IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S 142 OF 2016**

On Appeal From
the Full Federal Court of Australia

BETWEEN: **COMCARE**
Appellant

AND: **PETA MARTIN**
Respondent

APPELLANT'S SUBMISSIONS

Filed on behalf of the Appellant, Comcare

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PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUE

2. Where:

   a) an employer engages in administrative action (here, refusing the respondent's application for promotion); and

   b) a necessary consequence of that administrative action is something which the employee dreads (here, returning to work in the employee's substantive position under a supervisor with whom the employee had difficulties); and

   c) the employee's realisation of (a) and (b) leads to psychological injury,

   is the causal connection specified in the concluding part of s 5A(1) of the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) ('suffered as a result of') satisfied?

PART III SECTION 78B OF THE *JUDICIARY ACT 1903*

3. The appellant has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903*. None is required.

PART IV JUDGMENTS BELOW

Martin and Comcare [2014] AATA 553

*Martin v Comc*are [2015] FCA 4

Martin v Comcare [2015] FCAFC 169

PART V FACTS

4. Ms Martin (the respondent) worked at the Australian Broadcasting Corporation (ABC) between January 2010 and March 2012. Initially she worked under the direct supervision of Mr Mellett as a producer. The respondent and Mr Mellett did not have a good working relationship.[1]

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1 *Martin and Comcare* [2014] AATA 553 at [1], [8], [9] and [11]-[12].

5. In order to remove herself from being supervised by Mr Mellett, the respondent applied for various positions within the ABC, outside of the Renmark workplace, but was unsuccessful.[2] However, in mid-2011 the respondent sought and obtained a temporary period of acting higher duties in the position of cross-media reporter. Again, the respondent applied for that position (on a temporary basis) in order to avoid Mr Mellett's supervision.[3]

6. When the permanent position of cross media reporter was advertised the following year, the respondent applied for the substantive position. Again, she did so to avoid having to return to work under Mr Mellett's supervision, rather than because of any 'yen' for career advancement. [4]

7. In March 2012 the respondent was advised by telephone that her application had been unsuccessful and, as a consequence, she would be returning to her substantive position under the supervision of Mr Mellett.[5] The respondent realised that once the position of cross media reporter was filled by someone else on a permanent basis her temporary occupancy of that position would cease and she would return to her substantive position.[6]

8. The respondent immediately 'broke down' and was subsequently diagnosed as suffering from an adjustment disorder for which she sought compensation.[7] Comcare denied her claim on the basis that her injury was excluded by s 5A of the SRC Act.[8]

PART VI ARGUMENT

Introduction

9. The Tribunal found the respondent broke down and suffered an adjustment disorder because she perceived (accurately) that as a consequence of her failure to obtain the promotion she would return to work in her substantive position under the supervision of Mr Mellett.[9] This finding by the Tribunal accorded with the lay and expert evidence and the manner in which the respondent ran her case.[10] Consistently with clearly established authority,[11] there was no dispute that the non-promotion constituted 'administrative action' within

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2 *Martin and Comcare* [2014] AATA 553 at [31].

3 *Martin and Comcare* [2014] AATA 553 at [9] and [31].

4 *Martin and Comcare* [2014] AATA 553 at [10], [55]-[56] and [58].

5 *Martin and Comcare* [2014] AATA 553 at [10] and [53].

6 *Martin and Comcare* [2014] AATA 553 at [10], [53]-[54], [56], [58] and [61].

7 *Ibid.*

8 *Martin and Comcare* [2014] AATA 553 at [1], [2], [10] and [54].

9 *Martin and Comcare* [2014] AATA 553 at [10], [53]-[54], [56], [58] and [61].

10 *Martin and Comcare* [2014] AATA 553 at [51], [53], [55], [56] and [58].

11 *Commonwealth Bank v Reeve* (2012) 199 FCR 463 at [30]-[33] and [57]-[60]; *Drenth v Comcare* (2012) 128 ALD 1; [2012] FCAFC 86 at [22].

the meaning of s 5A of the SRC Act.[12] In these circumstances, the Tribunal's finding, in paragraph [62] of its reasons, that the respondent's psychological injury was 'a result of' administrative action was not only open to it but was the only finding available.

10. The majority of the Full Federal Court's decision to the contrary was infected by 3 substantial legal errors. The majority:

- failed to take full account of the text of s 5A;
- failed to properly consider the purpose of s 5A in determining how it should be interpreted and applied (in favour of exclusive resort to so-called common sense under the common law); and
- failed to respect a key factual finding of the Tribunal, which accorded with the lay and expert evidence and the manner in which the respondent ran her case.

The Tribunal's decision

11. The Tribunal (per Senior Member Britton) dealt with the issue of whether the respondent's adjustment disorder was 'a result of' the decision not to promote her to the position of cross-media reporter in paragraphs [51]-[62] of its reasons for decision.

12. In paragraph [51] of its reasons, the Tribunal noted, with apparent acceptance, the respondent's contention that the worsening of her condition was caused by her realisation that she would be returning to the supervision of Mr Mellett, a prospect she dreaded, and any contribution caused by her disappointment over the loss of an opportunity for career advancement was immaterial. The basis of this apparent finding was that the respondent's *subjective motivation* in seeking the promotion was not the opportunity it presented for career advancement, but was a means of securing a transfer to another position, thereby relieving her of the need to be supervised by Mr Mellett.

13. In paragraph [55] the Tribunal noted, with apparent acceptance, the respondent's evidence that the primary reason she had applied for the position of cross media reporter was to avoid having to return to work under Mr Mellett's supervision. In paragraph [56] the Tribunal noted that the medical evidence was to similar effect.

14. In paragraph [58] the Tribunal (i) reached a finding that 'the primary reason [the respondent] applied for that position was to remove herself from Mr Mellett's direct supervision'; and (ii) also reached a finding 'that what caused her to "decompensate" was the realisation that the decision meant she would be returning to Mr Mellett's supervision and her belief that the alleged bullying would continue' (emphasis added). In paragraph [60] the Tribunal found that

[12] *Martin and Comcare* [2014] AATA 553 at [51] and [59].

that the 2 main consequences flowing from the respondent's failure to obtain the promotion were that (i) she would be required to return to her substantive position and work under the direct supervision of Mr Mellett and (ii) she would be denied a small pay increase and the opportunity to further develop her skills in cross media production.

15. In paragraph [61] the Tribunal expressed a critical finding on the causation issue arising under s 5A of the SRC Act in the following way (with emphasis added):

> The question posed by s 5A(1) is whether the claimed ailment was suffered as a result of the nominated action, in this case the failure to obtain the promotion. It matters not which of the anticipated consequences of the offending decision was most likely to have troubled Ms Martin. That her reaction to the offending decision was primarily attributable to her dread of returning to work under Mr Mellett and not her disappointment with lack of career advancement, is irrelevant. In her mind the former was a direct and foreseeable consequence of the decision.

16. These findings clearly established:

- in the respondent's mind, non-satisfaction of her subjective reason for seeking the promotion was bound up with ('a direct and foreseeable consequence of') the non-promotion; and

- the respondent's illness was suffered as a direct result of her failure to obtain the promotion.

Such findings clearly justified the Tribunal's ultimate finding, in paragraph [62] of its reasons, that 'one of the operative causes of Ms Martin's adjustment disorder was her failure to obtain the position of cross-media reporter' and her 'condition was "a result of" that action.'

17. Whilst the Tribunal held that Ms Martin's adjustment disorder resulted from her failure to obtain the position of cross-media reporter, it also concluded that the recruitment/promotion process relating to the position of cross-media reporter was not undertaken in a reasonable manner and therefore set aside Comcare's reviewable decision denying liability to compensate the respondent. Comcare appealed the Tribunal's decision to the Federal Court.

The Federal Court's Decision

18. Justice Griffiths concluded the Tribunal had made errors of law in finding the recruitment/promotion process relating to the position of cross-media reporter was not undertaken in a reasonable manner.[13] His Honour upheld Comcare's appeal and remitted that aspect of the matter to the Tribunal to be heard and

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13 *Martin v Comcare* [2015] FCA 4 at [63].

determined according to law. In the course of Comcare's appeal, Ms Martin filed a notice of contention. This notice of contention was dismissed by Griffiths J.[14]

The Full Federal Court's Decision

19. The respondent appealed Griffiths J's decision to the Full Court of the Federal Court. All members of the Full Court agreed with the approach of Griffiths J to Comcare's appeal.[15] Each member of the Full Court also agreed that the argument advanced by the respondent in support of her notice of contention was without merit.[16] However, Murphy J (with whom Siopis J agreed) (who constituted the majority) concluded that the Tribunal had nevertheless erred in its construction of s 5A (and Griffiths J had therefore erred in dismissing the notice of contention). Justice Flick dissented. By majority, the matter was remitted to the Tribunal, for re-hearing of the following questions arising pursuant to the concluding words of s 5A: (i) the 'reasonableness' issues; and (ii) the causal question.[17] This appeal only concerns the latter issue. It is accepted by Comcare that if it succeeds in this appeal the matter will need to be remitted to the Tribunal for consideration of the 'reasonableness' issues arising under s 5A.

20. In paragraph [64] of Murphy J's reasons for judgment, his Honour suggested the Tribunal's error was contained in paragraphs [60]-[62] of its reasons. In paragraph [125] of Murphy J's reasons, his Honour concluded the Tribunal's error of construction was that '(i)t did not apply common sense to the facts, as found by it, that the cause of Ms Martin's condition was not the failure to promote her'.

The deficiencies in reasoning of the majority in the Court below

The failure to have proper regard to the language of s 5A

21. In paragraph [107] of Murphy J's judgment his Honour noted the task of construing s 5A must begin with a consideration of the text itself. However, instead of further analysing the text, his judgment collapsed the entire enquiry into, in effect, common sense causation (see paragraphs [108]-[110], [121] and [125]). This approach ignores 3 significant aspects of the text:

    - the use of the indefinite article – '*a* result of' as opposed to '*the* result of'
    - the meaning of the term 'result', and
    - other textual indicators of the breadth of the exclusion.

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14 *Martin v Comcare* [2015] FCA 4 at [105]-[109].

15 *Martin v Comcare* [2015] FCAFC 169 at [1], [56] and [136]-[137].

16 *Martin v Comcare* [2015] FCAFC 169 at [1], [43]-[45] and [100]-[105].

17 *Martin v Comcare* [2015] FCAFC 169 at [1] and [106]. Following the decision of Griffiths J, it was only the first of these questions that was remitted to the Tribunal for reconsideration.

The use of the indefinite article and the meaning of 'result'

22. In *Allianz Australia Insurance Limited & GSF Australia Pty Limited and another* (2005) 221 CLR 568 McHugh J suggested the use of the indefinite article in the expression 'a result of ... [the] defect' required a connection between the defect and the injury that did not have to be a direct connection or the only connection (at [37]). He also noted (with apparent approval) Mason P's views, expressed in the decision below, that the injury need not be the 'direct' or 'effective' result of the defect and the defect did not have to be the sole or even the predominant cause of the injury. McHugh J stated at [38]:

> The expression "a result of" emphasises the result or effect of the defect, rather than the defect causing the result. The term "result" emphasises effect and is less concerned with the proximity of cause and effect.

23. In *WBM v Chief Commissioner of Police* (2012) 230 A Crim R 322 Warren CJ, with whom Hansen JA agreed, also noted (at 331) that the phrase 'a result of' suggests more than one cause may be present whereas the phrase 'the result of' suggest there needs to be a sole or dominant cause.

24. Further, the notion that 'as a result of' imports a causal connection limited to the immediate or proximate cause has not been accepted in a worker's compensation context.[18]

25. In considering the proper construction of s 5A of the SRC Act in *Commonwealth Bank of Australia v Reeve and Anor* (2012) 199 FCR 463 (*Reeve*) Gray J correctly observed (at 473) that:

> it is difficult to find in the words "suffered as a result of" some limitation as to the proximity of the relationship between the condition and the action...the words chosen by the legislature to describe the causal relationship do not lend themselves readily to confinement to a direct result, or a result with any particular degree of proximity.

26. In paragraph [109] of Murphy J's judgment his Honour sought to draw support from the comments of Rares and Tracey JJ in paragraph [65] of *Reeve* that the phrase 'as a result of' requires a tribunal of fact to ascertain whether an injury is the, or a, common sense consequence of administrative action. However, on a fair reading of the comments of Rares and Tracey JJ, particularly having regard to the whole of pp 482-6, their Honours envisaged the phrase 'as a result of' having a significantly broader application than that suggested by Murphy J. In addition, on a fair reading, their Honours were not intending to elevate common sense causation beyond the constrained role that it has to play in statutory causation enquiries as discussed further below.

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[18] See for example *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 at 463 and *Australian Electrical Industries v Marlborough*, unreported, NSW Court of Appeal 16 June 1989, per Meagher JA.

27. The causal 'test' posed by the concluding words of s 5A is simply *whether* an injury *was suffered as a result of* the administrative action in question (subject to the action being reasonable and taken in a reasonable manner). If that question is answered in the affirmative, that is the end of the causal inquiry (the 'reasonableness issues will then fall to be determined). One does not proceed to then ask whether an employee's undoubted adverse reaction to the taking of administrative action was founded on one particular subjective desire/factor (such as a yen for career advancement) or another (such as a preference for a particular work location, a special interest in a particular subject etc) – much less re-appraise the causal connection through the prism of an answer to that (unwarranted) question. Employees will, ordinarily, react adversely to administrative action, and thereby sustain psychological injuries, for all sorts of reasons or combinations of reasons referable to their subjective states of mind.

28. The text of the causal test posed by s 5A ('as a result of') does not direct attention to, much less depend on, the construction of a hierarchy of qualifying and non-qualifying subjective factors operating within the minds or psyches of employees. The significance attached by Murphy J to the respondent's non-yearning for career advancement was a distraction which confounded the simplicity of the statutory language found in 5A.

Other textual indicators of a broad exclusion

29. In addition to the use of the phrase 'as a result of', the text of s 5A contains a number of other indicators that the exclusion should not be construed narrowly.

30. **First**, ss 5A(2)(e) and (f) are expressed in extremely broad terms, capturing not only administrative action but 'anything reasonable done in connection with' such action.[19] This indicates that Parliament intended to cast the exclusionary net widely so as to achieve a broad level of protection, subject at all times to satisfaction of the reasonableness requirements expressly stipulated in s 5A. The breadth of s 5A(2)(f), which applies to the administrative action in the present matter, is discussed further in paragraph [52] below.

31. **Second**, apart from the two reasonableness requirements stated in the last three lines of s 5A, there are no other express limitations on the amplitude of the provision.

32. **Third**, the terms of the exclusionary provision indicate that it is primarily, if not entirely, directed to psychological or psychiatric injuries. The very subject-matter of the exclusionary provision suggests that it is most unlikely the legislature intended that a subjective perception by an employee of what particular administrative action means for him or her could 'un-do' a causal connection otherwise clearly established on the evidence.

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[19] The phrase 'in connection' with is generally one of broad import - see for example, *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 16 FCR 465 at 479-480, *Perret v Commissioner of Superannuation* (1991) 29 FCR 581 at 592; *Commissioner for Superannuation v Miller* (1985) 8 FCR 153 at 154, 160 and 163 and *New South Wales v Austeel Pty Ltd* [2003] NSWCA 392 at [12].

33. These matters, emerging from the language of s 5A, are entirely consistent with, and strongly reinforced by, the clear indication, in the relevant extrinsic material, of the purpose the legislature intended s 5A to fulfil (see paragraph [38] below).

The failure to have proper regard to the purpose of s 5A

34. Justice Murphy placed almost exclusive reliance on so-called common sense causation (see paragraphs [108]-[110], [121] and [125] of his judgment). However, the High Court has over the past 15 or so years repeatedly and insistently emphasised that where causation arises under a statute, resort to common sense can be misleading and unhelpful. The primary enquiry must be into the evident purpose of the statute. For instance, the need to pay close attention to the purpose (or objects) of a legislative provision dealing with causation has been clearly established, and reaffirmed, by this Court in such cases as *I & L Securities Pty Limited and HTW Valuers (Brisbane) Pty Limited* (2002) 210 CLR 109 (*I & L Securities*), *Allianz Australia Insurance Limited & GSF Australia Pty Limited and another* (2005) 221 CLR 568 (*Allianz*) and *Travel Compensation Fund and Tambree and others* (2005) 224 CLR 627 (*Tambree*).

35. In *I & L Securities* the High Court considered the question of causation in the context of s 82 of the *Trade Practices Act 1974* (TPA). Chief Justice Gleeson noted (at paragraph [26]) that consideration of the issue of causation posed by s 82:

> .... is not done in a conceptual vacuum. It is done in order to give effect to a statute with a discernible purpose; and that purpose provides a guide as to the requirements of justice and equity in the case. Those requirements are not determined by a visceral response on the part of the judge assessing damages, but by the judge's concept of principle and of the statutory purpose.[20]

His Honour's reference to 'a visceral response' can readily be equated to determining questions of causation in a statutory context by resort to so-called notions of 'common sense'. Chief Justice Gleeson went on to stress the need to (i) have regard to the statutory purpose; and (ii) ensure that it was not defeated (at paragraph [33]). Justices Gaudron, Gummow, Hayne and McHugh made similar comments concerning the importance of applying causation in light of the statutory purpose(s) at play.[21]

36. In *Allianz* this Court reaffirmed the proposition that, when considering causation in a statutory context, common law approaches (including resort to 'common sense') must be applied and moderated in light of the terms and objects of the relevant act. For example, McHugh J said (at paragraph [42]):

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20 These comments were subsequently cited with approval by the plurality of the High Court in *Allianz* (at [100]).

21 See Gaudron, Gummow and Hayne JJ at [56] and McHugh J at [69].

.... the purpose of the inquiry must be ascertained before the application of any notion of "common sense". The purpose of the causal inquiry is critical because it conditions the result. Once the purpose of the inquiry is ascertained, the question of causality must be determined in light of the subject, scope and objects of the Act. Both Mason P[22] and Santow JA[23] acknowledged the importance of considering the purpose of the causal inquiry because the purpose "conditions the outcome of any application of common sense to its answer".[24]

37. The majority in *Tambree* (Gleeson CJ, Gummow and Hayne JJ) also strongly endorsed the proposition that questions of causation in a statutory context must be approached by reference to statutory subject, scope and purpose, rather than by the making of free-standing value judgments.[25]

38. As to the purpose of s 5A, the Explanatory Memorandum for the *Safety, Rehabilitation and Compensation Other Legislation Amendment Bill 2006* stated:

> The SRC Act aims to prevent compensation claims being used to obstruct legitimate management action by excluding claims where an injury (usually a psychological injury) has arisen as a result of reasonable disciplinary action or a failure to obtain a promotion, transfer or benefit in connection with the employee's employment.[26]
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> ...In this context, the Government is seeking to strike a balance between the obligations of employees covered by the scheme to employees injured or made ill thorough work and the need to ensure that the costs of the scheme are maintained at a reasonable level.[27]
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> ....
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> A further objective, through the exclusionary provisions, was to ensure that the wide range of legitimate human resource management actions, when undertaken in a reasonable manner, do not give rise to eligibility for workers' compensation.[28]
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> ...

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22 *Allianz* (2003) 57 *NSWLR* 321 at 323 [7], citing *Environment Agency v Empress Car Co (Abertillery) Ltd* [*1999*] 2 AC 22 at 29-30, per Lord Hoffmann.

23 *Allianz* (2003) 57 NSWLR 321 at 330 [40], citing *Environment Agency v Empress Car Co (Abertillery) Ltd* [*1999*] 2 AC 22 at 29, per Lord Hoffmann.

24 *Allianz* (2003) 57 NSWLR 321 at 330 [40]. See also pages 585-588 (per McHugh J) and 596-598 and, in particular, [96] (per Gummow, Hayne and Heydon JJ).

25 See Gleeson CJ at [28]-[30] and Gummow and Hayne JJ at [45].

25 See s 44 of the *Administrative Appeals Tribunal Act 1975; Brown v Repatriation Commission* (1985) 7 FCR 302[26] Explanatory Memorandum at page iv, point 8 on the page.

26 Explanatory Memorandum at page iv, point 8 on the page.

27 Explanatory Memorandum at page v, point 6 on the page.

28 Explanatory Memorandum at page v, point 8 on the page.

> The SRC Act should prevent workers' compensation claims being used to obstruct legitimate administrative action by excluding claims where an injury has arisen as a result of such action.[29]
>
> ....
>
> ...This option [the non-exhaustive list of exclusionary provisions in s 5A(2)] would reduce the risk of future loopholes emerging in the exclusionary provisions.[30]

39. It is clear from this extrinsic material, as well as from the text of s 5A, that the purpose of the section is to allow managers of employees covered by the SRC Act to undertake legitimate management actions (such as performance appraisals, counselling actions, disciplinary actions and decisions about who is appointed to a position), without the agency incurring financial penalty attendant upon attraction of workers' compensation liability. In short, s 5A was intended to provide broad, indeed complete, protection for management action, subject only to the requirements that the management action be reasonable and be undertaken in a reasonable manner.

40. This protective purpose indicates the causal connection between administrative action and an injury pursuant to s 5A:

    a) should be applied so as to confer protection with respect to (at least) employees' reactions to the perceived consequences of the action in question - that is, what the action means for them; and

    b) should not be applied so as to permit employees to 'self-select' out of what is excluded from compensation by subjectively attaching a positive or negative value to a particular aspect, consequence or attribute of the administrative action in question.

41. The clear purpose of s 5A is likely to be significantly frustrated if artificial distinctions are drawn between such things as disappointment referable to a lost opportunity for career advancement on the one hand, and disappointment referable to other consequential aspects of administrative action on the other hand (such as having to travel further to work, having to attend work in a different location, having to work on different subject-matters, having to work in a different team or under a different supervisor or having less status). As noted above, the text of s 5A does not support any such implicit 'carve out' from the exclusion in relation to the consequences of the non-fulfilment of such other subjective aspirations, expectations or perceptions which, in the mind of a particular employee, made a particular promotion, reclassification, transfer or benefit attractive.

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29 Explanatory Memorandum at page xi, point 4 on the page.

30 Explanatory Memorandum at page xi, point 5 on the page.

42. In particular, the protective effect of s 5A should not, in a non-promotion context, be confined to a situation where an employee has a subjective interest in undertaking the duties of the particular position or 'yen for career advancement'. The same holds true in the context of reclassifications, transfers or other benefits. Such a confined approach introduces an unwarranted gloss upon the plain terms of the provision. Employees may seek promotions, reclassification or transfers for all sorts of reasons, which may have little to do with their subjective level of interest in, or yearning to perform, the duties in question. The whole purpose of s 5A (allowing legitimate management action to be taken without incurring workers' compensation liability) would be seriously undermined if its application depended on an employee having a particular subjective purpose in mind when management action is taken.

43. Take for example a sexist or racist employee who sought a promotion, reclassification or transfer to avoid being supervised by someone of a particular gender, sexual orientation or ancestry. If such an employee sustains a psychiatric injury as a result of being informed their application was unsuccessful, can it be supposed the legislature intended the causal test would not be satisfied simply because the employee did not have a particular interest in the position? Such an outcome cannot have been intended by Parliament.

The failure to respect a key factual finding of the Tribunal properly

44. The majority's conclusion that the Tribunal did not apply common sense to the facts appears to be a way of seeking to turn disagreement with the Tribunal's factual findings into a matter the Court had jurisdiction to entertain.[31] An analysis of the majority's treatment of the key factual finding made by the Tribunal in paragraph [61] of its reasons suggests, at the very least, that Murphy J failed to properly respect this key factual finding of the Tribunal.

45. The respondent ran her case before the Tribunal on the basis that 'the worsening of her condition was caused by her realisation that she would be returning to the supervision of Mr Mellett, a prospect she dreaded, and any contribution caused by her disappointment with the loss of an opportunity for career advancement was immaterial'.[32]

46. She contended that the phrase 'failure to obtain a promotion' in s 5A(2)(f) was synonymous with 'failure to obtain career advancement' or 'failure to obtain monetary or other reward'.[33] The Tribunal rejected this argument,[34] including on the basis of a factual finding that 'in her mind, the former [her dread of returning

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31 See s 44 of the *Administrative Appeals Tribunal Act 1975; Brown v Repatriation Commission* (1985) 7 FCR 302 at 304; *Copperart Pty Ltd v Commissioner of Taxation (Cth)* (1993) 30 ALD 377 *at 377; Birdseye v Australian Securities and Investments Commission* (2003) 76 ALD 321 at 324–325; *Rana v Repatriation Commission* (2011) 126 ALD 1 at 5; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272; *Waterford v The Commonwealth* (1987) 163 CLR 54 at 77.

32 *Martin v Comcare* [2014] AATA 553 at [51].

33 *Martin v Comcare* [2014] AATA 553 at [59].

34 *Martin v Comcare* [2014] AATA 553 at [59].

to work under Mr Mellett] was a direct and foreseeable consequence of the [non-promotion] decision'.[35]

47. The Tribunal's finding in paragraph [61] was:

> ... [i]n [the respondent's] mind the [dread of returning to work under Mr Mellett] was a direct and foreseeable consequence of the decision [not to promote her].

48. This is clearly a finding as to the respondent's state of mind following the administrative decision in question. It followed the Tribunal's earlier factual finding, at paragraph [58] of its reasons, that 'what caused [the respondent] to 'decompensate' was the realisation that the decision [not to promote her] meant she would be returning to Mr Mellett's supervision and her belief that the alleged bullying would continue' (emphasis added). Justice Murphy identified this as a key finding of the Tribunal. However, his Honour did so in a way which omitted reference to the crucial words underlined above.[36]

49. Both the majority and Flick J correctly noted the Tribunal's finding in paragraph [61] of its reasons was a crucial factor in the Tribunal's reasoning on the causal question. Flick J correctly considered this finding entitled the Tribunal to reach the conclusion the respondent's condition was *a result of* her failure to obtain the promotion (at [42]-[45]). The majority disagreed (see at paragraphs [120]-[121] and [120(c)] in particular).

50. In dealing with this issue Murphy J held, wrongly, that there was nothing in the Tribunal's decision to indicate that there was evidence before the Tribunal to support its finding that the respondent saw it as a 'direct and foreseeable consequence' of the failure to promote her that she would be returned to her former position (at paragraph [120(c)]).

51. However, the evidence and matters referred to in paragraphs [55], [56], [57], [58] and [60] of the Tribunal's decision provided a clear, indeed unassailable, basis to support its finding that the respondent saw it as a 'direct and foreseeable' consequence of the non-promotion that she would be returned to her previous position. The respondent had herself testified that (i) she had applied for a number of positions outside South Australia, without success;[37] and (ii) the primary reason she applied for the job was to remove herself from Mr Mellett's supervision.[38] She had also given a history to doctors to the effect that (i) she saw the promotion as the only way to remove herself from Mr Mellett's supervision; and (ii) she realised that, following non-promotion, she would have to return to work under the supervision of Mr Mellett.[39] She conducted her case before the Tribunal on the basis that her injury was caused by the realisation

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35 *Martin v Comcare* [2014] AATA 553 at [61].

36 *Martin v Comcare* [2015] FCAFC 169 at [112].

37 *Martin and Comcare* [2014] AATA 553 at [31].

38 *Martin and Comcare* [2014] AATA 553 at [55].

39 *Martin and Comcare* [2014] AATA 553 at [56].

that, having failed to obtain the promotion, she would have to return to work under Mr Mellett's supervision.[40]

52. The suggestion there may have been a second intervening administrative action (see paragraph [122] of Murphy J's judgment) is misconceived and, in any event, beside the point for a number of reasons.

53. **First**, this was never argued before the Tribunal (see at paragraph [122]).

54. **Second**, s 5A(2)(f) of the SRC Act, in contradistinction to the way ss 5A(2)(a)-(e) are expressed, embraces within the rubic of administrative action of the present type 'anything done in connection with the employee's failure to obtain a promotion.' Telephoning the respondent to advise her she had not been successful in obtaining the promotion she sought, and discussing the likely immediate consequences of this in the workplace, were matters that clearly fall within the phrase 'anything done in connection with the employee's failure to obtain a promotion'. This action was appropriately assessed by the Tribunal as forming part of the one 'administrative action' rather than as matters requiring separate consideration of the causal connection between them and the respondent's injury.

55. **Third**, the respondent's own evidence identified the non-promotion as the trigger for her injury.

56. **Fourth**, even if there was some subsequent intermediate administrative action, this would not rob the decision not to promote the respondent of its causative role in her injury. Issues relating to the respondent's potential return to the supervision of Mr Mellett will need to be considered in assessing the reasonableness of the administrative action in question when the matter returns to the Tribunal. However, the majority was wrong to suggest those issues informed consideration of the causal connection between the non-promotion and the respondent's injury.

57. Justice Murphy also stated that the term 'reasonably foreseeable' is not in itself a test of causation (at paragraph [120(c)]). He cited Mason CJ's comments in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 (citing *Chapman v Hearse* (1961) 106 CLR 112 at 122) in support of this proposition. This treatment of the Tribunal's key finding is problematic for a number of reasons:

    a) the Tribunal's finding was not merely that returning to her former position was 'reasonably foreseeable'. Its finding was that, *in the respondent's mind*, returning to work under Mr Mellett was '*a direct* and foreseeable consequence' of her failure to get the promotion. That finding accorded with the evidence before the Tribunal (including the respondent's own evidence), and the manner in which the respondent conducted her case – absent securing the promotion, she knew she would have to return to work under Mr Mellett's supervision;

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40 *Martin and Comcare* [2014] AATA 553 at [51].

b) it may readily be accepted that, in a common law context, proof that a *tortfeasor* foresaw an injury will not, of itself, necessarily establish that the tortfeasor caused that injury. However, the Tribunal's finding related to the respondent's state of mind; and the Tribunal was entitled to conclude, by reference to the respondent's state of mind, that her psychological injury was 'as a result of' the non-promotion decision. The injury was, both objectively and subjectively, a direct consequence of the failure to obtain the promotion.

The appropriate interpretation and application of s 5A of the SRC Act

58. Drawing together the matters referred to above, the appellant offers the following observations, at a level of principle, in relation to the proper interpretation and application of the causal test posed by s 5A of the SRC Act.

59. **First**, the statutory language must be the beginning and end point.

60. **Second,** before conducting the causal inquiry, it is necessary to identify fully the administrative action in question, which in the present context, because of s 5A(2)(f), includes anything done in connection with the failure to obtain the promotion.

61. **Third**, the causal language then directs attention to the effect of the whole of the administrative action on the employee - the impact, or result, it had on him or her. If the evidence establishes that an employee reacted adversely because he or she understood/perceived that the administrative action would have a particular consequence for them, that evidence will support, rather than gainsay, satisfaction of the causal test.

62. **Fourth**, the statutory language does not direct attention to what is the sole or dominant or most immediate, direct or proximate cause(s) of any injury suffered by the employee.

63. **Fifth**, the expression 'as a result of' does not carry any unstated limitations or modifications.

Application of principle to the present case

64. Applying these matters to the facts of this case, the majority erred in proceeding on the basis of a very narrow application of s 5A, whereby a particular subjective reaction of the respondent to her failure to obtain a promotion (the realisation that the consequence of the decision was she would again be supervised by Mr Mellet) took the case outside the scope of s 5A. This is seen most clearly in paragraphs [111]-[113], [120]-[121] and [124] of Murphy J's judgment.

65. The majority held the exclusion did not apply because the respondent did not seek the promotion for its own sake, but as a means of avoiding being supervised by Mr Mellett. But, as held by the Tribunal, the respondent's subjective purpose in seeking the promotion supported, rather than undermined, satisfaction of the statutory exclusion of liability. The respondent realised, upon

being informed that she had failed to get a promotion, that returning to the supervision of Mr Mellett was something that was going to happen and it was that realisation, because of her dread with respect to that consequence, that caused her to decompensate and break down - either during the conversation that informed her of her non-promotion or immediately after it.[41] Non-attainment of her purpose in seeking a promotion (i.e. realisation that she would have to return to the supervision of Mr Mellett) was, on the respondent's own case, the cause of her injury.

66. The majority below also unduly focussed on whether the respondent's failure to obtain the promotion was the predominant, or at least a sufficiently direct or proximate, cause of her subsequent adjustment disorder.[42] An enquiry of this kind may well be appropriate where different statutory language (for example, 'the result of') governs the causal relationship that needs to be established. However, the language of s 5A requires consideration of whether the respondent's adjustment disorder was a result of her failure to obtain the promotion - even if something else (bound up with the failure) could be said to be a more significant, direct or proximate cause of her injury.

67. The text and evident purpose of s 5A supports a broader notion of causation to that embraced by the majority.

68. In short, to regard the non-promotion as 'no more than chronologically precedent' to the injury (at paragraph [121]) defies both the findings of the Tribunal and the protective purpose of s 5A.

69. Accordingly, on the findings of fact made by the Tribunal, the Tribunal properly concluded that the respondent's adjustment disorder was 'as a result of' her failure to obtain the promotion.

PART VII LEGISLATIVE PROVISIONS

70. The applicable statute as it existed at the relevant time is set out in the attached Annexure. Those provisions are still in force in that form, at the date of making these submissions.

PART VIII ORDERS SOUGHT

71. The appeal be allowed.

72. The orders made by the Full Court of the Federal Court on 30 November 2015 be set aside.

41 *Martin and Comcare* [2014] AATA 553 at [10], [53]-[58] and [61].

42 See for example [111]-[113] and [118]-[121].

73. The appellant bear its own costs and pay the respondent's reasonable costs of this appeal and of the proceedings before the Federal Court and Full Court of the Federal Court (as agreed or assessed).

PART IX ORAL ARGUMENT

74. The appellant estimates it will require 2 hours for oral argument.

Dated: 20 June 2016

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ANNEXURE: LEGISLATIVE PROVISIONS

Safety, Rehabilitation and Compensation Act 1988

14 Compensation for injuries

(1) Subject to this Part, Comcare is liable to pay compensation in accordance with this Act in respect of an injury suffered by an employee if the injury results in death, incapacity for work, or impairment.

5A Definition of *injury*

(1) In this Act:

injury means:

(a) a disease suffered by an employee; or

(b) an injury (other than a disease) suffered by an employee, that is a physical or mental injury arising out of, or in the course of, the employee's employment; or

(c) an aggravation of a physical or mental injury (other than a disease) suffered by an employee (whether or not that injury arose out of, or in the course of, the employee's employment), that is an aggravation that arose out of, or in the course of, that employment;

but does not include a disease, injury or aggravation suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment.

(2) For the purposes of subsection (1) and without limiting that subsection, reasonable administrative action is taken to include the following:

(a) a reasonable appraisal of the employee's performance;

(b) a reasonable counselling action (whether formal or informal) taken in respect of the employee's employment;

(c) a reasonable suspension action in respect of the employee's employment;

(d) a reasonable disciplinary action (whether formal or informal) taken in respect of the employee's employment;

(e) anything reasonable done in connection with an action mentioned in paragraph (a), (b), (c) or (d);

(f) anything reasonable done in connection with the employee's failure to obtain a promotion, reclassification, transfer or benefit, or to retain a benefit, in connection with his or her employment.