IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA563/2022
[2023] NZCA 654

BETWEEN	ACCIDENT COMPENSATION CORPORATION Appellant
AND	ANDERSON & O'LEARY LIMITED First respondent
AND	BUILDING CONNEXION LIMITED Second Respondent
AND	SOUTHERN LAKES BUILDING LIMITED Third Respondent

Hearing:	24 July 2023
Court:	Miller, Moore and Palmer JJ
Counsel:	D A Laurenson KC and C J Hlavac for Appellant G D Pearson, VTJ Sullivan and A J Isherwood for Respondents
Judgment:	15 December 2023 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B We answer the question of law as follows:

Was the High Court correct to conclude that s 170(2) of the Accident Compensation Act will only be engaged where an employer operates two or more separately identifiable businesses, each of which must be a separate and distinct activity?

No.

C The High Court judgment is set aside.

D The District Court and High Court costs orders are set aside.

E We make no order as to costs in this Court.

REASONS OF THE COURT

(Given by Palmer J)

Summary

[1] The three respondents operate timber and hardware stores which sell products to members of the public and those engaged in trade. In 2019, the Accident Compensation Corporation (ACC) reclassified them within the "Timber Wholesaling" classification unit (CU), requiring them to pay higher employer levies than previously. After a review and an appeal to the District Court, which both favoured the respondents, the High Court also ruled in favour of the respondents.[1] The High Court then granted leave to ACC to appeal to this Court on a question of interpretation of the Accident Compensation Act 2001 (the Act):[2]

> Was the High Court correct to conclude that s 170(2) of the Act will only be engaged where an employer operates two or more separately identifiable business, each of which must be a separate and distinct activity?

[2] Our answer is "no". The respondents are each engaged in multiple activities. ACC is required to apply s 170(2). On the basis of the factual decisions of the courts below, the activity attracting the highest levy rate under the associated regulations into which the respondents fall is CU 45310 — timber wholesaling. That reflects the purposes of the accident compensation legislative regime in incentivising the industry to contribute to lower safety risks for employees and fully fund the Work Account in order to compensate employees where safety risks are realised.[3]

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1 *Accident Compensation Corporation v Southern Lakes Building Ltd* [2022] NZHC 1288 [judgment under appeal].

2 *Accident Compensation Corporation v Anderson & O'Leary Ltd* [2022] NZHC 2517 [leave decision] at [5].

3 Accident Compensation Act 2001, s 6 defines "Work Account" as the Account described in s 167 of that Act.

What happened?

[3] The respondents, all members of the Independent Timber Merchants Co-operative (ITM), are:

(a) Anderson & O'Leary Ltd (Anderson & O'Leary), who owns and operates a sawmill and three stores in Whenuapai, Kumeu, and Swanson in Auckland, trading under the Western ITM brand;

(b) Building Connexion Ltd (Building Connexion), who operates four stores at Takaka, Motueka, Nelson, and Havelock and also a joinery, frames and trusses business in Richmond; and

(c) Southern Lakes Building Ltd (Southern Lakes), who owns and operates three building supply businesses in Cromwell, Queenstown and Alexandra, in Central Otago.

[4] It is common ground between the parties that:

(a) The respondents are each engaged in selling timber, hardware, and building supplies both to persons engaged in trade (predominantly builders/customers operating builders' trade accounts) and to the general public.

(b) Timber sales comprise approximately 30–40 per cent of their sales. They are predominantly sales to builders/customers operating builders' trade accounts.

(c) Each of the products are handled and sold to both categories of customers within the one integrated store premises.

[5] The issue in this case is how the activities of the respondents are classified for the purposes of ACC levies.

The legislative regime

[6] Section 3 of the Act provides, relevantly:

> **3 Purpose**
>
> The purpose of this Act is to enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury that has, as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs), through—
>
> (a) establishing as a primary function of the Corporation the promotion of measures to reduce the incidence and severity of personal injury:
>
> (b) providing for a framework for the collection, co-ordination, and analysis of injury-related information:
>
> …

[7] Part 6 of the Act is entitled "Management of the Scheme":

(a) Section 165(1)(d) imposes a duty on ACC to collect levies under the Act.

(b) Section 166(1)(a) requires ACC to maintain and operate a Work Account for the purpose, set out in s 167, of financing entitlements provided under the Act to employees, private domestic workers, and self-employed persons for work-related personal injuries.

(c) Section 166A provides that the cost of all claims under the levied Accounts are to be fully funded. When recommending regulations setting levies, s 166A(2) requires the responsible Minister to have regard to financial responsibility principles including that the levies derived for each Account should meet the lifetime cost of claims in relation to injuries occurring in a particular year.

(d) Section 166B requires the Minister to issue a funding policy statement, consistent with the financial responsibility principles mentioned above,

specifying, among other things, a target level or band for the funding of each Account.

(e) Section 168 requires an employer to pay levies to fund the Work Account in accordance with the Act and its regulations.

(f) Section 169 requires levies to be paid at rates prescribed in the Act's regulations and must be related to the amount of earnings estimated or deemed to have been paid by an employer to their employees. Regulations made under the Act may establish systems for experience rating of employers, private domestic workers, or self-employed persons, and/or risk sharing between employers, private domestic workers, or self-employed persons, on the one hand, and ACC on the other.

(g) Section 174A(1) provides that ACC may develop and establish workplace incentive programmes to provide incentives for employers and self-employed persons to reduce the "incidence, severity, and impact of work-related personal injuries". Section 174A(2) provides the Work Account levy, determined under s 168, may be adjusted up or down for a particular employer in accordance with the terms of the programme.

[8] Sections 170 and 171 of the Act provide:

170 Classification of industries or risks

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

(2) If an employer is engaged in 2 or more activities, the Corporation must classify all the employer's employees in the classification unit for whichever of those activities attracts the highest levy rate under the regulations.

(3) Despite subsection (2), the Corporation may classify the employer's employees in separate classification units for different activities if the

employer meets the threshold (if any) specified in regulations and if—

(a) the employer so requests; and

(b) the employer is engaged in 2 or more distinct and independent activities; and

(c) each of those activities provides services or products to external customers in such a way that each activity could, without adaptation, continue on its own without the other activities; and

(d) accounting records are maintained by the employer to the satisfaction of the Corporation that—

(i) demonstrate the separate management and operation of each activity; and

(ii) allocate to each activity the earnings of employees engaged solely in that activity.

(4) Regulations made under this Act must prescribe a Work Account levy for each industry or risk class defined under subsection (1).

…

(5) The Corporation must decide which industry or risk class is appropriate in relation to any employer or self-employed person by whom a levy is payable, and section 239 applies if the classes defined by the regulations do not specifically cover a particular activity.

(6) The Corporation must separately account for the amounts—

(a) collected from each industry or risk class under sections 168, 168B, and 211; and

(b) expended for the purposes of section 167(3) in respect of each industry or risk class.

…

171 Classification of self-employed persons and employees engaged in 2 or more activities

(1) A self-employed person or (if section 170(3) applies) an employee who is engaged in 2 or more activities must be classified in the industry or risk class for whichever of those activities attracts the highest levy rate under the regulations.

(2) If a particular activity accounts for 5% or less of a self-employed person's or an employee's earnings for the year, then that activity need not be considered when determining the correct industry or risk class under subsection (1).

> (3) Subsection (2) applies only if the self-employed person's or the employer's records are sufficient and accurate enough to satisfy the Corporation that the apportionment of total earnings is correct.

[9] Section 6 defines "activity":

> **activity**, for the purposes of Part 6,—
>
> (a) means a business, industry, profession, trade, undertaking of an employer, a self-employed person, or a private domestic worker; and
>
> (b) includes ancillary or subservient functions relating to the activity, such as administration, management, marketing and distribution, technical support, maintenance, and product development; and
>
> (c) in the case of a self-employed person, refers to the nature of his or her work rather than the context or business in which he or she is working

[10] Part 9 comprises of miscellaneous provisions, some of which provide relevant context:

(a) Section 329 empowers the Governor-General to make regulations, on the recommendation of the Minister, in relation to the rates of levies, classification prescriptions for the purposes of s 170, and the threshold that must be met for the purpose of "multiple classification" in s 170.

(b) Section 330 provides that the Minister may not make regulation recommendations in relation to classification prescriptions, for the purposes of s 170, without first engaging in consultation.

(c) Section 331(1) provides that the Minister may not recommend regulations prescribing the rates of levies unless the Minister has received and considered recommendations from ACC. Section 331(2) sets out the consultation procedure ACC must engage in, namely consulting levy payers, before recommending levy rates to the Minister.

The Regulations and ANZSIC

[11] The Accident Compensation (Work Account Levies) Regulations (the Regulations) govern Work Account levies, which are paid by employers. The Accident Compensation (Work Account Levies) Regulations 2017 and the Accident

Compensation (Work Account Levies) Regulations 2019 are relevant for this appeal. There is no relevant difference between these regulations for the purposes of this appeal.

[12] Employers' levies are set by classifying an employer into a CU that most accurately describes their activity.[4] The CU has a corresponding levy rate which is used to calculate the employer levy.[5] The amount of the levy depends on this classification. Underlying the classification regime is an assessment of injury risk based on historical records of injuries suffered by persons working in different types of workplaces.[6]

[13] Levy rates are set regularly by ACC by grouping CUs into a smaller number of Levy Risk Groups (LRGs). That bundles together similar risk CUs to generate a pool of risks with a reasonably large earnings base and number of claims per annum. The levy rate for the LRG is set based on an actuarial calculation based on the claims experience for each CU, following a consultation process.[7]

[14] The schedules to the Regulations contain 499 different "industries or risk classes", the CUs, with levy rates set at a specified sum per $100 of income earned by employees. For example, sch 1 of the 2017 Regulations included the following levy rates:

(a) CU 45310 — Timber wholesaling ($1.55);

(b) CU 45390 — Hardware goods wholesaling (not elsewhere classified) ($0.62);

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4 Accident Compensation Act 2001, s 170(1); Accident Compensation (Work Account Levies) Regulations 2017, reg 8; and Accident Compensation (Work Account Levies) Regulations 2019, reg 8.

5 The Work Account levy payable by an employer is calculated with the following formula: $(c \div 100) \times d$. C is the amount of earnings paid to the employer's employees in the tax year and d is the levy rate that applies to the CU. For example, the rate applying to the timber wholesaling CU under the 2019 regulations was $1.52: see Accident Compensation (Work Account Levies) Regulations 2019, reg 8 and sch 1.

6 See an explanation of the CU setting process in the most recent levy consultation document: Actuarial Services *Work Account: 2022/25 Pricing Report for Consultation* (Accident Compensation Corporation, 31 August 2021) at 39–41.

7 At 40–41.

(c) CU 45391 — Plumbing goods wholesaling ($0.48); and

(d) CU 52330 — Hardware and building supplies retailing ($0.79).

[15] The CUs are substantially derived from the Australia and New Zealand Standard Industrial Classifications 2006 (ANZSIC).[8] This is a joint initiative of Statistics New Zealand | Tatauranga Aotearoa and the Australian Bureau of Statistics and classifies industries for economic and statistical purposes. The system has four levels — 19 divisions, broken down into subdivisions, groups, and classes. The classes provide the categories which are replicated by the CUs in the Regulations. The classes which are relevant to this appeal are:[9]

> **3331 Timber Wholesaling**
>
> This class consists of units mainly engaged in wholesaling timber (except firewood)
>
> *Primary activities*
>
> - Plywood wholesaling
> - Timber dealing, wholesaling, (except firewood)
> - Veneer, wood, wholesaling
>
> *Exclusions/References*
>
> Units mainly engaged in firewood wholesaling included in class 3739 Other Goods Wholesaling [not elsewhere classified]
>
> **3332 Plumbing Goods Wholesaling**
>
> This class consists of units mainly engaged in wholesaling plumbing goods
>
> …
>
> **3339 Other Hardware Goods Wholesaling**
>
> This class consists of units mainly engaged in wholesaling other hardware goods (except timber or plumbing goods), including construction or building materials.
>
> …

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8 See Australian Bureau of Statistics and Statistics New Zealand | Tatauranga Aotearoa *Australia and New Zealand Standard Industrial Classification 2006* (28 February 2006) [ANZSIC].

9 At 224–226 and 253–254.

4231-Hardware and Building Supplies Retailing

This class consists of units mainly engaged in retailing hardware or building supplies.

Primary activities

- Carpenters' tool retailing
- Cement retailing
- Ceramic floor tile retailing
- Garden tool retailing
- Hardware retailing
- Lacquer retailing
- Lawnmower retailing
- Lock retailing
- Mineral turpentine retailing
- Nail retailing
- Paint retailing
- Plumbers' fittings retailing
- Plumbers' tools retailing
- Timber retailing
- Tool retailing
- Wallpaper retailing
- Woodworking took retailing

Exclusions/References

Units mainly engaged in:

- wholesaling builders' hardware or supplies (except plumbing supplies) are included in class 3339 Other Hardware Goods Wholesaling; and
- wholesaling timber are included in class 3331 Timber Wholesaling.

[16] For the purposes of the ANZSIC, a business unit can only be assigned to one class. The ANZSIC classifies businesses based on the predominant activity in which

a business is engaged, measured in terms of income. Chapter 7 of the ANZSIC provides definitions for the divisions, which is the highest level of classification. The divisions relevant to this appeal are:[10]

> **Division F: Wholesale Trade**
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> The Wholesale Trade Division includes units mainly engaged in the purchase and onselling, the commission-based buying, and the commission-based selling of goods, without significant transformation, to businesses. Units are classified to the Wholesale Trade Division in the first instance if they buy goods and then onsell them (including on a commission basis) to businesses.
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> …
>
> Wholesalers' premises are usually a warehouse or office with little or no display of their goods, large storage facilities, and are not generally located or designed to attract a high proportion of walk-in customers. Wholesaling is often characterised by high value and/or bulk volume transactions, and customers are generally reached through trade-specific contacts.
>
> …
>
> A unit which sells to both businesses and the general public will be classified to the Wholesale Trade Division if it operates from premises such as warehouses or offices with little or no display of goods, has large storage facilities, and is not generally located or designed to attract a high proportion of walk-in customers.
>
> …
>
> **Division G: Retail Trade**
>
> The Retail Trade Division includes units mainly engaged in the purchase and onselling, the commission-based buying, and the commission-based selling of goods, without significant transformation, to the general public. The Retail Trade Division also includes units that purchase and onsell goods to the general public using non-traditional means, including the internet. Units are classified to the Retail Trade Division in the first instance if they buy goods and then onsell them (including on a commission basis) to the general public.
>
> Retail units generally operate from premises located and designed to attract a high volume of walk-in customers, have an extensive display of goods, and/or use mass media advertising designed to attract customers. The display and advertising of goods may be physical or electronic.
>
> Physical display and advertising includes shops, printed catalogues, billboards and print advertisements. Electronic display and advertising includes catalogues, internet websites, television and radio advertisements and infomercials. While non-store retailers, by definition, do not possess the physical characteristics of traditional retail units with a physical shop-front location, these units share the requisite function of the purchasing and

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[10] At 68–70.

> onselling of goods to the general public, and are therefore included in this division.
>
> A unit which sells to both businesses and the general public will be classified to the Retail Trade Division if it operates from shop-front premises, arranges and displays stock to attract a high proportion of walk-in customers and utilises mass media advertising to attract customers.

[17] In *On the Go (New Zealand) Ltd v ACC*, Simon France J held that, while it is the wording of the Regulations that prevails, ANZSIC is an obvious interpretation aid.[11] That is not disputed between the parties.

[18] Employer levies are also affected by the employer's Work Experience Rating, one of the schemes developed by ACC in accordance with s 174A of the Act. The rating is determined by the process set out in the Accident Compensation (Experience Rating) Regulations (the Rating Regulations).[12]

[19] The Rating Regulations provide a mechanism for ACC to adjust the employer's Work Account levies upwards or downwards depending on past claims experience.[13] They provide a financial incentive to employers to "reduce the number and severity of workplace injuries and improve return to work outcomes".[14] They improve equity of the Work Account levy across employers by ensuring levies accurately reflect an employer's health and safety performance, and their cost to the accident compensation scheme.[15] The rating scheme is compulsory for employers who pay annual ACC levies of $10,000 or more.[16] Neither party refers to the Rating Regulations in their submissions. We refer to them as legislative context.

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11 *On the Go (New Zealand) v Accident Compensation Corporation* HC Wellington CIV-2011-485-736, 16 September 2011 at [20]–[21].

12 The relevant regulations that were in force for the purposes of this appeal are: Accident Compensation (Experience Rating) Regulations 2017; and Accident Compensation (Experience Rating) Regulations 2019. The current regulations are Accident Compensation (Experience Rating) Regulations 2022.

13 See Accident Compensation (Experience Rating) Regulations 2019, reg 3.

14 Ministry of Business, Innovation and Employment | Hīkina Whakatutuki *Regulatory Impact Statement: Experience Rating — increase loading and add fatality modifier* (19 November 2021) at 4.

15 At 4.

16 At 5. See also Accident Compensation (Experience Rating) Regulations 2019, reg 6 definitions of "qualifying class 1 levy payer" and "qualifying class 2 levy payer".

Legislative history

[20] The accident compensation regime derives from the report of the Royal Commission of Inquiry into compensation for personal injury in New Zealand, commonly referred to as the Woodhouse Report and still mentioned in s 3 of the Act.[17] In terms of funding, it recommended that industry classifications be abandoned, merit rating (what the Ratings Regulations in essence provide for) should not be included in the scheme, and that a uniform levy be in place based upon salary or wages paid.[18] This was a way to ensure that the idea of community responsibility was present within the scheme.[19]

[21] The Select Committee on Compensation for Personal Injury, which reviewed the proposal for an accident compensation scheme before the Bill was introduced to Parliament, disagreed with the Woodhouse Report regarding recommendations about employer levies. Their reason for disagreeing was that industry differential levies would incentivise reducing the total of industrial injuries.[20]

[22] Under the Accident Compensation Act 1972, the Accident Compensation Commission was required to make annual recommendations to the Minister regarding adjustments to levies, compensation, and related matters. This included recommendations about industry classifications, and associated levy rates, based on safety risks identified in New Zealand and overseas.[21] Further, the Governor-General was given the power to prescribe classifications of earners, industries, and occupations for the purposes of levies and the prevention of accidents.[22]

[23] The first time the predecessor to the current provisions at issue appeared in legislation was in in ss 170 and 171 of the Injury Prevention, Rehabilitation and Compensation Act 2001. However, the general rule that if an employer is engaged in

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17 AO Woodhouse, HL Bockett and GA Parsons *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (Government Printer, December 1967) [Woodhouse Report].

18 At 130–131 and 172–173, noting that the United Kingdom discarded industry classification risks 20 years earlier under their insurance schemes.

19 At 130.

20 Personal Injury Compensation Committee "Report of the Select Committee on Compensation for Personal Injury in New Zealand" [1970] IV AJHR I15 at [21].

21 Accident Compensation Act 1972, ss 15(2) and 44(3)(a).

22 Section 72(2).

two or more "industrial activities", they will attract the highest levy has been a part of the accident compensation regime since 1989 through the Accident Compensation Employers and Self-Employed Persons Levies Order 1989.[23]

[24] One other aspect of the legislative history to note is that in 1996, the definition of "activity" changed slightly from its predecessors.[24] It was no longer defined by the goods or services produced. Instead, it was, and is, defined by the industry, trade, business, profession, or undertaking of an employer.

The decisions to date

ACC's 2019 reclassification

[25] In 2018 and 2019, ACC reclassified the activities of the respondents. It identified that many ITM cooperative members, including the three respondents, were engaged in activities falling within more than one relevant CU. Before reclassification, Building Connexion and Southern Lakes were assigned CU 45390 (hardware goods wholesaling, not elsewhere classified) and Anderson & O'Leary were assigned CU 52330 (hardware and building supplies retailing). After reclassification they were all assigned CU 45310 (timber wholesaling). The impact the reclassification had on their employer levy rates is shown in the table below for each of the financial years 2018, 2019, and 2020:

CU	**Rate for FY 18**	**Rate for FY 19**	**Rate for FY 20**
CU 45390 hardware goods and wholesaling (not elsewhere classified)	$0.62	$0.62	$0.55
CU 52330 hardware and building supplies retailing	$0.79	$0.79	$0.68
CU 45310 timber wholesaling	$1.55	$1.55	$1.52

23 Accident Compensation Employers and Self-Employed Persons Levies Order 1989, cls 4 and 6.

24 Accident Rehabilitation and Compensation Insurance (Employment Premiums) Regulations 1996, reg 2. Compare with Accident Compensation Earners' Scheme Levies Order 1973, cl 2; and Accident Rehabilitation and Compensation Insurance (Employment Premiums) Regulations 1994, reg 2.

The Reviews

[26] The respondents each sought reviews of ACC's decision, arguing that their overall business activities are more closely aligned with that of a retailer:

(a) On 18 August 2019, the Review by FairWay Resolution Ltd of Anderson & O'Leary's classification quashed ACC's decision on the basis its stores "generally met the characteristics of a retailer", based on the ANZSIC commentary.[25] It issued directions for sales statistics to be provided to determine the classification.[26]

(b) On 9 January 2020, the Independent Complaint and Review Authority's review determined that Southern Lakes was most appropriately classed as a hardware and building supplies retailer under CU 52330.[27]

(c) On 13 January 2020, on the basis of the ANZSIC classifications, the Independent Complaint and Review Authority held that Building Connexion's classification is as a hardware and building supplies retailer under CU 52330.[28]

The District Court decisions

[27] ACC appealed the outcome of the reviews in relation to Building Connexion and Southern Lakes to the District Court. Anderson & O'Leary appealed its review. On 1 March 2021, in the District Court in Wellington, Judge A A Sinclair held in three contemporaneous judgments that each company's appropriate classification was CU 52330 — hardware and building supplies retailing.[29] The three decisions are largely the same except for details of fact and minor differences in the submissions of each

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25 FairWay Resolution Limited | Tā te Hinengatro Tōkeke Whakatau *Application by Anderson & O'Leary Limited for a Review under the Accident Compensation Act* (Auckland, 18 August 2019) at 11.

26 At 12.

27 Independent Complaint and Review Authority | Te Umanga Arotake Amuamu Motuhake *Application for Review under the Accident Compensation Act 2001* (9 January 2020) at [40].

28 Independent Complaint and Review Authority | Te Umanga Arotake Amuamu Motuhake *Application for Review under the Accident Compensation Act 2001* (13 January 2020) at [60].

29 *Accident Compensation Corporation v Building Connexion Ltd* [2021] NZACC 41; *Accident Compensation Corporation v Southern Lakes Business Ltd* [2021] NZACC 42; and *Anderson & O'Leary Ltd v Accident Compensation Corporation* [2021] NZACC 43.

respondent. Referring to *Anderson & O'Leary Ltd v Accident Compensation Corporation*, the Judge:[30]

(a) Accepted it was appropriate to adopt the definitions in the preambles to Division F and Division G of ANZSIC for the purposes of determining the correct classification of a business unit under s 170.[31] She rejected ACC's submissions about the limits on appropriate use of the ANZSIC.[32]

(b) Considered the activities of the business unit need to be considered, not those of its customers.[33] Having regard to the ANZSIC preamble factors, the classification most accurately describing Anderson & O'Leary's operations at each of its stores is CU 52330 — hardware and building supplies retailing.[34]

(c) Did not consider there was any factual foundation to support there being separate activities.[35] Each store operates as an integrated business.

[28] ACC appealed all three decisions to the High Court.

The High Court decision

[29] On 3 June 2022, in the High Court, Lang J held:[36]

> [34] The most obvious point to be made about ACC's argument is that, if the sale of timber to persons engaged in trade constitutes a business for the purposes of s 170, the respondents must also be engaged in a multitude of other businesses. By way of example, they would also be operating not only a retail timber business but also retail and wholesale plumbing, hardware and building supply businesses. This cannot be correct.
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> [35] Nor do I accept ACC's argument that s 170(2) expressly envisages that the activities will be integrated, in contrast to s 170(3) which requires that

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30 *Anderson & O'Leary Ltd v Accident Compensation Corporation*, above n 29.
31 At [46].
32 At [46]–[49].
33 At [60].
34 At [61]–[66].
35 At [69].
36 Judgment under appeal, above n 1 (footnotes omitted).

> the activities are distinct and independent. Section 170(3) enables the Corporation to assign separate classification units for different activities at the request of the employer provided various conditions are met. It does not necessarily follow that s 170(2) only applies where the activities are integrated. Rather, I consider s 170(2) will be engaged where an enterprise operates two separately identifiable businesses. Each needs to be a separate and distinct activity. By way of example, a business entity may operate both an accommodation facility and a separate mountain guiding service. Each of these would constitute a distinct business for the purposes of s 170(2) and ACC would be required to classify the business entity in accordance with which activity attracts the highest levy rate under the regulations.
>
> [36] This is not the position in the present case. The respondents sell a wide range of different products within and around the same premises. Customers have the same ability to view and purchase all products regardless of whether they are members of the public or engaged in trade. The only difference in the way the two are treated lies in the level of discount each receives at the point of sale. I therefore consider the Judge was correct to conclude the respondents operate a single integrated business at each store. I do not consider the sale of timber to persons engaged in trade constitutes a business or undertaking in its own right. Section 170(2) is therefore not engaged.
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> …
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> [38] ACC relies in large part on the fact that a significant proportion of the respondents' sales are made to persons who have opened trade accounts with individual stores. However, this does not mean that all such persons are engaged in trade. By way of example, persons who are building or renovating their own homes may operate a trade account. Furthermore, many of the persons who buy products are builders. They purchase timber products according to their current needs. This is not done for the purpose of "onselling" the products to others. Rather, the products are bought for immediate use in current building projects. This diminishes the weight that can be placed on the fact that many of the respondents' sales are to customers who hold trade accounts.

[30] The Judge also stated:

(a) ANZSIC is an obvious interpretation aid even though its purpose is different to the purpose of classifying activities under the Act.[37] Both opening paragraphs suggest they provide a provisional classification based on whether the business unit in question sells its product to the general public or persons engaged in trade.[38] The specificity of the features identified in the following paragraphs provides useful guidance when considering the respondents. They have none of the

[37] At [39].
[38] At [42].

characteristics referred to in passages for wholesale trade.[39] The factors in the classification of retail trade point unequivocally to the respondents being classified as retailers rather than wholesalers.[40]

(b) The District Court was correct to determine that the activity carried on by the three respondents falls within the category of CU 52330 — hardware and building supplies retail, which most accurately describes the activity in which they are engaged.[41]

[31] ACC sought leave from the High Court to appeal the High Court's decision under s 163 of the Act. Appeal is by way of case stated and is only available on a question of law. The High Court granted leave to appeal, on the question:[42]

> Was the High Court correct to conclude that s 170(2) of the Act will only be engaged where an employer operates two or more separately identifiable business, each of which must be a separate and distinct activity?

Submissions

[32] Mr David Laurenson KC, for ACC, submits:

(a) Section 6 of the Act defines "activity" to include "[an] undertaking of an employer", which will include, for the purposes of ss 170(1) and (2), an act, action(s) or task(s) and/or series of acts, carried out by an employer. So, an "activity" could constitute a "business" or it could constitute an "undertaking", which has a much wider scope including "an action, task, etc., undertaken or begun".[43] Either way, the sale of timber to persons engaged in trade is clearly an "activity".

(b) For s 170(2) to apply, an employer does not need to operate two separately identifiable businesses with each involving a separate and distinct activity. While s 170(2) might apply in that case, it is not an

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39 At [44].
40 At [45]–[46].
41 At [47].
42 Leave decision, above n 2, at [5].
43 *Shorter Oxford English Dictionary* (6th ed, Oxford University Press, Oxford, 2007) at 3428.

exclusive requirement. Section 170(2) will also apply where an employer is engaged in more than one activity, carried out as part of the same integrated business by the same employees. There is no requirement that the activities be separate and distinct activities, so as to be two separately identifiable businesses, as the High Court held. That is a significant gloss on the wording of s 170(2) which is inconsistent with its clear purpose.

(c) ACC's interpretation is consistent with the purpose of s 170(2) that, where employees are exposed to more than one activity with different degrees of risk, their employer should be levied according to the activity which exposes the employee to the highest risk. This is consistent with the intention behind the levy classification scheme.

(d) This interpretation is also consistent with the requirements in s 170(3) which is a limited exception to the default position in s 170(2). It is common ground that s 170(3) does not apply to these appeals. If s 170(2) only applies when an employer is engaged in two or more separate and distinct activities, s 170(3) would be superfluous. This interpretation is further reinforced by how the Act deals with self-employed persons engaged in more than one activity under s 171(1).

(e) The correct approach to the ANZSIC definitions is to apply the first instance definitions when classifying the activities of a business under s 170 but not the "additional factors" in the ANZSIC definitions. The additional factors are only required under ANZSIC because ANZSIC only allows the activities of a business to fall under one category at any level.

(f) The respondents sell hardware and building supplies to the general public, sell hardware supplies to persons engaged in trade, and sell timber to persons engaged in trade. ACC is therefore required to apply s 170(2). ACC correctly classified each of the respondents to CU 45310

— timber wholesaling, being the activity that attracts the highest levy rate under the Regulations.

[33] Mr Grant Pearson, for all three respondents, submits that:

(a) The respondents operate quite differently from wholesalers. They operate large format retail hardware shops similar to Placemakers, Mitre 10, Carters, and Bunnings. Everyone, including small children, can be in these premises' public areas. The stores do not have the same level of health and safety requirements as a wholesaler would. There has been a finding of fact that the nature of the premises is only retail in character and vastly different from that of a wholesaler,[44] which is beyond argument.

(b) The s 6 definition of activity is at the enterprise level — what is the activity of "the business" or "the industry". It does not break down daily activity to component elements. Nothing in the definition of "activity" or ss 170(1) or 170(2) supports a breakdown of a business into customer or product segments. It applies in s 170(2) to impose levies on liable income earned by employees and self-employed persons in relation to the business, industry, profession, trade, or undertaking — in this case, a business. An "undertaking" extends to something that would not qualify as a business but still involves a programme or plan of action.

(c) Sections 170(3) and 171 reinforce the statutory regime. Section 170(3) allows a discretionary categorisation of employees into separate classification units but only if the employer has two or more distinct and independent activities which could continue on their own. Even where those requirements are met, if an employee works across two or more of their employer's activities, under s 171, all the employee's

44 *Accident Compensation Corporation v Anderson & O'Leary Ltd*, above n 29, at [61]–[66]; *Accident Compensation Corporation v Building Connexion Ltd*, above n 29, at [51]–[57]; and *Accident Compensation Corporation v Southern Lakes Building Ltd*, above n 29, at [52]–[58].

earnings would be classified in the unit attracting the highest rate. But if they only worked across one activity, all their earnings would be classified into the classification relevant to that activity (provided s 170(2) is satisfied). There is no equivalent for self-employed persons because they would not usually have employees. Section 170(3) is not superfluous because s 170(2) requires an assessment of whether there is more than one activity. It is not engaged if there is only one activity. For example, a retailer's employees could not be classified separately under s 170(3) if it sells stationery and toys unless it operated two distinct and independent stores.

(d) The ANZSIC classifications are an aid to interpretation of the regulations. The definitions of "retail trade division" is directly applicable to the ITM stores, as opposed to "wholesale trade division".

(e) There would be significant policy implications if the position advocated for by ACC is accepted. Businesses would limit their activities to avoid ACC levies, which would be inefficient and irrational. Employers would be liable to pay work account levies for risks their employees are simply not exposed to. Rather, consistent with the objective of ACC risk categorisation, the nature of the premises (and accordingly risks the employees are exposed to) is the key element. As they are retail premises rather than wholesale distribution centres, ACC's categorisation is wrong. A customer's choice to purchase goods from a retailer rather than from a wholesaler cannot change the level of risk that the employee is exposed to.

What does s 170(2) mean?

Section 170

[34] Section 170(1) requires ACC to classify an employer in an industry or risk class that most accurately describes their activity. If an employer is engaged in two or more activities, the text of s 170(2) requires ACC to "classify all the employer's employees

in the classification unit for whichever of those activities attracts the highest levy rate under the regulations".

[35] The purpose of the requirement in s 170(2) emerges from the legislative context in pt 6 of the Act, which requires that:

(a) ACC must collect levies,[45] operate a Work Account to fund entitlement,[46] and separately account for amounts collected from, and expended in respect of, each industry or risk class;[47]

(b) the cost of all claims must be fully funded;[48]

(c) employers must pay levies to fund the Work Account;[49] and

(d) the levies, set in the regulations, are related to what an employer pays their employees and the classification regime which assesses the injury risks in different types of workplaces.[50]

[36] The effect of those provisions is that the levies paid by an employer are affected by the number of their employees, the amount the employees are paid, and their risk of injury. That provides some incentive on an industry as a whole to lower its risks of employee injuries. That was the explicit intention of the select committee that responded to the Woodhouse Report and is a feature of the current legislative scheme for accident compensation in New Zealand. If an employer is engaged in two or more activities and they pay a levy that is not based on the activity that attracts the highest levy rate, their incentives to contribute to lower risks for employees are reduced and the Work Account will be relatively underfunded. That explains why s 170(2) requires classification of an employer for the activity which attracts the highest levy rate. The

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45 Accident Compensation Act, s 165(1)(d).
46 Section 166(1)(a).
47 Section 170(6).
48 Section 166A.
49 Section 168.
50 See Sections 169, 329 and 331; Accident Compensation (Work Account Levies) Regulations 2022; and Accident Compensation (Experience Rating) Regulations 2022. See also Ministry of Business, Innovation and Employment | Hīkina Whakatutuki *Stage 2 Cost Recovery Impact Statement: 2022/23 – 2024/25 ACC Levies* (22 December 2021) at 5.

policy implication Mr Pearson suggests is inefficient and irrational is an intended feature of the regime.

[37] Section 170(3) is a discretionary exception to s 170(2). It empowers ACC to classify employees in separate classification units for different activities if the employer meets specified criteria. The criteria include that the employer is engaged in two or more "distinct and independent activities", each of which "could, without adaptation, continue on its own without the other activities".[51] There must also be accounting records which demonstrate the separate management and operation of each activity and allocate the earning of employees solely in each activity.[52] If Mr Pearson is correct that the respondents' employees are not exposed to the risks of the highest levy category, it may be that they could take advantage of this exception. But the relevant facts are not before us, and the discretion is ACC's. We express no view on that matter.

[38] The definition of "activity" in s 6 is relevant to the question of whether an employer is engaged in two or more activities for the purposes of s 170(2), as well as to the operation of s 170(3). The High Court focussed on the inclusion of "business" in the definition at paragraph (a). But we accept that "undertaking", which is also included in the definition, is a potentially wider term that can refer to a more disaggregated aspect of an employer's operations. Ancillary and subservient functions relating to an activity, are included in the definition of an "activity" in subs (b). Ancillary and subservient functions are specified to include administration, management, marketing and distribution, technical support, maintenance and product development.

[39] Accordingly, if there is a practical and distinct difference in functions associated with one aspect of an employer's operations compared with another, they are likely to be different activities for the purposes of pt 6. That alone does not determine the application of the definition. All parts of the definition should be brought to bear in a particular case. But this aspect of the definition of "activity" does indicate the meaning of the definition.

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51 Accident Compensation Act, ss 170(3)(b) and 170(3)(c).
52 Section 170(3)(d).

[40] The High Court is correct that the text of the definition of "activity" does not expressly envisage the activities will be integrated.[53] But neither does it expressly envisage the activities will not be integrated. We agree that separately identifiable businesses will be captured within s 170(2) unless s 170(3) applies. But the definition applies "for the purposes of Part 6" and must be read in light of the context and purpose discussed above. The context of s 170(3) as a discretionary exception to s 170(2) suggests that Parliament envisaged s 170(2) applying to employers engaged in two or more activities whether they are integrated or not. Otherwise, as Mr Laurenson submits, the requirement under s 170(3), that an employer can be classified in separate CUs if among other things "the employer is engaged in 2 or more distinct and independent activities", becomes superfluous.

[41] If the two or more activities are distinct and independent, and the other criteria of s 170(3) are met, ACC is empowered to classify the employees in separate CUs for the different activities. But if not, s 170(2) applies and the employees must be classified in the CU for whichever activity attracts the highest levy rate, for the reasons explained above related to purpose and context.

[42] This position is supported by the context of s 171(1) which applies to a self-employed person. If a self-employed person is engaged in two or more activities, the same position applies as under s 170(2). But there is no equivalent in s 171 to s 170(3). That is because a self-employed person is defined as a natural person and is therefore not able to be composed of distinct and independent businesses.

[43] Accordingly, we do not agree with the High Court that s 170(2) is only engaged where an employer operates separately identifiable businesses or that operation of a single integrated business does not engage s 170(2).[54] Neither do we agree with the High Court's conclusion that employers cannot be engaged in several activities simultaneously for the purposes of the section. Employers can be engaged with two or more activities simultaneously, including in operating a single integrated business. That is the situation envisaged by s 170(2), for the reasons we have explained, particularly: the context of s 170(3) as a discretionary exception; the treatment of

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53 Judgment under appeal, above n 1, at [35].
54 At [35] and [36].

self-employed persons in s 171; and the definition of "activity" relating to the practical nature of work undertaken that is materially distinguishable for the purposes of safety risks and, therefore, levies.

ANZSIC

[44] The ANZSIC is an obvious aid to interpreting the Regulations, as Simon France J stated in *On the Go (New Zealand) Ltd v Accident Compensation Corporation*.[55] But its helpfulness is limited by the differences in its own context, compared with that of the accident compensation regime. The accident compensation regime, and s 170(2) in particular, requires identification of where an employer is engaged in two or more activities. This has been so since 1989, as explained above. But the ANZSIC is created for different purposes. As described in the ANZSIC 2006, its purpose is to provide a basis for the standardised collection, analysis, and dissemination of economic data on an industry basis for New Zealand and Australia.[56] It is used widely by government agencies, industry organisations and researchers for various administrative, regulatory, taxation, and research purposes.[57] Classifications are produced on a mutually exclusive basis. A business unit can only be assigned to one class, on the basis of its "predominant activity", measured in terms of income.[58]

[45] Use of the ANZSIC for the purposes of application of the accident compensation regime needs to bear that difference in purpose in mind. So, for its own purposes, the ANZSIC characterises a unit that sells to both businesses and the general public as falling within the definition of "Wholesale Trade Division" if it operates from premises such as warehouses or offices with certain characteristics identified in the last paragraph of the definition quoted above, at [16] of this judgment. There is an equivalent set of characteristics associated with the retail trade division in the last paragraph of that definition quoted above, at [16] of this judgment. Because a unit must be in only one classification for the purposes of ANZSIC, it must be in either the wholesale or retail trade division, but not both. But, for the purposes of the accident compensation regime, an employer can be engaged in both wholesale trade and retail

55 *On the Go (New Zealand) Ltd v Accident Compensation Corporation*, above n 11, at [21].
56 ANZSIC, above n 8, at [1.5].
57 At [1.6].
58 At [2.3].

trade. This illustrates the limits of the usefulness of the ANZSIC definitions for the purpose of applying the accident compensation regime.

Application here

[46] This is an appeal on a question of law, stated by the High Court. For the reasons we have given, we consider the answer is that the High Court was not correct to conclude that s 170(2) of the Act will only be engaged where an employer operates two or more separately identifiable businesses, each of which must be a separate and distinct activity.

[47] Mr Pearson submits that there has been a finding of fact, by the District Court, that the nature of these respondents' premises is only retail in character and vastly different from a wholesaler.[59] But those suggestions by the District Court were made on the basis of an analysis of the legislative regime that we have concluded is incorrect. It appears to have been driven by the ANZSIC definitions which are designed to assign a business unit only to one class, on the basis of its "predominant activity", measured in terms of income.[60]

[48] We agree with ACC that the respondents are each engaged in multiple activities. ACC is therefore required to apply s 170(2). On the basis of the factual decisions of the courts below, the activity attracting the highest levy rate under the Regulations into which the respondents fall is CU 45310 — timber wholesaling. That is their appropriate classification. That reflects the purposes of the accident compensation legislative regime in incentivising the industry to contribute to lower safety risks for employees and fully fund the Work Account in order to compensate employees where safety risks are realised. We do not speculate on the potential availability of the s 170(3) discretion in relation to any of the respondents.

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59 *Anderson & O'Leary Ltd v Accident Compensation Corporation*, above n 29, at [61]–[66]; *Accident Compensation Corporation v Building Connexion Ltd*, above n 29, at [51]–[57]; and *Accident Compensation Corporation v Southern Lakes Building Ltd*, above n 29, at [52]–[58].

60 ANZSIC, above n 8, at [2.3].

Result

[49] We grant the relief sought by ACC, though we endorse its classification decision in the text of our judgment rather than by a formal order.

[50] We answer the question of law as follows:

> Was the High Court correct to conclude that s 170(2) of the Accident Compensation Act will only be engaged where an employer operates two or more separately identifiable businesses, each of which must be a separate and distinct activity?
>
> No.

[51] The orders are that:

(a) the appeal is allowed;

(b) the High Court judgment is set aside; and

(c) the District Court and High Court orders that ACC pay the respondents' costs are set aside.

[52] We make no order as to costs in this Court.

Solicitors:
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