Recovery claims under section 138 of the Accident Compensation Act 1985 (Vic) continue to be a cause of headache for general liability insurers. The Victorian WorkCover Authority (VWA) frequently adopts an inflexible approach to the prosecution of such claims. No doubt this is partially informed by the quantification of the potential indemnity, using a methodology which is unique to Victoria, and clearly favourable to the VWA.¹ Moreover, it has been our experience that the VWA sometimes refuses to adopt a commercial approach to the resolution of claims, in circumstances where liability is in issue, thereby placing insurers and insureds in a difficult predicament.

The good news is that a recent decision of the Supreme Court of Victoria illustrates that contentious recovery claims (i.e. where liability is in dispute) can be defeated, using careful case preparation.² The worker in that case allegedly suffered injury in March 2010, in the course of his employment as a truck driver. He alleged that the incident occurred when he was unloading his truck and some sheets of plyboard fell on him, causing him to suffer injury to his right shoulder. Interestingly, the judgment notes that the worker’s common law claim against his employer (the trucking business) and the defendant in the recovery claim had been settled, which suggests that some attempt is likely to have been made by the defendant to settle the s 138 claim, prior to trial.
The court was not satisfied that the worker suffered injury in the course of his employment as alleged, on the basis he was an unreliable witness. The trial judge pulled no punches when he described the worker as a ‘truly appalling witness’. In concluding that ‘factor X’ in the s 138 formula was nil, the court held that it was significant that the worker:

- Made no report to the defendant in March 2010, or at all, concerning the incident;
- Made no contemporaneous report to his employer of the incident;
- Provided a different account of the incident when completing the injury claim form and when he consulted his treating doctors;
- Had previously sworn an affidavit in 2014, in which he omitted to disclose the fact that in the late 1990s he had undergone two hydro-dilation procedures to his right shoulder;
- Had completed a job application form, in which he had falsely answered that he had never been convicted of a criminal or drug offence; and
- Had recent prior convictions for dishonesty related offices.

This case is a welcome win for public liability insurers facing s 138 recoveries and demonstrates the importance of carefully weighing up prospects of defending such claims.

1 The same methodology is contained in s 369 of the Workplace Injury Rehabilitation and Compensation Act 2013 (Vic), which applies in respect of workplace accidents which occur on or after 1 July 2014.
3 Representing the extent, expressed as a percentage, that the defendant’s negligence caused or contributed to the relevant injury.