

## INTRODUCTION

This paper is divided into three main parts.

Part I deals with psychological injuries in the light of the recent Court of Appeal decision in *Northern NSW Local Health Network v Heggie* [2013] NSWCA 255. In particular, it focuses on s 11A of the *Workers Compensation Act* 1987 and the assessment of reasonable conduct by the employer. While the paper closely follows the Court of Appeal's decision, and attempts to summarise the key points, it is not a substitute for the Court's full reasons.

Part II looks at the introduction of fresh evidence or additional evidence on appeal under s 352(6) of the *Workplace Injury Management and Workers Compensation Act* 1998, and the circumstances in which it will be permitted, in light of recent Court of Appeal decisions.

Part III considers the journey provisions in light of the introduction of s 10(3A) by the *Workers Compensation Legislation Amendment Act* 2012 which provides that the journey provisions only apply if "there is a real and substantial connection between the employment and the accident or incident out of which the personal injury arose".

This paper is meant as a guide only and not as a substitute for your own research. It is based on the state of the law as at 5 March 2014.

## PART I

### Psychological injuries in light of *Northern NSW Local Health Network v Heggie* [2013] NSWCA 255

#### INTRODUCTION

- 1.1 The Court of Appeal's decision in *Heggie* provides a valuable insight into the practical aspects of psychological injury cases where the employer relies on the defence of reasonable action with respect to one or more of the actions listed in s 11A. That decision discussed, and this paper will focus on, the following areas:
- (a) the importance of establishing the action (or actions) that were the whole or predominant cause of the psychological injury, before considering the reasonableness of that action;
  - (b) the nature of an appeal under s 352 of the *Workplace Injury Management and Workers Compensation Act* 1998 (the 1998 Act) where the appeal is against an evaluative judgment by an Arbitrator;
  - (c) when the question of reasonableness is to be considered, and
  - (d) how an Arbitrator's reasons should be read.
- 1.2 I will start with looking at the relevant section, the background facts in *Heggie*, the proceedings before the Arbitrator, the proceedings before the Deputy President, and, finally, the Court of Appeal's decision and the keys points to note from it.

#### Section 11A

- 1.3 Section 11A(1) of the 1987 Act provides:
- “11A No compensation for psychological injury caused by reasonable actions of employer
- (1) No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers.”

#### Background facts in *Heggie*

- 1.4 Mr Heggie was a security officer at Tweed Hospital. On the evening of 3 June 2009, a patient who had been issued with a mental health certificate under s 19 of the *Mental Health Act* 2007, which required her detention, was transferred from a public hospital to the Tweed Hospital. Mr Heggie and another security officer, Mr Carlson, were required to restrain the patient on that evening. Mr Heggie had sought assistance because the patient was “extremely combative”. Later the same evening, Mr Heggie and Mr Carlson had to remove the patient from the shower. According to Mr Heggie, she continued to act in a violent manner until she settled.
- 1.5 At about 7.30 pm on 4 June 2009, Mr Heggie was called to assist with the same patient. Nurse Taylor made a written complaint later that evening stating that Mr

Heggie had been both verbally and physically aggressive towards the patient and that he pushed her fist into her mouth, causing it to bleed. The nursing supervisor asked Mr Heggie to leave, which he did, and the patient immediately settled.

- 1.6 Mr Heggie also submitted a report about the incident in which he said the patient attempted to bite him and that she had struggled as he and other staff attempted to restrain her.
- 1.7 On 5 June 2009, the nurse unit manager spoke to the security manager, Mr Button. Mr Button said that a nurse (Nurse Clark) had advised him on 5 June 2009 that a security officer had been involved in an incident and that allegations of assault had been made. He then spoke with another nurse (Nurse Dicker) who gave him a version of events similar to that of Nurse Clark.
- 1.8 Also on 5 June 2009, the police attended the hospital in response to a report of an assault the previous evening and obtained a list of witnesses, all of whom were later interviewed.
- 1.9 Later on 5 June 2009, the hospital's general manager, Ms Podbury, asked Mr Button if he would hand Mr Heggie a letter on his return to work on 7 June 2009. In a letter written on 17 December 2009, Ms Podbury said she had decided on 5 June 2009 to take action to formally investigate the alleged aggressive incident and to stand Mr Heggie down pending completion of the investigation.
- 1.10 On 7 June 2009, Mr Button handed Mr Heggie a letter, signed by Ms Podbury, informing him that serious allegations had been made against him and that he had been suspended on full pay.
- 1.11 On 11 June 2009, Nurse Taylor signed a statement alleging that Mr Heggie had forced the patient's fists into her mouth and that he had also hit the patient. She said that, as a result of Mr Heggie's actions, the patient's mouth was bleeding. Another nurse provided a similar statement.
- 1.12 On 11 June 2009, Mr Heggie wrote to Ms Podbury disputing that he had been verbally or physically aggressive towards the patient. He said that the patient was physically aggressive and had verbally abused him. He said she had bitten him and that he attempted to restrain her using the techniques he had been trained to employ in such circumstances.
- 1.13 On 17 June 2009, two other nurses made statements to the police about the alleged assault on 4 June 2009.
- 1.14 On 11 August 2009, Mr Heggie was told that he would be charged with assault occasioning actual bodily harm to the patient.
- 1.15 On 13 August 2009, Ms Podbury told Mr Heggie in writing that, due to the reporting obligations imposed by Policy Directive PD 2006-026, the incident had been reported to the police and that an internal investigation could not proceed until the police had completed their own investigation. Once that investigation concluded, an investigation would be completed in accordance with North Coast Area Health Service (NCAHS) processes.

1.16 The Policy Directive 2006-026 stated that:

“If at any point in the assessment or investigation of an allegation there is a reasonable belief that conduct may have occurred that constitutes a serious sex or violence offence, the **employee should be suspended immediately** pending finalisation of the investigation and a decision concerning any disciplinary action to be taken.” (emphasis in original)

1.17 It added that the “protection of a Health Service’s patients, clients and employees for which it is responsible is to be paramount”.

1.18 On 17 August 2009, a psychiatrist reported that Mr Heggie was suffering marked symptoms of anxiety and depression “in the context of what he believed was unreasonable disciplinary action by his Health Network”.

1.19 On 2 September 2009, Ms Podbury appointed an officer to investigate the allegations against Mr Heggie.

1.20 On 2 October 2009, the investigator upheld allegations that, in breach of the NCAHS Code of Conduct, Mr Heggie had been verbally and physically aggressive towards the patient and had pushed the patient’s fist into her mouth causing it to bleed.

1.21 On 17 November 2009, Mr Heggie was told of the investigator’s conclusions and was invited to respond, which he did on 23 November 2009.

1.22 On 3 December 2009, Ms Podbury wrote to Mr Heggie confirming the conclusions of the investigation and advising him that his actions constituted misconduct and gave him five working days in which to show cause why he should not be dismissed. Mr Heggie responded on 10 December 2009.

1.23 On 17 December 2009, Ms Podbury wrote to the chief executive officer of the Health Network setting out the allegations against Mr Heggie, the findings of the investigation, the show cause letter, and Mr Heggie’s response. She said that Mr Heggie’s conduct amounted to misconduct and she recommended that disciplinary action be taken against him.

1.24 On 23 December 2009, the chief executive officer told Mr Heggie that his conduct justified summary dismissal and that his employment was terminated immediately.

1.25 On 5 April 2011, the charges against Mr Heggie were dismissed by the Tweed Local Court.

1.26 On 19 April 2011, Mr Heggie filed an Application to Resolve a Dispute in the Commission in which he alleged that he had suffered post-traumatic stress syndrome due to being assaulted while attempting to restrain a patient.

### **The Arbitrator’s decision**

1.27 The Arbitrator rejected Mr Heggie’s assertion that he had suffered post-traumatic stress disorder as a result of the violent altercation with the patient on 4 June 2009. He said that the medical evidence demonstrated that Mr Heggie suffered anxiety and depression in consequence of his suspension and the subsequent investigations following 4 June 2009.

- 1.28 The Arbitrator said that Mr Heggie's psychological injury was the result of the procedures implemented following the incident on 4 June 2009, namely:
- (a) the suspension from duty;
  - (b) the reporting of the matter to police;
  - (c) the police investigation, and
  - (d) the subsequent investigation by the Health Network.
- 1.29 The Arbitrator also accepted that Mr Heggie's dismissal and the delay in his registration as a nurse and the revocation of his security licence may have exacerbated his injury. However, he said the evidence showed that Mr Heggie suffered "a significant and debilitating psychological injury immediately following his suspension from duties".
- 1.30 In the Arbitrator's view, Mr Heggie's psychological injury was clearly the result of actions taken by his employer with respect to discipline, namely, the suspension and the instigation of an investigation by the Health Network and then by the police. He said he did not need to consider the Health Network's actions in dismissing Mr Heggie nor that the criminal charges had been dismissed.
- 1.31 The Arbitrator noted the evidence upon which the Health Network determined to suspend Mr Heggie and carry out an investigation was "primarily contained in statements of other nurses and security officers employed at the hospital at the time" who were either present during the incident or present shortly after it. He said that the allegations about Mr Heggie's conduct "were extremely serious" and would "clearly warrant investigation". The Arbitrator added that it was "not relevant whether the dismissal was proper or based on a reasonable or thorough assessment of all evidence".
- 1.32 The Arbitrator said that the injury was "wholly or predominantly caused by the actions of the Health Network in suspending [Mr Heggie] and instituting an enquiry", which occurred between 7 June 2009 and 13 August 2009. (This was inconsistent with the reasons noted at 1.28 and 1.30 above.)
- 1.33 In looking at reasonableness, the Arbitrator considered:
- (a) there had been a serious and violent incident involving Mr Heggie and a patient;
  - (b) the patient sustained injury;
  - (c) a number of complaints were made by nursing staff about Mr Heggie's conduct, which, if proven, would establish serious misconduct;
  - (d) Mr Heggie was suspended on full pay pending an investigation;
  - (e) due to the nature of the allegations, the Health Network was obliged to report the incident to the police for investigation;

- (f) the Health Network deferred investigation until after the police investigation had concluded, and
- (g) Mr Heggie was advised about the process and informed about the course of action being taken by the Health Networks.

- 1.34 The Arbitrator concluded that, in circumstances where nursing staff were extremely distressed and made complaints suggesting inappropriate conduct, including that a patient was assaulted or inappropriately restrained in a manner which caused physical injury to the patient, it was appropriate and reasonable for the Health Network to commence an investigation and to suspend Mr Heggie pending the outcome of that investigation. He added that, having regard to the seriousness of the allegations, and the protocols set out by Ms Podbury, it was reasonable that the incident be reported to the police and to await the outcome of the police investigation before continuing their internal investigation.
- 1.35 The Arbitrator made an award for the Health Network. Mr Heggie appealed.

### **The Deputy President's decision**

- 1.36 Due to the unsatisfactory way the “grounds of appeal and submissions in support” were expressed, the Deputy President did not know exactly what challenge Mr Heggie made to the Arbitrator’s decision. As a result, he listed the matter for teleconference and then for an oral hearing.
- 1.37 At the hearing of the appeal, counsel for Mr Heggie identified the issue to be whether the Arbitrator erred in finding that the action taken by the Health Network in respect of discipline was reasonable action within the meaning of s 11A. This was not a proper ground of appeal and did not comply with Practice Direction No 6. It was merely a complaint that Mr Heggie did not agree with the result on the reasonableness issue. Significantly, Mr Heggie did not challenge the Arbitrator’s inconsistent statements on causation and the Deputy President did not deal with that inconsistency.
- 1.38 To comply properly with Practice Direction No 6, Mr Heggie should have identified how it was alleged the Arbitrator erred in his approach or conclusion on the reasonableness issue. For example, he might have alleged, if appropriate, that the Arbitrator erred in failing to consider relevant evidence. In presenting the appeal in such a broad and unsatisfactory way, and by not properly identifying the grounds of appeal, counsel for Mr Heggie was essentially inviting the Deputy President to engage in a rehearing on the evaluative decision on reasonableness, something that is not permitted in a s 352 appeal.
- 1.39 Though the Health Network’s counsel argued on appeal that the suspension alone caused the injury (which was inconsistent with the argument it presented at the arbitration, which was that the injury had been caused by the suspension, the investigation and the dismissal), the Deputy President did not accept that argument. He found that the Arbitrator’s findings concerning the relevance of the suspension and “the subsequent investigation” were consistent with the views of the Chief Justice in *Department of Education and Training v Sinclair* [2005] NSWCA 465; 4 DDCR 206 (*Sinclair*) concerning the relevance of the entirety of various steps of a disciplinary process.

- 1.40 The Deputy President said that the Arbitrator had determined that the suspension was “the first step in the action relevant to causation of the subject injury and that the subsequent inquiry was also causative”. The Deputy President rejected a submission that the statutory test required the Commission to consider the Health Network’s actions at the time they were taken and determine whether, in the circumstances at that time, the actions were reasonable. He said that the authorities made it clear that all relevant circumstances had to be considered.
- 1.41 The Deputy President said that the “fundamental decisions concerning the action to be taken in response to the assault were made by Ms Podbury within a period of hours on 5 June 2009” ([123]).
- 1.42 He considered that the Health Network had failed to take into account a number of relevant matters when making its decisions with respect to disciplinary action and that the Arbitrator erred in failing to take those matters into account on the issue of reasonableness.
- 1.43 The Deputy President said that a proper assessment of the events on 4 June 2009 required a careful and objective analysis of all the prevailing circumstances, which included:
- (a) the known violent propensity of the patient;
  - (b) her history of violent behaviour;
  - (c) the extreme and distressing circumstances created by the patient’s conduct at the time of admission on 3 June 2009 and thereafter;
  - (d) the difficulties encountered and injuries received by Mr Matheson (another security officer) when managing the patient before Mr Heggie presented at work on 4 June 2009;
  - (e) that Mr Heggie was summoned to the medical ward without explanation or warning concerning the circumstances;
  - (f) failure in those circumstances to ensure that relevant security protocols were observed, and
  - (g) failure to comply with procedures concerning the activation of duress alarms at the time it was perceived by staff that security assistance with the patient was required.
- 1.44 In the absence of evidence from Ms Podbury, it was not known what matters she took into account on 5 June 2009 before deciding that Mr Heggie be suspended. The Deputy President rejected the Health Network’s submission that reliance had, or could be, placed on the witness statements, since they did not come into existence until after 5 June 2009.
- 1.45 The Deputy President said there were deficiencies in the conduct of the inquiry that should have been taken into account by the Arbitrator. No consideration had been given to evidence that might have been provided by Mr Carlson, a security officer who could have described the patient’s behaviour on 3 June 2009. No consideration

had been given to evidence that might have been proffered by Ms Cooper, a mental health emergency nurse, who had dealings with the patient on 3 and 4 June 2009.

- 1.46 The Deputy President concluded that these matters should have been taken into account by the Health Network and its investigators, given the “plain statement” in the Facilitator’s Manual entitled Prevention and Management of Violence and Aggression that “at times a staff member’s duty of care to a client may justify the use of detainment, restraint or sedation for client’s own safety or the safety of others”. (Mr Heggie’s evidence was that he was attempting to restrain the patient for her own protection and that of staff.)
- 1.47 The Deputy President said that the absence of evidence from Ms Podbury left many questions unanswered concerning what, if any, consideration had been given to matters that should have been taken into account before the institution of disciplinary action.
- 1.48 He said that the Arbitrator also, on the question of reasonableness, failed to take into account the consequences of the Health Network’s decision. For Mr Heggie those consequences were “dire” and included the loss of his security licence, termination of his employment, a ban preventing his registration as a nurse until acquittal, prosecution by the police, and incurring substantial legal costs.
- 1.49 The Deputy President said that, in the absence of evidence from Ms Podbury, the Health Network had failed to establish that the action taken was reasonable. Looking at the investigation process itself, the report by the investigating officers did not reveal the reasoning process that led them to conclude that the charges against Mr Heggie had been substantiated. It merely recited the matters taken into account.
- 1.50 The Deputy President made an award in favour of Mr Heggie. The Health Network appealed.

### **The Court of Appeal’s decision**

- 1.51 Essentially, the Health Network’s complaint was that, by revoking the Arbitrator’s decision, and substituting his own decision, without first identifying an error of fact or law and correcting that error of fact or law, the Deputy President exceeded the statutory task required of him by s 352. It argued that the Deputy President impermissibly conducted an evaluative review of the Arbitrator’s decision as to reasonableness and therefore asked himself the wrong question.
- 1.52 Sackville AJA (Ward JA agreeing) delivered the leading judgment. Basten JA delivered a separate judgment in which he agreed that the Deputy President had erred in law.
- 1.53 Before dealing with the substance of the appeal, Sackville AJA made several important observations about s 11A.
- 1.54 His Honour said that the following quote from *Irwin v Director-General of School Education* (unreported CCNSW, Geraghty CCJ, 18 June 1998, No 14068 of 1997) (*Irwin*), which Foster AJA cited with apparent approval in *Commissioner of Police v Minahan* [2003] NSWCA 239; 1 DDCR 57 (*Minahan*), and which the Arbitrator had reproduced in his decision, had to be read in context. Geraghty CCJ said in *Irwin*:



“The question of reasonableness is one of fact, weighing all the relevant factors. The test is less demanding than the test of necessity, but more demanding than a test of convenience. The test of ‘reasonableness’ is objective, and must weigh the rights of employees against the objective of the employer. Whether an action is reasonable should be attended, in all the circumstances, by questions of fairness.”

- 1.55 The context (in *Minahan*) was that allegations had been made against a police officer. Another officer conducted a preliminary enquiry with a view to determining whether the complaint required a full investigation to be undertaken. The preliminary enquiry determined that the complaint was “ridiculous” and that no further action should be taken. Notwithstanding this recommendation, the officer was told that the matter would be referred to a corruption prevention unit for “intelligence purposes”. The officer’s request that a formal investigation be conducted so he could clear his name was rejected. The referral to the corruption unit caused the officer a psychological injury.
- 1.56 The Compensation Court found that the employer had not discharged the onus under s 11A. The Commissioner had not taken the interests of the officer into account in determining whether further resources should have been expended on an investigation into the complaint. The Court of Appeal dismissed the Commissioner’s appeal.
- 1.57 The action that caused the officer’s injury was not the investigation, but the referral of an apparently groundless complaint to the corruption prevention unit. That referral was done without undertaking the obvious enquiries that were likely to have confirmed that the complaint was baseless and would have cleared the officer’s name. The critical point was that the investigating officer knew the complaint was “ridiculous” and was aware that the referral to the corruption unit would have a major psychological impact on the police officer concerned.
- 1.58 Sackville AJA observed, at [58]:
- “The case [presumably *Minahan*] is therefore not authority for the proposition that disciplinary action, short of dismissal of an employee or a finding of misconduct, is reasonable only if the decision is based on a consideration of all the circumstances bearing on the truth or otherwise of allegations made against the employee.”
- 1.59 His Honour then set out the following propositions, at [59]:
- “(i) A broad view is to be taken of the expression ‘action with respect to discipline’. It is capable of extending to the entire process involved in disciplinary action, including the course of an investigation.
- (ii) Nonetheless, for s 11A(1) to apply, the psychological injury must be wholly or predominantly caused by reasonable action taken or proposed to be taken **by or on behalf of the employer**.
- (iii) An employer bears the burden of proving that the action with respect to discipline was reasonable.
- (iv) The test of reasonableness is objective. It is not enough that the employer believed in good faith that the action with respect to discipline that caused psychological injury was reasonable. Nor is it necessarily enough that the

employer believed that it was compelled to act as it did in the interests of discipline.

(v) Where the psychological injury sustained by the worker is wholly or predominantly caused by action with respect to discipline taken by the employer, it is the reasonableness of **that action** that must be assessed. Thus, for example, if an employee is suspended on full pay and suspension causes the relevant psychological injury, it is the reasonableness of the suspension that must be assessed, not the reasonableness of other disciplinary action taken by the employer that is not causally related to the psychological injury.

(vi) The assessment of reasonableness should take into account the rights of the employee, but the extent to which these rights are to be given weight in a particular case depends on the circumstances.

(vii) If an Arbitrator does not apply a wrong test, his or her decision that an action with respect to discipline is or is not reasonable is one of fact.”  
(emphasis included in original)

- 1.60 In looking at whether the psychological injury was caused by reasonable disciplinary action taken or proposed to be taken by the employer, Sackville AJA said, at [61], that the reasonableness of an employer’s action for the purpose of s 11A is to be “determined by the facts known to the employer at the time or that could have been ascertained by reasonably diligent inquiries”. His Honour added, at the same paragraph:

“Ordinarily, the reasonableness of a person’s actions is assessed by reference to the circumstances known to that person at the time, taking into account relevant information that the person could have obtained had he or she made reasonable inquiries or exercised reasonable care. The language does not readily lend itself to an interpretation which would allow disciplinary action (or action of any other kind identified in s 11A(1)) to be characterised as not reasonable because of circumstances or events that could not have been known at the time the employer took the action with respect to discipline.”

- 1.61 His Honour noted that many actions with respect to discipline, such as suspension on full pay while serious complaints are investigated, are necessarily taken without the employer having the opportunity to establish the full facts.
- 1.62 A test of reasonableness by reference to facts that could not have been known at the time the action is taken invites a factual inquiry far removed from the fairness or integrity of the actual decision-making process. Action with respect to the transfer, performance appraisal or retrenchment of workers may be perfectly reasonable when taken. However, in the light of subsequent, unforeseen, developments the action might turn out to have been mistaken and therefore retrospectively vulnerable to being characterised as unreasonable. His Honour seemed to be firmly of the view that that ought not happen.
- 1.63 However, that is not to say that evidence of events after the relevant action can never be relevant on the question of reasonableness. Reports or correspondence prepared after the action may shed light on the facts known by the employer at the time the action was taken or that could have been ascertained had diligent inquiries been undertaken. However, his Honour thought it unlikely that facts or circumstances that

were neither known nor ascertainable when the employer took the action could have a material bearing on the reasonableness of that action.

- 1.64 Turning to the nature of an appeal under s 352, Sackville AJA said that it is clear from the language in the section that the Commission is not entitled to overturn an Arbitrator's decision unless the decision is affected by an error of fact, law or discretion.
- 1.65 His Honour said that the observations of Allsop J in *Branir Pty Ltd v Owston Nominees (No 2)* [2001] FCA 1833; 117 FCR 424 at [28] (reproduced below) need to be borne in mind, particularly where the challenge is to an evaluative judgment such as the reasonableness of actions by an employer with respect to discipline:
- “in [the] process of considering the facts for itself and giving weight to the views of, and advantages held by, the trial judge, if a choice arises between conclusions equally open and finely balanced and where there is, or can be, no preponderance of view, the conclusion of error is not necessarily arrived at merely because of a preference of view of the appeal court for some fact or facts contrary to the view reached by the trial judge.”
- 1.66 Sackville AJA saw a number of difficulties with the approach taken by the Deputy President.
- 1.67 First, the Deputy President did not advert to the internal inconsistency, in the Arbitrator's reasons, as to the action that caused Mr Heggie's psychological injury (as earlier noted, those inconsistencies were not the subject of challenge on appeal to the Deputy President and, though the parties did make submissions on causation, those submissions were inconsistent with the submissions made at the arbitration). He proceeded on the basis that it was not only the suspension and the initiation of an inquiry that had caused the injury, but also the “subsequent inquiry”, though it was not clear which inquiry he had in mind.
- 1.68 This point raises one of the central and crucial issues in all s 11A cases, namely, what action (or actions) caused the injury. The evidence, and the parties' submissions, should always address this issue first. Unless one or more of the matters listed in s 11A was the whole or predominant cause of the psychological injury, the question of reasonableness does not arise.
- 1.69 Though his Honour said it was not easy to reconcile the inconsistencies in the Arbitrator's reasons on the causation issue, he thought that the Arbitrator's “ultimate finding” was that the injury was wholly or predominantly caused by two actions by the Health Network: first, in suspending Mr Heggie (on 7 June 2009) and, second, in initiating an inquiry into the allegations (which was done by letter from Ms Podbury dated 13 August 2009).
- 1.70 This was supported by the Arbitrator's finding that Mr Heggie “suffered a significant and debilitating psychological injury immediately following his suspension from duties”. It was also supported by the fact that, in considering the reasonableness of the conduct, the Arbitrator did not refer to the Health Network's conduct of its investigation.
- 1.71 Second, there was an inconsistency in the Deputy President's reasons concerning the matters to be taken into account on the question of the reasonableness of the Health Network's actions. He rejected the contention that reasonableness should be

determined by reference to the circumstances at the time of the relevant disciplinary action. However, he also rejected the Health Network's submission that the reasonableness of the decision to suspend should be assessed having regard to the statements made by several eyewitnesses.

- 1.72 Sackville AJA said that in considering the “dire” consequences that flowed from the Health Network's actions, the consequences considered all required action, **beyond the disciplinary action taken by the Health Network that caused Mr Heggie's psychological injury**, before they could happen. In other words, the Deputy President considered matters that were beyond the two actions that the Arbitrator found had caused the psychological injury.
- 1.73 Third, the Deputy President concentrated on the reasoning of Ms Podbury, rather than the reasoning of the Arbitrator. The question for the Deputy President was whether the Arbitrator's finding that the disciplinary action was reasonable was vitiated by an error. Ms Podbury's failure to consider the events prior to 4 June 2009 (assuming them to be relevant) did not necessarily mean that the Arbitrator had failed to take those matters into account on the question of reasonableness.
- 1.74 Fourth, the Deputy President referred, several times, to the failure to adduce evidence from Ms Podbury. If Ms Podbury's state of mind was relevant to the question of reasonableness, the failure to give evidence might have permitted adverse inferences to be drawn against the Health Network. However, counsel made no *Jones v Dunkel* [1959] HCA 8; 101 CLR 298 submission. As it was clear (from correspondence in evidence) that Ms Podbury had rejected Mr Heggie's contention that the incident on 3 June 2009 was relevant, it was not clear why the Deputy President thought the absence of evidence from Ms Podbury was relevant.
- 1.75 Dealing with the failure to call evidence from Ms Podbury, Basten JA said that, as the reasonableness of the employer's actions had to be established objectively, the reasons of the decision maker (Ms Podbury) were not critical. However, they might have been relevant in a negative sense, if, for example, it were established that she was actuated by malice or other irrelevant factors (which was not alleged in this case). Therefore, Ms Podbury's actual reasons for suspending Mr Heggie and instituting the investigation were “of little significance” ([11]).
- 1.76 Basten JA said that the mere fact of uncertainty (about what happened on 4 June 2009) was an important factor in assessing the reasonableness of the suspension pending investigation. On that basis, anything that happened after the action was taken was “arguably irrelevant” ([12]).
- 1.77 What happened after 13 August 2009 may have been relevant in so far as it cast doubt on the proposition that Mr Heggie's injury had been caused by the action of the employer, as distinct from the action of third parties (such as the police), but it had no bearing on the reasonableness of the Health Network's conduct.
- 1.78 Basten JA added that considerations of arguments as to what was foreseeable and what possibilities Ms Podbury should have taken into account at the time the decision was made “may be permissible, but should not be influenced by knowledge achieved with hindsight” ([13]).

1.79 His Honour said, at [14]:

“In short, in assessing the reasonableness of the action taken by [Ms Podbury], the relevant material was that in existence at or prior to the time when the decision was made and communicated to [Mr Heggie].”

1.80 It followed that by placing weight on the subjective decision-making of the employer, rather than limiting his consideration to an objective consideration of the reasonableness of the decision, based on information available at the time Ms Podbury took the decision, the Deputy President erred.

1.81 Fifth, Sackville AJA said it was not apparent why the Deputy President thought the Arbitrator was bound to take into account the events of 3 June 2009 in determining whether it was reasonable for the Health Network to suspend Mr Heggie on full pay and initiate an investigation into the allegations against him. At the time of the suspension, Ms Podbury had available to her Nurse Taylor’s written complaint concerning Mr Heggie’s conduct and the information Mr Button had received from Nurses Clark and Dicker, which confirmed Nurse Taylor’s complaint.

1.82 The material available to Ms Podbury on 5 June 2009 established that serious allegations of assault had been made against Mr Heggie by staff who had observed the alleged conduct. She also had Mr Heggie’s exculpatory account. The conflicting versions would have to be resolved by appropriate processes. By the time Ms Podbury made her decision it was apparent that:

- (a) a serious and violent incident had occurred on 4 June 2009 involving Mr Heggie and a patient;
- (b) the patient had sustained an injury in consequence of the altercation;
- (c) staff had made complaints about Mr Heggie’s conduct amounting to allegations of assault, and
- (d) the staff who had been involved were extremely distressed about the incident.

1.83 The decision to suspend Mr Heggie on full pay pending further consideration of the allegation was made in conformity with PD 2006-026, which provided that, if at any point in the assessment of an allegation there is a reasonable belief that a serious violence offence **may have occurred**, the employee **should be suspended immediately**. Though compliance with the Policy Directive was not determinative of the objective reasonableness of the Health Network’s actions “it [was] a highly material consideration” (162).

1.84 Sackville AJA said it was difficult to see how the events on 3 June 2009 could have been relevant to the decision to suspend Mr Heggie on full pay pending an investigation, or to the decision to initiate an investigation into Mr Heggie’s conduct. What happened before 4 June 2009 could not detract from the significance of the nurses’ account of events and the implications for the safety of staff and patients raised by the complaints.

1.85 Sixth, if the events on 3 June 2009 were relevant to the reasonableness question, the Deputy President (wrongly) proceeded on the basis that the Arbitrator gave no

consideration to those events. Noting that s 294(2) of the 1998 Act requires the Commission to attach **a brief statement of its reasons** to the Certificate of Determination and that s 354 provides that proceedings are to be conducted as informally as proper consideration of the matter permits, a fair reading of the Arbitrator's reasons showed that he did take into account the events preceding the alleged assault, but considered that they had little bearing on the issue of the reasonableness of the Health Network's actions.

- 1.86 Read in context, the Arbitrator's finding (on reasonableness) should be understood as conveying that the Health Network's actions were reasonable notwithstanding Mr Heggie's difficult experience the previous evening.
- 1.87 Last, the Deputy President referred to Practice Direction 2006-026 but he made no reference to the overriding concern in that Practice Direction to avoid any ongoing risk to the Health Network's employees or to the patients.
- 1.88 None of the matters relied on by the Deputy President as establishing error by the Arbitrator (see 1.43) was capable of demonstrating that the Arbitrator had erred in finding that the Health Network's actions were reasonable. The Arbitrator did take the events preceding the alleged assault into account, but considered them to have no material bearing on the reasonableness of the Health Network's actions.
- 1.89 Given the Arbitrator's findings as to the circumstances known to Ms Podbury on 5 June 2009, it was open to him to conclude that the altercation with the patient the previous evening could not detract from the reasonableness of the actions concerned. Viewed at the time the actions were taken (7 June 2009 for the suspension and 13 August 2009 for the initiation of the inquiry) the events on 3 June 2009 might have had a bearing on whether any further disciplinary action should be taken against Mr Heggie and, if so, what. However, having regard to the other matters, the events on 3 June 2009 could be regarded by the Arbitrator as of marginal significance.
- 1.90 The adverse consequences the Deputy President said the Arbitrator should have taken into account (see 1.48) were referred to by the Arbitrator. However, the Arbitrator seemed to have taken the view that those matters were not material to the actions taken by the Health Network because they were not necessary consequences of the relevant actions (the suspension and the decision to investigate the allegations). For example, the termination of Mr Heggie's employment only came about as a consequence of the inquiries, and a distinct decision making process, and **was not causally related to Mr Heggie psychological injury**.
- 1.91 Though the Health Network referred the matter to the police, its action in doing so could not be rendered unreasonable by the possibility that the police would decide to initiate a prosecution against Mr Heggie. The protocols required the allegations of assault to be referred to the police.
- 1.92 The Deputy President's conclusion that the Arbitrator had erred by not taking into account the factual matters he identified (see 1.43 and 1.48 above), and his approach to the Health Network's compliance with PD 2006-026, suggested that he "transcended the permissible limits of the Commission's role on an appeal from an Arbitrator" ([175]).

- 1.93 While the Arbitrator did not consider it was incumbent on the Health Network to undertake a “proper” assessment of the conflicting claims about the events of 4 June 2009, before suspending Mr Heggie, and another Arbitrator might have given greater weight to the merits of the Health Network obtaining formal statements from the witnesses, “these were matters that the legislature entrusted to the Arbitrator to evaluate” ([178]).
- 1.94 The Deputy President’s preference for a different approach did not establish that the Arbitrator’s decision was affected by an error of fact. The Arbitrator either did take into account the “shortcomings” in the actions taken by the Health Network “or was entitled, in the exercise of his evaluative judgment, to regard them as having little or no bearing on the question he had to determine” ([179]). The evaluative judgment referred to was whether the Health Network’s actions were reasonable.
- 1.95 By taking into account material that could not demonstrate that the Arbitrator had erred, and was therefore irrelevant, the Deputy President exceeded the authority conferred by s 352(1) and (5) of the 1998 Act.
- 1.96 There was a further problem. Though the Arbitrator’s findings on causation were ambiguous, Sackville AJA interpreted them to mean that the actions that caused the psychological injury were the suspension and the initiation of the investigation. As the Deputy President was not asked to set aside these findings, it was only these two actions that had to be assessed for reasonableness. Therefore, in considering if the Arbitrator erred on the reasonableness issue, it was not open to consider other actions, such as the adequacy of the Health Network’s investigation and the decision to terminate Mr Heggie’s employment.
- 1.97 Having regard to Sackville AJA’s interpretation of the Arbitrator’s decision on causation, which had not been challenged on appeal to the Deputy President, the Deputy President had to consider whether “**that decision** was affected by an error of fact” ([184], emphasis included in original). The Deputy President considered whether the Arbitrator had erred in finding that a wider range of actions with respect to discipline had been reasonable. Those actions included some that the Arbitrator had not found to be causative of the injury.

### Key points to note

- 1.98 First, where s 11A is pleaded as a defence, it is crucial to first determine the whole or predominant cause of the psychological injury. In addressing that issue, the following should be noted:
- (a) the onus of proof in establishing a defence under s 11A is on the employer (*Sinclair* at [18]; *Minahan* at [25]);
  - (b) the Commission has accepted that the meaning of “predominantly caused” is “mainly or principally caused” (*Ponnan v George Weston Foods Ltd* [2007] NSWCCPD 92 at [24]);
  - (c) the test of causation in workers compensation matters is the commonsense test, not the proximate cause test or the but for test (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796 (*Kooragang*));

- (d) the Commission will determine causation by applying a “commonsense evaluation of the causal chain” on the “basis of the evidence, including, where applicable, expert opinions” (*Kooragang* per Kirby P (as his Honour then was) (Sheller and Powell JJA agreeing) at 463;
- (e) scientific certainty is not required, but the decision maker must feel actual persuasion of the occurrence or existence of the fact in issue before it can be found (Redlich JA, Harper JA and Curtain AJA in *NOM v DPP* [2012] VSCA 198 at [124]), and
- (f) medical evidence should address the causation issue in the terms of s 11A, which is a different question to the causation question in s 9A (*St George Leagues Club Ltd v Wretowska* [2013] NSWCCPD 64 at [126]).

- 1.99 If possible, it is usually prudent to deal with the causation issue first. If the employer is unable to establish that the psychological injury was wholly or predominantly caused by action taken with respect to one or more of the matters listed in s 11A, then reasonableness does not arise.
- 1.100 Second, if the employer is able to establish that the psychological injury was wholly or predominantly caused by particular action that comes within the matters listed in s 11A, the next step is to look at whether **that action** was reasonable. The test is not whether, considering the matter generally, the employer acted reasonably, but whether the action that caused the psychological injury was reasonable. Nor is the test whether the employer’s relevant actions were not unreasonable. As Basten JA observed in *Jeffery v Lintipal Pty Ltd* [2008] NSWCA 138 (*Jeffery*), the statute does not require “that the action be demonstrated to be ‘unreasonable’ in order for the claimant to succeed, but rather ... that compensation will not be payable if the action were ‘reasonable’”. As always, it is the words of the legislation that must be applied, having regard to the context of the legislation as a whole and the purpose of all the provisions in the statute (*Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355).
- 1.101 Third, the Commission will determine reasonableness objectively by reference to the circumstances known to the employer at the time the relevant action is taken, taking into account relevant information the employer could have obtained had it made reasonable inquiries or exercised care. It is not open to an employer to say that, based on the information it had, its actions were reasonable, if it did not make simple inquiries that a fair and rational assessment of the situation required it to make. That is especially so in circumstances where an employee’s rights and entitlements are at risk. However, evidence of events that post-date the relevant action may still be relevant if they explain facts known to the employer at the time the action was taken.
- 1.102 Fourth, in making an objective assessment of reasonableness, the reasons of the decision maker will not be critical. That is not to say, however, that such reasons are irrelevant. A worker is entitled to know why the employer has taken disciplinary action. The reasons for the action may well indicate that the employer has unfairly taken into account matters that were irrelevant, or failed to take into account relevant matters.
- 1.103 The point is that the employer’s reasons for the particular action will not be decisive. Consistent with this, it will not be enough that the employer has followed its usual protocols, if those protocols are not objectively reasonable (*Jeffery* at [50]; *Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle v Broad* [2008]



NSWWCCPD 139 at [63]). In *Heggie*, compliance with the Policy Directive was not determinative of the objective reasonableness of the Health Network's actions, but, in the absence any challenge to the reasonableness of the Policy Directive, it was "a highly material consideration".

- 1.104 Fifth, when an Arbitrator's decision involves an evaluative judgment, such as an assessment of reasonableness in s 11A, the conclusion of error is not necessarily arrived at merely because the Presidential member has a different view on that issue. In the absence of error, a presidential member is not entitled to interfere with the decision on the ground that he thinks a different outcome is preferable. The appellant must first establish that the Arbitrator erred in some way that has affected the outcome. This does not mean that every finding by an Arbitrator involves an evaluative judgment of the kind involved in assessing reasonableness in s 11A.
- 1.105 Last, in assessing an Arbitrator's reasons for their decision, it is important to consider those reasons in context, bearing in mind that s 294(2) of the 1998 Act requires a brief statement of reasons and that s 354 provides that proceedings are to be conducted as informally as the proper consideration of the matter permits.

## PART II

### FRESH EVIDENCE IN S 352 APPEALS

- 2.1 The admission of fresh evidence or additional evidence on appeal is dealt with in s 352(6) of the 1998 Act:
- “(6) Evidence that is fresh evidence or evidence in addition to or in substitution for the evidence received in relation to the decision appealed against may not be given on an appeal to the Commission except with the leave of the Commission. The Commission is not to grant leave unless satisfied that the evidence concerned was not available to the party, and could not reasonably have been obtained by the party, before the proceedings concerned or that failure to grant leave would cause substantial injustice in the case.”
- 2.2 The admission of fresh evidence on appeal requires leave and is therefore discretionary. The Commission is not to grant leave to a party to rely on fresh evidence on appeal unless it is satisfied that:
- (a) the evidence concerned was not available to the party, and could not reasonably have been obtained by the party, before the proceedings concerned, or
  - (b) failure to grant leave would cause substantial injustice in the case.
- 2.3 Consistent with the subsection, and the principles discussed in *Akins v National Australia Bank* [1994] FCA 1209; 34 NSWLR 155 and *Nowlan v Marson Transport Pty Ltd* [2001] NSWCA 346; 53 NSWLR 116, an applicant seeking leave to rely on fresh evidence (or evidence in substitution) must establish:
- (a) that the evidence could not have been obtained with reasonable diligence for use at the arbitration;
  - (b) that the evidence is such that there is a high degree of probability that there would be a different result if the evidence had been available to the Arbitrator (whether the further evidence would have produced a different outcome must be addressed in the context of the grounds of appeal as well as separately from those grounds: *Tjong v Tjong* [2012] NSWCA 201 Meagher JA (Whealy and Barrett JJA agreeing) at [14]);
  - (c) that the evidence is credible, or
  - (d) that, in the circumstances of the case, it is just to admit the evidence.
- 2.4 If the evidence sought to be tendered is evidence that was available to the party, or could reasonably have been obtained by the party, before the proceedings concerned before the Arbitrator, then, the applicant must satisfy the second, alternative, ground in the sub-section, namely, the “failure to grant leave would cause a substantial injustice in the case”.
- 2.5 In *Heggie*, Sackville AJA (Ward AJ agreeing) said that having regard to the limited nature of a s 352 appeal, the purpose of the fresh evidence provision in s 352(6) is to

allow the Commission to admit further additional evidence which, if accepted, would be likely to demonstrate that the decision appealed against was erroneous (*CDJ v VAJ* [1998] HCA 67; 197 CLR 172 at [109]).

- 2.6 This statement was quoted, with apparent approval, by Barrett JA (Macfarlan AJ agreeing) in *CHEP Australia Ltd v Strickland* [2013] NSWCA 351 at [34] (*Strickland*). In *Strickland*, the worker injured her wrist at work. Her doctor prescribed Mobic, an anti-inflammatory drug, which she took from 20 August 2010. On medical advice, she stopped taking Mobic on 7 October 2010, because it caused an increase in her blood pressure. She resumed work on 28 October 2010 and suffered a ruptured aneurysm on 16 or 17 November 2010. The Arbitrator held that the rupture of the aneurysm had resulted from taking Mobic, which had been prescribed as treatment for the work injury.
- 2.7 The appellant employer sought leave to tender on appeal clinical notes from the worker's treating general practitioner. The notes were available and, with reasonable diligence, could have been obtained and tendered at the arbitration. Therefore, the appellant could not satisfy the first limb of s 352(6).
- 2.8 On the question of whether the failure to grant leave to tender the notes on appeal would cause substantial injustice in the case, the President, Keating DCJ, posed the question of whether the admission of the notes at the arbitration would have led to a different outcome and concluded that they would not. The employer argued that his Honour misdirected himself in law and that the substantial injustice criteria may be satisfied in circumstances where it is not possible to say that the new evidence would have produced a different result.
- 2.9 Barrett JA (Macfarlan JA agreeing) rejected that submission. His Honour said that the task is to decide whether the absence of the evidence "would cause" substantial injustice in the case. There must therefore be a decision as to the result that "would" emerge if the evidence were taken into account and the result that "would" emerge if it were not. If the result would be the same on each hypothesis, the ends of justice cannot be said to have been defeated by excluding the evidence.
- 2.10 His Honour then considered the fresh evidence, and the other evidence in the case, and concluded that it strengthened the case on which the worker succeeded (based on the effect Mobic had on her hypertensive state) and did not advance the appellant employer's case. It followed that the President had not erred in law by not admitting the notes into evidence.
- 2.11 Basten JA said that the President had analysed the proffered evidence, and its possible effect, if taken into account. The President was satisfied that the doctor's notes added "nothing to the evidence already before the Arbitrator". Once he made that assessment, his paraphrase of the statutory test revealed no error of law.

### **Keys point to note**

- 2.12 Due to the restricted nature of a s 352 appeal, applications to rely on fresh evidence will succeed in only the most exceptional cases. As the Commission has held in dozens of cases, arbitrations are not a dress rehearsal where the parties can await the outcome and then attempt to tender on appeal evidence that could and should have been tendered at the arbitration. All relevant evidence should be called at the arbitration.

## PART III

### JOURNEY CLAIMS IN LIGHT OF S 10(3A)

- 3.1 Until 19 June 2012, a personal injury received by a worker on any journey to which s 10 of the 1987 Act applies was, for the purposes of that Act, “an injury arising out of or in the course of employment”. Subject to several exceptions, which will not be discussed in this paper, this provision applies to daily or periodic journeys between the worker’s place of abode and place of employment and to other specified journeys listed in s 10(3).
- 3.2 By an amendment made by the *Workers Compensation Legislation Amendment Act* 2012, the Parliament introduced s 10(3A), which applies to all injuries received on or after 19 June 2012. It provides:
- “(3A) A journey referred to in subsection (3) to or from the worker’s place of abode is a journey to which this section applies only if there is a real and substantial connection between the employment and the accident or incident out of which the personal injury arose.”
- 3.3 The Commission has considered the new provision in several decisions: *Mitchell v Newcastle Permanent Building Society Ltd* [2013] NSWWCPCPD 55 (*Mitchell*); *Bina v ISS Property Services Pty Ltd* [2013] NSWWCPCPD 72 (*Bina*); *Wickenden v Dewan Singh and Kim Singh t/as Krambach Service Station* [2013] NSWWCC 471 (*Wickenden*); and *Field v Department of Education and Communities* [2013] NSWWCC 488 (*Field*). Both *Wickenden*, where the worker succeeded, and *Field*, where the worker failed, are under appeal and will not be discussed in this paper.
- 3.4 In *Mitchell*, the worker was a loans processing officer who worked in Newcastle. Her usual hours were from 8.30 am until 5.00 pm. On 20 June 2012, her employer required her to work passed her usual finishing time and she did not leave work until shortly after 5.50 pm, by which time the sun had set and it was dark. While walking to her car in darkness she tripped on the exposed roots of a fig tree on the side of the road and suffered injuries. The evidence was that the sun set at 4.53 pm and last light was at 5.21 pm.
- 3.5 Ms Mitchell’s main argument before the Arbitrator was that her injury arose out of her employment under s 4(a) of the 1987 Act and that her employment was a substantial contributing factor to her injury. In the alternative, she relied on the journey provisions in s 10.
- 3.6 The Arbitrator concluded that the injury had not arisen out of Ms Mitchell’s employment. He said that the fact that she had to travel home, and that her journey was in darkness, were circumstances related to the fact of her being employed and not to her being employed in her particular job. Therefore, her employment only provided the occasion or setting for her injury to occur and there was nothing about her employment that contributed to her injury.
- 3.7 The Arbitrator said there was no evidence of the extent of luminance or darkness at the time Ms Mitchell normally left work, had she not been required to work back, and

no evidence of how long it took her to walk from her office to the point where she tripped. He added that it was unknown to what extent the tree root would have been visible to Ms Mitchell had she left work at her usual time. (These omissions in the evidence appear to have been crucial to the outcome. Had the evidence addressed these matters, the result may well have been different.)

- 3.8 Though he did not have to deal with s 9A, the Arbitrator said that Ms Mitchell's employment was not a factor that was real and of substance in terms of the occurrence of her injury.
- 3.9 With respect to the claim under s 10, the Arbitrator said that the words "substantial" and "employment" were to bear the same meaning throughout the legislation. He interpreted "substantial connection" to mean "a connection that is real and of substance". He said that "employment" was "not a reference merely to the fact of a worker being employed but to the employment of a worker in the worker's particular job". He defined "real" and "connection" by reference to the dictionary definitions and said that "real" means "actual", and "connection" means "association" or "relationship" or "link".
- 3.10 The Arbitrator said that, as with s 9A, s 10(3A) "involves a causative element between the employment of a worker in the particular job and the incident or accident out of which the injury arose". He added that whether there was a real and substantial connection between the employment and the accident or incident out of which the injury arose was a matter to be inferred from the facts based on commonsense.
- 3.11 While the Arbitrator accepted that there was a link between the fact that Ms Mitchell was employed and her tripping, in that, but for her being employed she would not have been making that journey, he said that there was "no link between the employment of Ms Mitchell in her particular job as a loans processing officer and her tripping over the tree roots".
- 3.12 For the sake of argument, the Arbitrator added that, if it were open to find that the connection between the employment and the incident was real and of substance if the journey became more perilous due to a change in the time the worker stopped work, the evidence did not establish that there was something about Ms Mitchell working back on 20 June 2012 that exposed her to a journey that was more perilous than would otherwise have been the case if she finished work at 5.00 pm.
- 3.13 Ms Mitchell appealed.
- 3.14 On the question of whether the injury arose out of Ms Mitchell's employment, the Deputy President said that the fact that Ms Mitchell worked an extra 50 minutes on 20 June 2012 did not make the journey home something that was "incidental" to her employment. He did not accept that the risk of tripping, because of darkness, was a consequence of "special exposure". (I note that the idea that the employment must have been of a nature to carry a "special risk" of suffering injury of some particular kind is no longer valid (*Favelle Mort Ltd v Murray* [1976] HCA 13; 133 CLR 580 per Barwick CJ at 585 (*Favelle Mort*). The question is whether the employment – its nature, conditions, incidents and obligations – exposed the worker to the risk of the injury that occurred, regardless of whether a member of the public may also have been exposed to that risk (*Dennis v A J White & Co* [1917] AC 479 per Lord Finlay at 481; *Favelle Mort* at 585)).

- 3.15 The injury did not arise out of Ms Mitchell's employment merely because the fall happened after leaving work 50 minutes later than usual. Such a proposition involves the "but for" test, which is not the test of causation in workers' compensation matters (*Qantas Airways Ltd v Watson (No 2)* [2010] NSWWCPCPD 38 at [85]–[86]). Nor could it be said that the injury occurred when Ms Mitchell's employment brought her to a particular locality where the danger arose, as occurred in *Telstra Corporation Ltd v Bowden* [2012] FCA 576 at [46]–[48]).
- 3.16 In deciding that the injury had not arisen out of Ms Mitchell's employment, the Deputy President considered several matters (at [55]) that included, but were not limited to, the fact that, at the time of the accident, Ms Mitchell was walking to retrieve her vehicle, an activity that was unrelated to her employment, and that she tripped on public land.
- 3.17 On the s 10(3A) issue, Ms Mitchell argued that there was a direct causative link between her employment and her tripping over the tree roots on her journey home from work. That link arose, so it was argued, because the employer required Ms Mitchell to work at its workplace and because, on the day of the accident, she completed additional tasks, which required her to remain at work until after dark. In addition, it was argued that the journey to and from work was for the sole purpose of discharging Ms Mitchell's duties and the journey from work was made in darkness because of the employer's requirement that Ms Mitchell perform additional duties. It was submitted that the Arbitrator erred by looking at Ms Mitchell's duties as a loan processing officer rather than the requirement of her employment as a whole.
- 3.18 The Deputy President held that the Arbitrator's approach to the meaning of "employment" and "substantial" was correct. This was based on the principle of statutory construction that a word had the same meaning throughout a statute (*Commissioner of Police v Industrial Relations Commission of NSW* [2012] NSWCA 439 at [98]). As Workers Compensation Acts do not define "real" or "connection", the Arbitrator was correct to place some reliance on the dictionary definitions to determine the meaning of those words.
- 3.19 The Deputy President concluded that "real" should be construed in its qualitative sense (*Minister for Immigration, Local Government and Ethnic Affairs v Batey* [1993] FCA 75; 112 ALR 198) and that, in the context of s 10(3A), the Arbitrator was correct to interpret "real" to mean "actual". The Deputy President agreed with the Arbitrator that "connection" involves the concept of "link".
- 3.20 While there was a clear distinction between "substantial contributing factor to injury" (s 9A) and "real and substantial connection between employment and the incident" (s 10(3A)), the Deputy President said that both involve a causal element, noting that the term "connection" in s 10(3A) may also encompass some other association with the employment (which was not argued). Without deciding the last point, he said it was clear that, as with s 9A, "the requirement of there being a 'real and substantial connection' involves a test that goes to causation at least as stringent as that found in s 4(a) (arising out of employment)" ([73]).
- 3.21 The Deputy President rejected Ms Mitchell's argument that the link between the employment and the incident arose from the requirement to work at the employer's premises and because of the 50-minute extension of the shift, during which time the light faded. He said that the "link" between the employment and the incident was far too tenuous to meet the causal requirement that the subsection requires.

- 3.22 Next, Ms Mitchell argued that, leaving aside the 50 minutes of additional work, the fact that she received her injury on the way home from work established, on its own, the relevant “real and substantial connection”. She relied on s 30 of the *Workers Compensation Rehabilitation and Compensation Act 1986* (South Australia) (the South Australian Act), which is similar to s 10(3A). Subsection (6) of s 30 provides that the fact that a worker has an incident in the course of a journey to or from work does not in itself establish a sufficient connection between the accident and the employment. Ms Mitchell argued that the absence of a similar provision in the 1987 Act supports the proposition that the fact that the injury occurred on a journey between work and home is of itself sufficient to satisfy the requirement of s 10(3A).
- 3.23 The Deputy President rejected this argument. After referring to the parliamentary debates, the Deputy President said that the legislative intent was to abolish entitlement in respect of journey injuries except in those circumstances addressed by s 10(3A). On a proper reading of s 10 there is an entitlement to compensation in journey cases if, and only if, the requirements of s 10(3A) are met or if s 10(5A) applies.
- 3.24 In *Bina*, the worker was a cleaner at Guildford West Public School. She worked a split shift: 5.30 am until 8.00 am and 3.00 pm until 6.30 pm Monday to Friday. She drove to and from work in her car because of a lack of public transport. At 8.20 am on 27 July 2012, she received injuries in a car accident while driving from the school to her home at the end of her morning shift.
- 3.25 As in *Mitchell*, Ms Bina argued that her injuries arose out of her employment and that it was therefore not necessary to rely on s 10. In the alternative, she argued that she satisfied the test in s 10(3A).
- 3.26 The Arbitrator rejected both arguments. Dealing with whether the injuries arose out of the employment, he said that the phrase “arising out of employment” requires a causal connection with the employment, which is a question of fact where considerations of whether the particular job caused or to some material extent contributed to the injury should be applied (*Nunan v Cockatoo Docks & Engineering Co Ltd* (1941) 41 SR (NSW) 119 at 214; *Zinc Corporation v Scarce* (1995) 12 NSWCCR 556 (*Scarce*) and *March v E & M H Stramare Pty Ltd* [1991] HCA 12; 171 CLR 506).
- 3.27 The Arbitrator concluded that it was not open to hold that an injury on a journey between a worker’s place of abode and place of employment arises out of the employment unless there is some greater connection with the employment than having to get to and from that place of employment. He said there was no causal connection between Ms Bina’s employment and the injuries sustained on her journey home, noting that the obligations of her employment did not expose her to injury at the intersection where the accident occurred.
- 3.28 Dealing with s 10(3A), the Arbitrator agreed with and adopted the analysis and approach taken by the Arbitrator in *Mitchell*. He concluded that the mere fact that a worker must travel to or from work is insufficient to establish a real and substantial connection between his or her employment and the accident or incident. He said that there had to be some relationship between the activities of the employment and the accident or incident.
- 3.29 The Arbitrator added that if the mere fact that a worker was travelling to or from his or her place of employment at the time of the accident were sufficient to establish a real

and substantial connection between the employment and the accident, sub-s (3A) would be otiose. As a matter of statutory construction, effect must be given to all words of an Act (*Wilson v State Rail Authority of New South Wales* [2010] NSWCA 198). He rejected the submission that assistance could be gained from the South Australian Act, noting that it was unnecessary to resort to extrinsic materials in the absence of ambiguity (*Harrison v Melhem* [2008] NSWCA 67).

- 3.30 Ms Bina appealed.
- 3.31 For different reasons to those expressed in *Mitchell*, the President, Keating DCJ, confirmed the Arbitrator's determination.
- 3.32 On the arising out of issue, Ms Bina argued that the causal relationship with employment does not connote direct or physical causation (*Smith v The Australian Woollen Mills Ltd* [1933] HCA 60; 50 CLR 504 (*Smith*) and that the test was whether the fact of being employed in a particular job contributed to some extent to the injury. She submitted that the Arbitrator failed to consider other relevant factors, such as the fact that Ms Bina worked on a split shift, which required her to travel to and from work twice each day, that she worked at a school that was not her employer's premises, that she was required to return home and not stay at the school between shifts, and that she was obliged to use her own transport.
- 3.33 The President rejected these arguments. Applying *Scarce*, the President held that the phrase "arising out of employment" requires a causal connection between the worker's injury and his or her employment such that, as a matter of ordinary commonsense and experience, the injury should be regarded as having arisen out of the employment.
- 3.34 While the President accepted that, applying *Smith*, the expression "arising out of" does not necessitate direct or physical causation, that did not assist Ms Bina because her injuries were not caused by some aspect of her employment. It was not part of Ms Bina's employment to "hazard, to suffer, or to do that which caused her injury" (*Smith* at 517, quoted by the President at [60]). She was merely driving home from work.
- 3.35 The President observed, as has been noted earlier in this paper (see 1.98(c) and 3.15 above), that the test of causation in workers compensation matters is the commonsense test, not the "but for" test. Causation is therefore not established by saying that "but for" her employment Ms Bina would not have been driving at the location where the accident occurred. The Arbitrator applied the correct test of causation. The mere fact that a worker must travel to and from work does not establish, of itself, a causal connection between the injury and the activities of, or incidental to, the employment. As the Arbitrator observed, no obligation under Ms Bina's contract of employment exposed her to the risk of injury at the location of her accident.
- 3.36 Contrary to Ms Bina's submissions, the Arbitrator did consider the split shift, the lack of public transport and that Ms Bina was required to make two journeys to and from work, but correctly concluded that those matters said nothing about the causal relationship between each journey and the employment.
- 3.37 While the Arbitrator did not expressly mention the fact that the school was not her employer's premises, he was aware that that was so. The President said that the



location of the employer's headquarters was irrelevant to the issues on appeal. For all relevant purposes, Ms Bina worked at the school and had done so for 10 years prior to the accident. That was her place of employment, regardless of her employer's place of business.

- 3.38 The President agreed with the Arbitrator that if injuries sustained during the course of a journey to and from work arose out of employment, there would have been no need to enact the journey provisions and those provisions would be superfluous. All words must be given some meaning and effect (*Commonwealth v Baume* [1905] HCA 11; 2 CLR 405 at 414, cited with approval in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 at [71]; 194 CLR 355 at 382 (*Project Blue Sky*)). By posing the rhetorical question he posed, the Arbitrator did no more than acknowledge that the express provisions in s 10 must be given meaning and effect.
- 3.39 Dealing with s 10(3A), Ms Bina argued that the Arbitrator erred in considering the component parts of the expression "real and substantial connection with employment" rather than considering the expression as a whole. She submitted that as the amendment of s 10 (which, as initially proposed, abolished all rights to claim compensation for injuries received on journeys to and from work) was subject to a subsequent amendment, to "protect" workers making journey claims, by introducing s 10(3A), that subsection should be given an "expansive interpretation". It was contended that the test in s 10(3A) does not require any causal relationship between the employment and the accident. Ms Bina relied on various Federal Court, South Australian and Canadian authorities in support of her position.
- 3.40 His Honour observed that the starting point in the interpretation of a statutory provision is "the ordinary and grammatical sense of the statutory words to be interpreted having regard to their context and the legislative purpose" (*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27 at [4], per French CJ).
- 3.41 His Honour agreed that it is not correct to take individual words in isolation and ask whether each is used in its ordinary meaning (*OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSCA 155 at [3] and [32]) and that the primary task is to determine the meaning of the provision "by reference to the language of the instrument viewed as a whole" (*Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; 147 CLR 297 at 320; *Project Blue Sky* at [69]). Moreover, as observed in *Sea Shepherd Australia Ltd v Commissioner of Taxation* [2013] FCAFC 68, the task is to construe the language of the statute, not individual words. One should not pull a provision apart and select one meaning, divorced from the context in which it appears, and then reassemble the provision.
- 3.42 In other words, his Honour added, every passage in a document must be read as part of the whole instrument. Therefore, the word-by-word analysis in *Mitchell* is not the preferred approach to statutory interpretation. However, a different approach to the interpretation of s 10(3A) made no difference to the result, either in *Bina* or in *Mitchell*.
- 3.43 The President considered the Federal Court decision of *Phillips v Commissioner for Superannuation* [2005] FCAFC 2 (*Phillips*), upon which Ms Bina relied. That case concerned s 66(2)(c) of the *Superannuation Act 1976* (Cth), which provides that certain superannuation benefits may be reduced where the Commonwealth Superannuation Corporation is of the opinion that the incapacity which was the ground for the claimant's retirement "was caused, or was substantially contributed to,

by a physical or mental condition or conditions specified in the certificate or by a physical or mental condition or conditions connected with such a condition or conditions”.

- 3.44 One of the issues in *Phillips* was whether there was a connection between the claimant’s obsessive compulsive disorder (OCD) (which was the condition certified as having caused her retirement) and her personality disorder and her major depressive disorder. In answering that question, the trial judge said (at [19]):

“S66(2)(c) does not require a **causal** connection between the [appellant’s] OCD and the conditions specified in the BCC [Benefit Classification Certificate], it requires only a connection between the two conditions. In *Commissioner for Superannuation v Benham* (1989) 22 FCR 413 (*Benham*), the Full Federal Court identified the correct approach at 421:

‘The construction which should be adopted, in the case of this Act, is a reading of s 66(2)(c) as referring to cases where there is a real and substantial connection between the certified condition and the condition that caused or substantially contributed to the incapacity.’

*The Court expressly rejected any necessity for a causal relationship between the two conditions.”* (emphasis in original)

- 3.45 The Full Court of the Federal Court held (at [44]) that the trial judge in *Phillips* correctly stated that *Benham* does not require any causal relationship between the two conditions.
- 3.46 Consistent with this authority, and contrary to *Mitchell*, the President accepted that, for a worker to succeed under s 10(3A), he or she does not have to prove that the accident was caused by the employment. If the employment caused the accident then, depending on the circumstances, there is every likelihood that the accident will have arisen out of the employment and there will be no need to rely on the journey provisions.
- 3.47 The Arbitrator expressed no concluded view on whether s 10(3A) involves a causative element. He merely said, and the President agreed, that the test in s 9A involves a test of causation, but the word “connection” in s 10(3A) may, but does not necessarily, convey the notion of a causal connection. This statement is inconsistent with the statement in *Mitchell* that “the requirement of there being a ‘real and substantial connection’ involves a test that goes to causation at least as stringent as that found in s 4(a)” ([73]). Until the Court of Appeal considers the matter, the preferred view is that expressed by the President.
- 3.48 Accepting that the word “connection” is wide and imprecise (*Australian National Railways Commission v Collector of Customs (SA)* [1985] FCA 312; 69 ALR 367), but considering the whole of the relevant phrase in s 10(3A), and the provision as a whole in the context of the legislation, the President determined that the Arbitrator’s conclusion was correct. Therefore, the mere fact that a worker is driving to and from work does not provide a real and substantial connection between the employment and the accident.
- 3.49 The President considered the course of the amendments to s 10 through Parliament and said that the Parliamentary debates did not clarify the meaning of the phrase

“real and substantial connection”. He saw no basis, in the debates, to justify an “expansive interpretation” of the provision.

- 3.50 Dealing with the South Australian authorities, the President referred to *The State of South Australia v Brophy* (1997) 68 SASR 97 where it was held that a police officer failed to establish a real and substantial connection between his employment and his accident in circumstances where, while in uniform, he was riding a police motorcycle on a journey between his place of employment and his place of abode at the time of the accident.
- 3.51 It was held that even though the officer had his radio on, which he was monitoring, and was available to respond if called upon to do so, he was not in fact responding at the time of the accident. Applying a “common sense and practical” approach, Doyle CJ concluded that the requirements of s 30 of the South Australian Act had not been met, but his Honour offered no further comment on the meaning of the phrase “real and substantial connection”. Thus, this authority was of little assistance.
- 3.52 The President found the Canadian authority relied on by Ms Bina (*Club Resorts Ltd v Van Breda* [2012] 1 SCR 572) to be of no relevance to the issues before him. That case concerned the jurisdiction of a Canadian court to determine claims for damages against a company, incorporated in the Cayman Islands, arising from accidents that occurred in Cuba (not in Canada as the President’s decision states at [111]) involving Canadian tourists. The Canadian Supreme Court considered the “real and substantial connection” test as an appropriate common law rule for the assumption of jurisdiction. Thus, as the President concluded, it determined a completely different question to the question in s 10(3A) and provided no assistance on the matter he had to determine.
- 3.53 Essentially, the President agreed with the Arbitrator that:
- (a) a substantial connection is one of substance (*Badawi v Nexon Asia Pacific Pty Ltd t/as Commander Australia Pty Ltd* [2009] NSWCA 324; 75 NSWLR 503 at [82]–[83] and [107]);
  - (b) “employment” in s 10(3A) has the same meaning as in s 9A, that is, it is the activities of, or incidental to, the employment, as opposed to the (mere) fact of being employed (*Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; 110 CLR 626 at [11]);
  - (c) the mere fact that a worker must travel to and from work is insufficient to establish a real and substantial connection between the employment and the accident – there must be some real relationship (connection) between the activities of the employment and the accident out of which the personal injury arose, and
  - (d) if travelling to and from work was sufficient to establish the relevant connection, s 10(3A) would be otiose.
- 3.54 The above construction followed from “the ordinary and grammatical sense of the statutory words having regard to their context and legislative purpose” (*Zanardo & Rodriguez Sales & Services Pty Ltd v Tolevski* [2013] NSWCA 449 at [37]), which achieved a harmonious result and a consistent interpretation of the legislation as a whole (*Commissioner of Police v Eaton* [2013] HCA 2 at [78]), and not from a word-by-word dictionary analysis of the provision.

- 3.55 In the context of the 1987 Act as a whole, the President concluded that, other than the fact that Ms Bina was driving from her place of employment to her home, which did not provide the connection required by s 10(3A), there was no connection between Ms Bina's accident and her employment.
- 3.56 The President said that the subsection would usually be satisfied, depending on the facts, when there is a real and substantial connection between some feature of what the worker is reasonably required, expected or authorised to do, by reason of his or her employment, and the accident or incident out of which the personal injury arose.
- 3.57 On the facts in *Bina*, it was open to the Arbitrator to conclude that there was no real and substantial connection between Ms Bina's employment and the accident out of which her personal injuries arose. As no error had been established, the appeal failed.

### **Key points to note**

- 3.58 The mere fact of being on a journey between a place of employment and a place of abode, of itself, does not satisfy s 10(3A).
- 3.59 Section 10(3A) does not require a causal connection between the accident or incident and the employment before it can be satisfied. However, there must be a real and substantial connection (that is, a connection of substance) between some feature of the worker's employment (its nature, conditions, incidents and obligations) and the accident or incident out of which the personal injury arose.
- 3.60 As always, each case will turn on its own facts and careful and thorough preparation, bearing in mind the terms of the section, will be crucial.