later a majority of the Full Federal Court in *Byrne and Frew v. Australian Airlines Limited*[5] expressly overruled *Gregory*, rejecting the appellants' claim for damages under the contract of employment.

After two conflicting Full Federal Court decisions, the appeal to the High Court in *Byrne and Frew v. Australian Airlines Limited* (*Byrne and Frew*)[6] provided the Court with an opportunity to make an emphatic pronouncement of law on this issue. The Court, in two separate joint judgments, unanimously dismissed the appeal and upheld the decision of the Full Federal Court. In addition to the claim for damages for breach of contract, the High Court also rejected a number of alternative arguments relied upon by the appellants. Also considered was the role of procedural fairness in determining whether a dismissal is harsh, unjust or unreasonable.

BACKGROUND

Byrne and Frew were dismissed from their employment as baggage handlers with Australian Airlines after video evidence showed them assisting another employee to interfere with passengers' baggage. They claimed that their dismissal was in breach of clause 11(a) of the Transport Workers' (Airlines) Award 1988 (the award) which provides that "termination of employment by an employer shall not be harsh, unjust or unreasonable."

At first instance, Hill J considered himself bound to follow the decision in *Gregory* on the issue of the contractual incorporation of clause 11(a). However his Honour found, on the facts, that the dismissals were not harsh, unjust or unreasonable.[7]

On appeal, a majority of an enlarged Full Federal Court[8] rejected the appellants' claim that clause 11(a) was a term of their contracts of employment. However the Full Federal Court held that the dismissals were harsh, unjust or unreasonable due to the failure of the respondent to afford the appellants procedural fairness in dealing with their respective dismissals.[9]

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5 (1994) 120 ALR 274.

6 (1995) 69 ALJR 797.

7 (1992) 45 IR 178.

8 Black CJ, Keeley, Beaumont, Gray and Heerey JJ.

9 n 5.

Byrne and Frew were granted special leave to bring the following applications before the High Court:

- a claim for damages at common law for breach of contract;
- a claim for damages on the basis that the effect of clause 11(a) was to render the termination of their contracts ineffective, thus giving rise to an action for repudiation of the contract;
- a claim for damages for breach of statutory duty; and
- an application pursuant to section 178 of the *Industrial Relations Act* (Cth) 1988 for breach of clause 11(a).

The respondent lodged a cross-appeal from the Full Federal Court's finding that the appellants' dismissals were harsh, unjust or unreasonable on the sole ground that they had been denied procedural fairness.

COMMON LAW DAMAGES

The appellants' claim for common law damages for breach of contract was based on the submission that clause 11(a) of the award was a term of their contract of employment. It was submitted that the award clause was incorporated into the contract in three ways:

imported independently of the intention of the parties;

- implied as a matter of fact; and
- implied by custom or usage.

The appellants' first and second submissions were those relied upon by the majority in *Gregory* in reaching the conclusion that the award provision in question was a term of Mr. Gregory's contract of employment.

Imported Independently of the Intention of the Parties

The appellants' argued that clause 11(a) was imported into the contract in two ways:

- the existence and binding nature of the award operated to import clause 11(a) (and other award terms) into the contract; and
- the term should be implied, as a matter of law, into employment contracts as a class of contract.

Existence and Binding Nature of the Award

Brennan CJ, Dawson and Toohey JJ summarised the first limb of the appellants' argument as follows:

> They rely upon the statutory force given to the award and say that, because the relationship between the parties is contractual, the provisions of the award - or at least some of them including clause 11(a) in this case - become terms of the contract.[10]

Their Honours rejected this submission, finding that the employment relationship was governed concurrently by the award and the contract, and that therefore it is "plainly unnecessary that the contract of employment should provide for those matters already covered by the award."[11]

Class of Contract

According to McHugh and Gummow JJ an award term should only be implied by law into employment contracts as a class of contract as a matter of "necessity" - this involves considering whether clause 11(a) is a "necessary incident of a definable category of contractual relationship".[12] Their Honours held that implication of a term will only be necessary where the contract would be rendered "nugatory" or "deprived of its substance, seriously undermined or drastically devalued in an important respect."[13]

Their Honours concluded that the contracts were not rendered nugatory if the existing provisions operated concurrently with the regime established by the award.[14]

The High Court's reasons for rejecting the appellants' argument are grounded on the premise that the award and the contract of employment are separate aspects of the employment relationship which operate concurrently to govern it. This premise lies at the heart of the differences in the decisions in *Byrne and Frew* and *Gregory*. The decision in *Gregory* suggests that the contract must stand alone to regulate the employment relationship.

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[10] n 6 at 800 per Brennan CJ, Dawson and Toohey JJ.

[11] n 6 at 800 per Brennan CJ, Dawson and Toohey JJ.

[12] n 6 at 818.

[13] n 6 at 819.

[14] n 6 at 819.

It is submitted that the view advocated in *Byrne and Frew* is to be preferred from both a historical and practical perspective.

Historically, the view that awards are statutory instruments which stand and operate independently from contracts of employment was advocated by the High Court in *Josephson v. Walker*.[15] According to Isaacs J "the right to the statutory rate of wages is not part of the contract, but a new right".[16]

In the years following this decision, the position advocated in *Josephson v. Walker* was the generally accepted view.[17] The decisions relied on as supporting a reversal of this position in *Gregory*[18] are generally regarded as equivocal at best[19] - the failure of the Court in *Gregory* to explain why the authorities cited support its findings make it difficult to justify its position.

Further the position advocated in *Byrne and Frew* is to be preferred for practical reasons. It was held in *Gregory* that the facts of the case satisfied the "business efficacy" test established in *BP Refinery (Westernport) Pty Ltd v. Hastings Shire Council*[20] because:

> absent an implied term incorporating into the contract of employment the provisions of the award as they might be from time to time, the contract would lack content on matters as fundamental, and important to both parties, as hours of work and wages and the grounds and notice on which the contract could be terminated.[21]

It appears a logical extension of this approach that workers' compensation, annual and sick leave, superannuation, occupational health and safety and any other regulation that has some impact on the employment relationship should be incorporated into the employment contract. This is clearly unnecessary and not the intention of the legislature. Most of these aspects of the employment relationship are governed by separate pieces of legislation each providing its own consequences for breach of its provisions.

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15 (1914) 18 CLR 691.

16 n 15 at 703.

17 Meyrick J, "The Interaction of Awards and Contracts" (1995) 8 *AJLL* 1 at 7.

18 *Mallinson v. The Scottish Australian Investment Company Limited* (1920) 28 CLR 66; *Amalgamated Colleries of WA Ltd v. True* (1938) 59 CLR 417; *R v. Gough. Ex parte Meat and Allied Trades Federation of Australia* (1969) 122 CLR 237.

19 See the discussion of authorities by Brennan CJ, Dawson and Toohey JJ, n 6 at 799-800.

20 (1977) 180 CLR 266.

21 n 1 at 479.

Like the award, each piece of legislation has statutory force and does not require importation into the contract of employment to govern the employment relationship. Further, the High Court has held that where a statutory penalty has been provided for an offence, "the role of the common law in determining the legal consequences of commission of the offence is therefore diminished".[22]

On this basis, the position advocated in *Byrne and Frew*, that the award and the contract of employment are separate aspects of the employment relationship which operate concurrently to govern it, is to be preferred.

An Alternative View - Gray J

It is interesting to note that Gray J in the Federal Court took a different approach; he saw it as "a matter of opinion whether the authorities did or did not support the view taken by the majority in *Gregory*"[23] and based his support for the majority view in *Gregory* on different grounds. According to Gray J clause 11(a) should be implied into the contract of employment, not from the application of the tests in *BP Refinery* or earlier law relating to implied terms, but should be imposed on the parties by law as a matter of policy. Terms such as clause 11(a) are "regarded by the law as proper incidents of the employment relationship and are applicable in the absence of express agreement to the contrary".[24]

In support of this proposition Gray J referred to other aspects of the traditional law of contract which have been adapted in response to "the reality of imbalances of wealth and power between contracting parties"[25] - ie in *Trident General Insurance Co Ltd v. McNiece Bros Pty Ltd*[26] allowance was made for the modification of the doctrine of privity in certain circumstances in order to protect the interests of those for whose benefit insurance is effected.

Gray J also offered in support of his argument, examples from New Zealand employment law which has developed "not by the application of the *BP Refinery* principles, but by a conscious decision to impose terms in

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22 *Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd* (1978) 139 CLR 410 at 429.

23 n 5 at 333.

24 n 5 at 334.

25 n 24.

26 (1988) 165 CLR 107.

employment relationships which will place the parties to them on equal footing".[27] He also noted that the interpretation in *Gregory* was consistent with the standards laid down by the International Labour Organisation's *"Convention Concerning Termination of Employment at the Initiative of the Employer"*.[28]

Gray J concluded by recognising the issue as a "clear policy choice". Accordingly, even if the view adopted by his fellow members of the Federal Court and subsequently by the High Court is technically correct, matters of policy demand that the Court follow *Gregory*:

> thereby prising employment law in Australia from the grip of 19th century judges and correcting some of the imbalance inherent in employer-employee relationships, while at the same time paralleling developments in other common law countries and adhering to international recognised standards.[29]

In coming to this conclusion, Gray J freely admits to placing a higher priority on facilitating the achievement of desirable policy objectives than the technical correctness of his decision.[30]

Implied as a Matter of Fact

The appellants also argued that clause 11(a) was "implied as a term from the particular circumstances of the case and to give effect to some apparent underlying intention of the parties about providing business efficacy".[31] It was argued that the five conditions for implication of a term into a contract enunciated by the Privy Council in *BP Refinery (Westernport) Pty Ltd v. Hastings Shire Council*[32] were satisfied. The High Court rejected this submission.

The Court stated that a rigid approach to the test in *BP Refinery* was not appropriate in cases such as this where the formal contract does not contain all the terms of the agreement.[33] It held that it was necessary to

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[27] n. 5 at 335.

[28] Australia has ratified the Convention, but has not incorporated its provisions into domestic law.

[29] n. 5 at 336.

[30] n. 29.

[31] n. 6 at 812.

[32] n. 20 at 283.

[33] n. 6 at 801.

determine the actual terms of the contract and then to determine whether the implication of a particular term was necessary "for the reasonable or effective operation of a contract of that nature in the circumstances of the case."[34]

Relying once again on the premise that the contract and award are separate but concurrent aspects of the employment relationship, the Court held that the implication of clause 11(a) was not necessary for the reasonable and effective operation of the contract. According to Brennan CJ, Dawson and Toohey JJ:

> The contract is capable of operating reasonably and effectively in the absence of such a term and in the presence of an award provision offering limited remedies in the event of breach.[35]

This finding has been criticised on the basis that insufficient evidence was presented on the terms of the contract to enable the Court to make an "assessment as to whether the contract was efficacious".[36] If, however, it is accepted that the contract and award operate concurrently to regulate the employment relationship, the contract is capable of operating effectively without such a term because that aspect of the employment relationship is governed by the award operating concurrently with the contract.

Further, in their consideration of whether the implication of clause 11(a) is "so obvious it goes without saying", McHugh and Gummow JJ asked themselves the same question considered by the Full Federal Court in *Gregory,* and concluded, in accordance with the findings of Beaumont and Heerey JJ in the Full Federal Court, that:

> There is much to be said for their Honours' hypothesis that the employer would indicate that, whilst bound by the terms of the Award and so subject to the penalties prescribed by the legislation for breach, it would not accept cl 11(a) as a term of the contract. In the event of breach, the employer would not only be liable to penalty but also to pay damages in contract.[37]

The High Court's conclusion is clearly correct - it is far from obvious that an employer would expose itself to an action for damages by voluntarily

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[34] n 6 at 801 and 815.

[35] n 33.

[36] Coulthard A, "Damages for Unfair Dismissal: The High Court's Judgment in *Byrne and Frew v. Australian Airlines*" (1996) 9 *AJLL* 38 at 52.

[37] n 6 at 815.

agreeing to the incorporation of a term such as clause 11(a) into the contract of employment.

Implied by Custom

The final argument raised by the appellants was that clause 11(a) "embodies a 'crystallised custom' of the industry in which the parties were engaged and for that reason became a term of the contract."[38]

This was not an argument advanced in *Gregory*, and was dealt with quite briefly by the High Court. Both judgments in *Byrne and Frew* applied the test established in *Con-Stan Industries of Australia Pty Ltd v. Norwich Winterthur Insurance (Australia) Ltd*[39] stating that a term will only be applied by custom if:

> the general notoriety of the custom makes it reasonable to assume that the parties contracted with reference to the custom so that it is therefore reasonable to import such a term into the contract.[40]

The High Court concluded that the argument should fail for two reasons. First, it was held that a custom could not exist where parties were bound by statute to abide by a particular term[41] - the binding nature of the award rests not upon consensus but by statute.[42] Secondly, even if it did amount to a custom, there was no evidence of the "general notoriety" of such a custom. [43]

DAMAGES FOR REPUDIATION OF CONTRACT

The appellants also argued that, even if they had no claim for damages based upon the breach of clause 11(a) as a term of their contracts, nevertheless the purported termination of the contracts, in breach of clause 11(a), was illegal and void. Consequently, the appellants claimed that although their dismissal terminated the employment relationship, the contract of employment continued on foot indefinitely until they accepted

[38] n 6 at 798 and 811.

[39] (1986) 160 CLR 226 at 236-8.

[40] n 6 at 812.

[41] n 6 at 801-2 and 811-2.

[42] Coulthard, n 36 at 59.

[43] n 40.

the termination. On this basis, the appellants claimed that the breach of clause 11(a) amounted to a repudiation of the contract of employment which entitled them either to elect to treat the contract as at an end and sue for damages, or else to treat the contract as continuing indefinitely and sue for unpaid remuneration.[44]

In support of their contention the appellants' relied on the High Court decision in *Automatic Fire Sprinklers Pty Ltd v. Watson.*[45] In that case, the *National Security Act* (Cth) 1939 provided that an employer carrying on a protected undertaking should not, without the written permission of the Director-General of Man Power, terminate the employment of a person employed in the undertaking. The appellant employed the respondent in such an undertaking and purported to dismiss him without the requisite permission. The Court (by a 4:2 majority) held that the purported dismissal was ineffectual in law to terminate the respondent's employment because the dismissal was illegal and therefore not permitted under any circumstances (as opposed to illegal in the sense of being in contravention of the statute and punishable by penalty).

The High Court in *Byrne and Frew* dismissed the appellants' argument for two reasons.

First it held that the minority view in *Automatic Fire Sprinklers* was to be preferred.[46] According to the minority "the fact a statute prohibits the doing of an act under a penalty does not show that the act cannot be done".[47]

Second, the High Court held that, even if the decision of the majority in *Automatic Fire Sprinklers* was correct, there was sufficient distinction between the regulation in that case and clause 11(a) to reach a different conclusion.[48] According to Brennan CJ, Dawson and Toohey JJ:

> The regulation directly prohibited the termination of the employment without the required permission. Clause 11(a), on the other hand, merely provides that the termination shall not be harsh, unjust or

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[44] n 6 at 803 and 819.

[45] (1946) 72 CLR 435.

[46] The Court in *Byrne and Frew* also noted that, in substance, the minority also had the support of Dixon J who on the facts regarded the minority position as correct, but considered himself bound by English authority to hold otherwise - see n 45 at 471.

[47] n 45 at 454 per Latham CJ.

[48] n 6 at 805.

> unreasonable. That does not suggest that failure to observe the requirements of the clause renders a de facto termination a nullity.[49]

In rejecting the appellants' submission, the High Court concluded that a termination in breach of clause 11(a) not only brings to an end the employment relationship, for all practical purposes it is also effective in terminating the contract of employment.[50] The Court held that in this case the effective termination did not involve a breach of contract, because clause 11(a) was not a term of the contract. Therefore the appellants' claim for damages based on the submission that clause 11(a) precluded the contract from being effectively terminated and therefore rendered the conduct of the respondent in breach of contract, failed.[51]

Although the claim was not raised, the Court suggested that the appellants may have been successful in a claim for wrongful dismissal on the basis that the respondent had failed to comply with the common law requirement that an employer must give reasonable notice of termination except in circumstances justifying summary dismissal.[52] Although the Court did not explore the issue further, the fact that it was raised suggests that there may be some scope for employees dismissed unfairly to obtain contractual damages.

DAMAGES FOR BREACH OF STATUTORY DUTY

The appellants also claimed that a breach of clause 11(a) gave rise to an action for damages for breach of statutory duty.

According to Brennan CJ, Dawson and Toohey JJ a cause of action for damages for breach of statutory duty arises:

> where a statute which imposes an obligation for the protection or benefit of a particular class of persons is, upon its proper construction, intended to provide a ground of civil liability when the breach of the obligation causes injury or damage of a kind against which the statute was designed to provide protection.[53]

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[49] n 48.

[50] The contract of employment is not technically terminated until the termination is accepted by the employee.

[51] n 6 at 805.

[52] n 51.

[53] n 6 at 802.

It was held that an intention to protect such private interests could not be found in the generally public objectives of the legislation.[54]

Further, the Act "can and does disclose a contrary intention in providing a means for the enforcement of awards which does not contemplate the existence of private rights enforceable by way of an action for damages."[55]

The High Court found additional support for this conclusion in the dicta of Mason J in *Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd*:

> There is much to be said for the view that once a statutory penalty has been provided for an offence the role of the common law in determining the legal consequences of commission of the offence is therefore diminished.[56]

WAS THE DISMISSAL IN BREACH OF CLAUSE 11(A)?

In addition to their claim for damages the appellant's sought the imposition of a penalty for breach of clause 11(a) pursuant to section 178 of the *Industrial Relations Act* (Cth) 1988. This claim required the Court to determine whether the dismissal was harsh, unjust or unreasonable.

A majority of the Full Federal Court held that the dismissal was harsh, unjust or unreasonable solely on the grounds that the appellants had been denied procedural fairness. In reaching this conclusion, the majority did not consider whether there was sufficient evidence to establish the appellants' misconduct.

The respondent cross-appealed from these findings claiming that the majority of the Full Federal Court was in error in finding the dismissals harsh, unjust or unreasonable without reference to the substantive evidence against the dismissed employees.[57]

The respondent's submission was accepted by the High Court. It held that the question under clause 11(a) was whether, in all the circumstances, the termination of employment was harsh, unjust or unreasonable and that this question could not be answered by "imposing a disjunction between

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[54] n 6 at 803.

[55] n 54.

[56] n 22 at 429.

[57] n 6 at 805.

procedure and substance".[58] Therefore the procedural and substantive fairness of the decision are to be considered concurrently - the matter is not to be decided simply by "looking to the first issue before there is seen to be any need to enter upon the second".[59]

The question of whether the dismissals were harsh, unjust or unreasonable was remitted to the Federal Court for determination.

CONCLUSION

For the reasons discussed above, each element of the High Court's decision in *Byrne and Frew* is valid and to be preferred to the Full Federal Court's decision in *Gregory*.

As previously discussed, the practical effect of the decision in *Gregory* was to expand the damages available at common law for an employee dismissed in breach of their contract to the benefits that would have been received had the employee remained with the employer to the age of retirement, discounted for the vicissitudes of life. An application of this theory led the Federal Court in *Bostik (Australia) Pty Ltd v. Gorgevski*[60] to award Mr. Gorgevski $195,000 in damages.

Conversely, following the enactment of the *Industrial Relations Reform Act* (Cth) 1993, the practical effect of the decision in *Byrne and Frew* is to limit the damages available to an employee dismissed in breach of an unfair dismissal clause of an award to the "remuneration that the employee would have received in the six months immediately following the termination" for award employees and subject to a further limitation of $30,000 for non-award employees.[61] This is a significant improvement from the common law position - pursuant to which an unfairly dismissed employee was entitled to compensation for the requisite period of notice to end the contract lawfully.

The right to "unlimited compensation by way of damages"[62] advocated in *Gregory* is clearly at odds with the objectives of the legislation which provides for the imposition of a penalty of $1,000 for the breach of an

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58 n 6 at 827.

59 n 58.

60 n 3.

61 *Industrial Relations Act* (Cth) 1988, s170EE (3) and (4).

62 As described by Brennan CJ, Dawson and Toohey JJ, n 6 at 803.

award provision such as clause 11(a);[63] and limits statutory damages for unfair dismissal for award employees to six months wages.[64] It is further submitted that the substance of an award of damages of the magnitude in *Bostik* essentially serves to punish the employer, rather than compensate the dismissed employee - this abrogates the penalty provisions of the Act and, further, is inconsistent with the compensatory nature of damages in Australia.

According to Gray J in the Full Federal Court, even if the decision in *Byrne and Frew* is technically correct, as a matter of policy the Court should have approved the decision in *Gregory*.[65]

It is, however, submitted that the result in *Byrne and Frew* is also desirable for policy reasons. Whilst the need for employee protection mechanisms is recognised, not all employers are large corporations with a seemingly unlimited supply of funds. Further, given:

> the relatively high level of unionism and labour regulation in Australia, by no means do all employer and employee relationships in this country have an inherent imbalance favouring the employer.[66]

Whilst some might see an award of $195,000 against a large dominant employer as a desirable policy result, an award of such magnitude will put many small employers out of business - the end result being the termination of other employees. On this basis, the assessment of damages pursuant to the decision in *Gregory* is undesirable even from the perspective of the employee. On the other hand, assessment of damages pursuant to the provisions of Part IVa of the *Industrial Relations Act* (Cth) 1988,[67] as required by the decision in *Byrne and Frew*, effectively protects and balances the interests of both parties - the possibility of having to pay six months wages to a former employee without receiving the benefit of that person's service provides a significant deterrent to employers not to dismiss an employee in breach of the award. Further, given that the dismissed employee is free to seek other employment, the payment of up to six months wages is sufficient to compensate for their loss.

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[63] n 61 section 178.

[64] n 61 section 170EE(3).

[65] n 5 at 336.

[66] n 5 at 321 per Beaumont and Heerey JJ.

[67] It should be noted that this division of the Act is currently the subject of review.