IN THE HIGH COURT OF AUSTRALIA No. S98 of 2013

SYDNEY REGISTRY

BETWEEN: **COMCARE**

Appellant

and

PVYW

Respondent

RESPONDENT'S SUBMISSIONS

Filed on behalf of **PVYW (Respondent)**
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PART I: FORM OF SUBMISSIONS

1. This submission is in a form suitable for publication on the Internet.

PART II: ISSUES

2. Did the judgment of the plurality in ***Hatzimanolis***[1] err in its formulation of the test for determining whether an injury sustained during an interval or interlude in a single period of employment is sustained "in the course of" employment?

3. Should this Court, in any event, reconsider the test formulated in ***Hatzimanolis***?

4. Did the Full Court –

   (a) misinterpret the decision in ***Hatzimanolis***; or

   (b) apply the decision incorrectly to the agreed facts of the present case?

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

5. The Respondent has considered whether any notice should be given in compliance with s.78B of the ***Judiciary Act 1903*** (Cth). The Respondent does not consider that any such notice is required.

PART IV: THE FACTS

6. The only factual material relied upon before the Tribunal and the Federal Court was the statement of Agreed Facts submitted by both parties, together with certain other concessions made in the course of the hearing. The Respondent agrees that the facts summarised by the Appellant are accurately stated, but they do not comprise the whole of the important factual background.

7. The Appellant conceded before the Tribunal that the Respondent was not guilty of "serious and wilful misconduct" or "intentionally self-inflicted injury"[2], which (if present) would have disentitled her to compensation. On the question of "misconduct", the Tribunal specifically endorsed that concession[3]. It was specifically agreed that the Respondent suffered a physical injury and psychological injury as a result of the incident for which compensation was claimed, resulting in incapacity for work and/or impairment under the SRC Act[4]. There was also no dispute that the two days that the Respondent was away from her usual place of work for the purposes of her employment constituted a single period of employment, and that the injury

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[1] ***Hatzimanolis v ANI Corporation Ltd*** (1992) 173 CLR 473.

[2] See s.14(2)-(3) of the SRC Act.

[3] Tribunal reasons for decision, at [18] and [29].

[4] For an "injury" to be compensable, it must result in "death, incapacity for work, or impairment": s.14(1).

suffered by the Respondent had occurred during an "interval or interlude" in that single period of employment (namely the evening and night of 26 November 2007)[5].

8. There was no evidence of what the employer knew, or might have foreseen, about how the Respondent might spend her free time on the evening of 26 November 2007. There was no evidence about what view the employer might have taken of the possibility that she might use some of that time to have sex with a friend in her motel room, or what relevance such a view may have had to the terms and conditions of her employment. In particular, there was no evidence of Departmental guidelines or terms of employment that might have had concerned the manner in which employees were to conduct themselves during off-duty periods on business trips, or set out what lawful activities short of misconduct or self-inflicted injury might result in a denial of workers compensation liability.

PART V: APPLICABLE LEGISLATION

9. The Respondent accepts the Appellant's statement of the currently applicable statutory provisions.

PART VI: STATEMENT OF ARGUMENT

The Respondent's Central Submissions

10. The Respondent's primary submission is that all of the questions posed under Part II above should be answered "**No**" for the following summary reasons –

    (a) the test formulated by four justices of this Court in ***Hatzimanolis*** was the clear and unambiguous product of a reconsideration of relevant past case law with the specific intention of distilling an organising principle which would provide practical guidance to courts and tribunals in "interval cases"[6], and demonstrates no error of principle;

    (b) even if this Court were to entertain some reservations about the test formulated in ***Hatzimanolis***, there are powerful considerations which militate against another reformulation of the test;

    (c) no error was made by the Full Court in interpreting the decision in ***Hatzimanolis***, and past cases applying it;

    (d) no error was made by the Full Court in applying the test set out in ***Hatzimanolis*** to the circumstances of the present case.

11. The test laid down in ***Hatzimanolis*** is found at page **484** of the authorised report:

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[5] Tribunal reasons for decision, at [21].

[6] In these submissions, the term "interval cases" refers to cases involving injuries sustained in an interval or interlude in a single period of employment, rather than in an interval between two separate periods of employment.

"Accordingly, it should now be accepted that an interval or interlude within overall period or episode of work occurs within the course of employment if, expressly or impliedly, the employer has induced or encouraged the employee to spend that interval or interlude at a particular place or in a particular way. Furthermore, an injury sustained in such an interval will be within the course of employment if it occurred at that place or while the employee was engaged in that activity unless the employee was guilty of gross misconduct taking him or her outside the course of employment. In determining whether the injury occurred in the course of employment, regard must always be had to the general nature, terms and circumstances of the employment 'and not merely to the circumstances of the particular occasion out of which the injury to the employee has arisen'".

12. Although the Appellant's Notice of Appeal does not contain a specific ground of appeal that the ***Hatzimanolis*** test should be overruled, rather than reinterpreted, the central thrust of the submissions relied upon by the Appellant is that the ***Hatzimanolis*** test is either wrong (because it is allegedly inconsistent with the statutory formula[7]), or (in the alternative) the plain language used by the plurality in the preceding passage did not mean exactly what it said.

13. The Respondent submits that, contrary to the submissions made by the Appellant, the test in ***Hatzimanolis***, as set out above, was intended by the plurality to be interpreted as the Full Court interpreted it. Moreover, that test is consistent with the progressive development of the statutory formula itself since it was first used in the United Kingdom legislation in 1897 and 1906[8], and the need to apply it in changing social conditions. The notion of "master and servant", which characterised much of the early case law, has largely been discarded, and replaced by a recognition of reciprocal rights and responsibilities between employers and employees.

Arising in the Course of Employment

14. It has long been accepted that "the course of employment" is not identical with "the period of employment" of a worker, or with the work which that person performs. It has also long been accepted that the course of employment covered not only the actual work that a person was employed to do, but also "the natural incidents connected with the class of work"[9]. It was already well established in the early case law that the "incidents" of service, even during usual working hours, could involve "resting between shifts", "taking a meal" or "merely standing by, waiting for the next job"[10]. What was "incidental" to service, was "a matter of degree, in which time, place and

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[7] In these submissions, "the statutory formula" is intended to refer to the phrase "arising out of, or in the course of, employment", including its earlier forms over the years since 1897. The difficulties in extracting consistent meaning from the formula has been detailed in numerous cases at the highest appellate level: see, for example, ***Charles R. Davidson & Co v M'Robb*** [1918] AC 304 at 316, ***Armstrong Whitworth & Co v Redford*** [1920] AC 757 at 780, ***The Workmen's Compensation Board (N.B.) v Canadian Pacific Railway Company & Noell*** (1952) 2 SCR 359 at 368 (Supreme Court of Canada).
[8] ***Workmen's Compensation Act 1897***, (60 & 61 Vict. Chap.37, s.1 ; ***Workmen's Compensation Act 1906***, (6 Edw. 7, Chap.58, s.1. These statutes provided for liability in cases of "personal injury by accident arising out of and in the course of his employment". In later years cumulative formula was replaced by the current formula which uncoupled liability arising "out of" employment from liability arising "in the course of" employment. In relation to Australian Commonwealth employees, that change was made in 1948.
[9] ***Charles R. Davidson & Co v M'Robb*** [1918] AC 304 at 321.
[10] ***Pearson v Fremantle Harbour Trust*** (1920) 42 CLR 320 at 328, quoting Lord Wrenbury in ***St Helens Colliery Co v Hewitson*** [1924] AC 59 at 91-92. As Lord Wrenbury observed in that case, quoting from Milton's ***On his Blindness***, "They also serve who only stand and wait".

circumstance, as well as practice, must be considered together with the conditions of the employment"[11].

15. Moreover, the phrase "in the course of employment" does not imply any causal connection between an injury and the employment (unlike the phrase "arising out of" employment)[12]. At least in the last 50 years, it is clear that a purely temporal relationship is sufficient, covering any time when the worker was doing something that was part of, or "incidental" to, the worker's service.

16. However, as this court observed in ***Hatzimanolis***, "incidence of service...is not a principle the application of which will determine whether the injury was sustained in the course of employment; it is a conclusion"[13]. The Court added that while the matters of time, place and circumstance, and the conditions of employment, must be examined for the purpose of determining whether an injury was sustained in the course of employment, "those matters do not automatically determine that question". What the Court thought was required was "an organizing principle", by which (it is submitted) the Court meant a practical test, to be applied to a set of facts to determine whether a particular connection with the employment should be regarded as an "incident" of that employment.

Intervals When the Worker Is Not Required to Carry out Duties

17. The need for a practical test to organise and apply relevant matters is particularly acute in "interval" cases like ***Hatzimanolis***, and the present case[14].

18. The position of the worker in ***Hatzimanolis*** illustrates the problem. In general, he was not required to work Sundays. Sundays were available for rest and recreation.

19. Apart from the trip to Wittenoom, the report of the case does not record what recreational opportunities were available to Mr Hatzimanolis. Nor does it record how many of the workers at the campsite were single men and single women. Nonetheless, there was a concession made by the employer in that case that while Mr Hatzimanolis was "enjoying recreational activity at the camp" he would have been in the course of his employment[15]. In a camp full of mineworkers, one might readily assume that "recreational activity" would include drinking and sex, if available.

20. Where a worker is not required to carry out "actual duties" at the time of the accident, the ***Henderson-Speechley*** test[16] is of limited use. That test suggested that whether an injury had been sustained "in the course of" employment ultimately depended on whether the worker was doing something that he (or she) was "reasonably required, expected or authorised to do in order to carry out his actual duties". But how can such a test be consistently applied if the worker was not required to carry out any actual

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[11] ***Whittingham v Commissioner for Railways (W.A.)*** (1931) 46 CLR 22 at 29 per Dixon J.

[12] ***Kavanagh***, at 557 (per Dixon CJ), 558 (per Fullagar J), 572 (per Menzies J), Taylor & Windeyer JJ dissenting.

[13] ***Hatzimanolis v ANI Corporation Ltd*** (1992) 173 CLR 473 at 478.

[14] Although ***Favelle Mort Ltd v Murray*** (1976) 133 CLR 580 was not treated as an "interval" case, it could easily have been so treated if the evidence had been more detailed.

[15] ***Hatzimanolis***, at 475.

[16] The test enunciated by Dixon J in ***Henderson v Commissioner of Railways (W.A.)*** (1937 58 CLR 281, at 294, and ***Humphrey Earl Ltd v Speechley*** (1951) 84 CLR 126, at 133.

duties at the time of injury? As was pointed out in ***Hatzimanolis***, only "by use of a strained interpretation of the words 'in order to carry out his duties' is it possible to reconcile the application of the test with the decisions in many modern cases where workers have been held to have sustained injury in the course of employment"[17].

The Practical Test Formulated in *Hatzimanolis*

21. In ***Hatzimanolis***, the High Court specifically reformulated the ***Henderson-Speechley*** test so that it could be applied directly to interval cases in a practical way that would take into account the myriad factual circumstances which these kinds of cases had thrown up over the years.

22. Much of the argument put forward by the Appellant fails to appreciate the difference between stating a "conclusion", and formulating a test which will capture the essential elements of that conclusion in a practical fashion.

23. The test as stated by the plurality clearly contains two parts separated by the conjunction "or". If the plurality had meant to include the necessity for requirement or encouragement of the activity engaged in at the time of the accident, it would have been unnecessary to divide the test into two parts. The second limb alone would have been sufficient to cover all cases.

24. The essential connection with employment that means the injury is sustained "in the course of" employment is inducement or encouragement by the employer (whether it is presence at a place, or engagement in an activity). Absent inducement or encouragement of any kind by the employer, there will be no compensation liability.

25. Of course, it may frequently be the case that an inducement or encouragement to be at a particular "place" during an interval in employment, will be the indirect result of an encouragement to carry out a particular activity broadly stated, such as "social interaction" or "recreation", although in other cases the inducement or encouragement to be at a "place" will be no more than the necessity of having a place to use as a base while away from home. However, it is submitted that the point of the practical test is that whatever be the reason why the inducement or encouragement to be at the "place" was given, once it is given it is unnecessary to inquire any further into why it was given, in order to make out the connection with employment.

The Decisions in *Danvers* and *Oliver*

26. The Appellant argues that the decision in ***Hatzimanolis*** "was not intended to expand the law on 'place cases' beyond the actual result in ***Danvers*** or so as to reinterpret the reasoning in ***Oliver***"[18]. The Respondent submits that there is nothing in ***Hatzimanolis*** to support that conclusion.

27. ***Danvers*** was a case decided under the ***Henderson-Speechley*** test. It was cited by the plurality in ***Hatzimanolis*** as an example of a "strained reading" of the words "in order to carry out his duties"[19]. It seems clear that the plurality regarded it as a case where

[17] ***Hatzimanolis***, at 479.
[18] Appellant's submissions at [49].
[19] ***Hatzimanolis***, at 480.

Barwick CJ in applying the test "liberally and practically" was really deciding it on the basis that the worker was simply present at a place that his employer had encouraged him to be. There was no direct evidence, as Barwick CJ noted, of what Mr Danvers was doing at the time that the fire in his van broke out, or at the time its effects overwhelmed him. The suggestion that "it could be inferred that at these times he was asleep"[20] may be a benevolent fiction, bringing the matter closer to conventional views derived from past cases about matters incidental to employment, and confirming that no adverse finding could be made adversely to Mr Danvers, or perhaps more significantly (given his death), "to his dependants"[21].

28. Absent the drawing of that inference, ordinary human experience with bedroom fires might have suggested that the otherwise unexplained fire was probably caused by Mr Danvers smoking in bed and dozing off in the course of doing so. Smoking in bed in a van used to store paint would have been difficult to fit within the ***Henderson-Speechley*** test, if there had been any direct evidence of it. Of course, if the core principle underlying the decision was simply that Mr Danvers was in the place his employer encouraged him to be during an interval in his work, then the decision that he was "in the course of" his employment makes perfect sense under the ***Hatzimanolis*** test. In that case, the precise circumstances of the fire do not matter, in the absence of any evidence of misconduct.

29. Similarly, the decision in ***Oliver***[22] was decided as an application of the ***Henderson-Speechley*** test. In that case Dixon CJ and Menzies J (Owen J dissenting) found that the injury had occurred "in the course of" employment. The facts of the case (decided in 1962) were "surprisingly close"[23] to the facts of ***Whittingham*** (decided in 1931). In ***Whittingham***, Dixon J had found in ***Whittingham*** that the injury was not "in the course of" employment. In ***Oliver***, 31 years later, Dixon CJ found that it was. Both Dixon CJ and Menzies J appear to have justified the different result in ***Oliver***, compared to ***Whittingham***, on the basis of the changing practices in employment over the previous 30 years.

30. In any event, it requires a "strained reading" of the ***Henderson-Speechley*** test to bring the playing of a scratch game of cricket at lunchtime within those things which might fairly be regarded as "reasonably required, expected or authorised to do in order [for Mr Oliver] to carry out his actual duties". However, ***Oliver*** can be understood equally as a case that was fundamentally resolved on the basis that the workers were conducting an activity at a "place" that they were encouraged to be by their employer.

31. In summary, the Respondent submits that there is simply no basis for saying that the ordinary application of the test laid down in ***Hatzimanolis*** is limited by the previous decisions in ***Oliver*** and ***Danvers***. Rather, the plurality was looking for a formulation of the test which would satisfactorily encompass the outcomes in ***Oliver*** and ***Danvers*** (and also ***Lyon***[24]).

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[20] ***Danvers v Commissioner for Railways (NSW)*** 122 CLR 529 at 533.
[21] ***Danvers*** at 535.
[22] ***Commonwealth v Oliver*** (1962) 107 CLR 353.
[23] ***Oliver*** at 357.
[24] ***Commonwealth v Lyon*** (1979) 24 ALR 300.

The Rider

32. The so-called "rider" to the ***Hatzimanolis*** test comes from the decision of Barwick CJ in ***Danvers***[25]. Although the Appellant submits that the rider can both expand or confine liability, there can be little doubt that Barwick CJ was using the rider as "words of expansion". To suggest that the general nature and circumstances of employment might also operate to restrict the compensability of an injury suffered by a worker at a "place", is simply to restate the Appellant's argument in different words without adding more to its content.

33. It is certainly clear that anything amounting to "gross misconduct" (or "serious and wilful misconduct" in the language of the SRC Act) would create an upper limit on the use of the "place". Thus, an injury occurring as a result of a wild drunken party held in a motel room provided by the employer, contrary to express written instructions that the worker was not to have any guests in the room during the stay would, under the SRC Act, at least create a potential for a denial of compensation liability on the basis of serious and wilful misconduct, depending on the precise facts and the seriousness of the injury[26]. The outcome in such a case might also depend upon the authority of the employer to issue instructions governing the use of the worker's room during an interval in the overall period of employment.

34. Accepting that "socialising" or "recreational activity" in an interval or interlude in a single period of employment would normally be regarded as "in the course of" employment, it is difficult to see how the general nature and circumstances of the employment could, as a matter of principle, restrict liability for injuries occurring as a result of "socialising" or "recreational activity" (including as a result of lawful sexual activity not involving misconduct, or self-inflicted injury) in a motel room provided to the worker by the employer for the purposes of an employment-related trip.

The Actual Decision in *Hatzimanolis*

35. The Appellant further argues that the actual decision in ***Hatzimanolis*** shows that mere presence at "place" will not of itself be enough to establish liability without further enquiry[27]. With respect, that submission misunderstands the passage at **485** of the authorised report.

36. The fact that there may be room for argument on the facts about the boundaries of any "place" at which the worker said to have been induced or encouraged to be by the employer, does not mean that presence at a "place" is not in itself sufficient. The boundaries of the relevant "place" will necessarily fall within a continuum, starting with "*clearly fixed and identifiable*" at one end, and ending with "*incapable of identification*" at the other.

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[25] ***Danvers***, at 537.
[26] The exclusion for serious and wilful misconduct, contained in s.14(3) of the SRC Act, does not apply if the injury results in death or serious and permanent impairment.
[27] Appellant's submissions, at [57].

37. There will come a point on the "place" continuum at which it cannot be said that the injury occurred at a "place" at which the worker was induced or encouraged to be by the employer. At or before that point is reached as a matter of judgment on the facts, consideration may be given to whether the worker was, in any event, engaged at the time of the injury in an activity induced or encouraged by the employer.

38. The preceding exercise is what was being described by the plurality in ***Hatzimanolis*** at **485** of the report. It was unnecessary to explore on the facts of that case where the accident site between Mt Newman and Wittenoom lay on the continuum of "place", or whether the vehicle was itself a relevant "place", because the Court found that the employer had in any event encouraged Mr Hatzimanolis to take part in the visit to Wittenoom.

The Subsequent Application of the *Hatzimanolis* Test:

39. The actual decision in ***Hatzimanolis***, as noted above, also exemplifies the fact that the two limbs of the ***Hatzimanolis*** test are not mutually exclusive, any more than an injury arising "out of" employment cannot also be an injury arising "in the course of" employment.

40. That is clear in the subsequent decisions discussed in the decision of the Full Court in the present case. The Respondent respectfully agrees with all of the views expressed by the Full Court in relation to those cases, and accordingly, it is unnecessary to go through them in detail. However, the Respondent submits that the Appellant's analyses in the courts below of most of the superior court decisions following ***Hatzimanolis*** suffer from one consistent logical flaw: a finding by a court that ***both*** limbs of the ***Hatzimanolis*** test were satisfied on the specific facts does not mean that it was ***necessary*** to satisfy both limbs.

Disparate Treatment of Interval Injuries and Non-Interval Injuries

41. The Appellant suggests that that the approach of the Full Court "actually introduces a different treatment of liability in interval cases from that which applies when an employee is at work during work hours"[28].

42. In non-interval cases, where the worker is performing actual duties, the usual question is whether the worker did something to cause an "interruption" to the course of employment. An activity that might amount to an "interruption" in an interval case, where a worker is engaging in recreation and not liable to carry out actual duties, is difficult to conceive of in circumstances that would not amount to serious and wilful misconduct or self-inflicted injury. The level of control that an employer would be entitled to exercise over the activities of an employee during an interval is not comparable in the 21st century to the level of control that might have been acceptable and expected in the "master and servant" law of the late 19th century and early 20th century, when the statutory formula was first introduced.

43. Perhaps one justifiable basis for distinguishing between different sorts of recreational activity during an interval at a "place" nominated by the employer could be an issue

[28] Appellant's submissions, at [69].

of occupational health and safety, or potential damage being done to the property itself. In such a case, enforcement of OH&S guidelines would be entirely reasonable, and a failure to comply with specific directions given in relation to such guidelines might on the facts amount to serious and wilful misconduct. If it does not amount to serious and wilful misconduct, then on what basis should it impact upon compensation liability?

44. The proposition that the ***Hatzimanolis*** test, as interpreted by the Full Court, creates some kind of logical inconsistency with the treatment of non-interval cases cannot be made out on the case law. In particular, the decision of the High Court in ***Bill Williams Pty Ltd v Williams***[29] does not assist the argument.

45. ***Bill Williams*** involved an application of the ***Henderson-Speechley*** test in the usual hours of employment which did not require the same kind of "strained reading" as had been applied in interval cases. Nonetheless, the case must be approached with some caution for other reasons, namely the manner in which it came to the High Court, and the manner in which it had been dealt with in the NSW Court of Appeal[30]. The fact finding below was clearly recognised as being unsatisfactory, but was essential to the outcome, because the case was decided on the basis that the initial altercation between Mr Williams and the wronged husband who eventually shot him had resulted in an "interruption" to the course of employment. It might be doubted that ***Bill Williams*** would be decided the same way in 2013 as it was in 1972. On that basis, the peculiar circumstances of ***Bill Williams*** means that the case has to be confined to its own facts. But if it be accepted as a matter of fact that an "interruption" to the course of employment did occur in that case, then the result follows. That is no different to the position that would apply in an interval case, if a finding were made that there had been an "interruption" to the course of employment resulting from serious and wilful misconduct.

46. The Appellant submits that the approach of the Full Court in the present case "sits uncomfortably" with the notion that a quarrel at the workplace concerning another person's spouse could interrupt the course of employment[31], whereas a quarrel in a hotel during an interval in a work trip could not. That conclusion is unduly simplistic. Putting aside the SRC Act itself, a quarrel in a hotel during an interval in a work trip could interrupt the course of employment if it involved "gross misconduct" on the part of the claimant, which led to injury. However, the alleged difference in treatment is rendered moot in relation to Commonwealth employees by the serious and wilful misconduct exclusion in s.14(3) of the SRC Act, which overlies the statutory formula, and applies to both interval and non-interval cases.

The *Hatzimanolis* Test Remains Relevant and Does Not Require Reformulation

47. If the Court accepts the previous submissions, the question might still be posed: does the ***Hatzimanolis*** test require further reformulation or refinement?

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[29] ***Bill Williams Pty Ltd v Williams*** (1972) 126 CLR 146.

[30] As Toohey J noted in ***Hatzimanolis***: "In assessing the impact of any particular decision [*concerning the phrase "in the course of employment"*], regard should be had to the appellate process by which the case was finally determined.", at 489.

[31] although that submission ignores s.6(1)(a)-(b) of the SRC Act.

48. For all of the reasons canvassed earlier, the Respondent submits that no further reformulation or refinement of the ***Hatzimanolis*** test is necessary. It is a real "test", rather than the statement of a "conclusion". Its wording is clear. The test has been part of the law in Australia for more than 20 years. There has been no application made to this Court until now alleging a need for any clarification or reformulation of the test. Indeed, it might be thought that the lemon of the statutory formula has been so thoroughly squeezed for additional meaning over the last 100 years, that nothing more of consequence is likely to be extracted from it.

49. No attempt was made to bring any of the NSW Court of Appeal decisions in ***Inverell Shire Council v Lewis***[32], ***McCurry v Lamb***[33], and ***WorkCover Authority (NSW) v Walling***[34] before this court for further guidance following ***Hatzimanolis***. In each of those cases, the ***Hatzimanolis*** test was applied. Whereas in ***Lewis*** and ***McCurry***, that may have been because both limbs of the ***Hatzimanolis*** test were regarded as being satisfied, in ***Walling*** pure presence at place was the decisive factor[35], notwithstanding the sympathy expressed by the Court with the notion that it may make a world of difference if an injury occurs a short distance away from the camp or work location[36]. Indeed, that may be so if there is no evidence of any inducement or encouragement to carry out an activity beyond the boundaries of the camp, but the same result would apply on the argument advanced by the Appellant.

Hatzimanolis Should be Followed In Any Event

50. Even if this Court were of the view that there was a basis for considering a further refinement of the ***Hatzimanolis*** test, or for substitution of the test with another test, the Respondent submits, with respect, that the Court should refrain from doing so.

51. The considerations to be weighed by this Court in considering whether to depart from its past authority were conveniently summarised by Kirby J in ***Zickar***[37]. The following matters are, it is submitted, relevant in the present case.

52. The field covering the statutory formula has been "well ploughed" (to use the phrase used by Kirby J), and does not involve any question of constitutional interpretation. The past history of the statutory formula suggests that no reformulation is likely to cover every factual circumstance that might arise, to the satisfaction of every person affected by it, or every Court having to apply it. As Kirby J noted in ***Zickar***, "matters of statutory construction are inherently disputable", and in this area perhaps more than most, bearing in mind that the interpretation given to the statutory formula is heavily influenced by the standards and mores of the day. As Kirby J said: "Successor judges, who favour review different from that earlier expressed, should observe a high measure of restraint, lest an undesirable element of uncertainty be introduced into the law, damaging respectful legal institutions in which future judges, in their turn, override the authority established by them".

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[32] ***Inverell Shire Council v Lewis*** (1992) 8 NSWCCR 562.
[33] ***McCurry v Lamb*** (1992) 8 NSWCCR 556.
[34] ***WorkCover Authority (NSW) v Walling*** (1998) 16 NSWCCR 527. ***Walling*** was a case decided on the law in force before the enactment of s.9A of the ***Workers Compensation Act 1987*** (NSW).
[35] ***Walling*** at 534, paragraph [20].
[36] See ***Goward v Commonwealth*** (1957) 97 CLR 335.
[37] ***Zickar v MGH Plastic Industries Pty Ltd*** (1996) 187 CLR 310 at 348-9.

53. Restraint is particularly appropriate in relation to a basic statutory formula such as this one. In the Commonwealth legislation, and in the other jurisdictions where the formula still has significant work to do, the ***Hatzimanolis*** test remains the primary source of guidance in relation to the statutory formula. In those jurisdictions where the statutory formula has been modified by overlaid statutory tests, there is also a risk that a change in the application of the statutory formula might bring further unexpected complications. Certainty, rather than purity, in the interpretation of the basic statutory formula may be regarded as the more valuable goal in an area of law which involves the actuarial assessment of risk by employers and insurance companies over long periods of time.

54. The Commonwealth Parliament has also had 20 years in which to consider the application of the ***Hatzimanolis*** test. In that period amendments have been passed which have had the effect of both extending and restricting liability to pay compensation under the SRC Act. Since the decision in ***Hatzimanolis***, there have been seven dedicated Acts amending the SRC Act, plus a larger number of consequential amendments made through amendments of other Acts, and omnibus statute law revision legislation. None of these addressed any perceived problems arising specifically as a result of the ***Hatzimanolis*** test.

55. Extensive legislative changes have been made to State and Territory workers compensation schemes around Australia since 1992. A number of these changes have specifically impacted upon the statutory formula, and the ***Hatzimanolis*** test based upon it. In NSW, for example, the introduction of s.9A of the ***Workers Compensation Act 1987*** (NSW) in 1996 had the effect of significantly narrowing the application of the ***Hatzimanolis*** test in that State. It may be inferred that the existence of the ***Hatzimanolis*** test was part of the background which determined the content of s.9A.

56. More than a year has elapsed since the decision of Nicholas J setting aside the decision of the Administrative Appeals Tribunal in the present case. In the course of the last year an extensive review of the SRC Act has been conducted by Mr Peter Hanks QC. The report of that review was presented to the Federal Government in February this year[38], two months after the Full Court decision in the present case. The Report contains no recommendation for change touching upon the ***Hatzimanolis*** test.

The Disposition of the Present Case Applying the *Hatzimanolis* Test

57. If the Court accepts the submission that the ***Hatzimanolis*** test was not misconstrued by the Full Court, and further accepts the submission that the test does not require refinement or reformulation, or that in any event the Court should not revisit the reformulation done in 1992, then it follows that no error on the part of the Full Court has been demonstrated on matters of general principle in disposing of the present case.

58. The remaining issue relevant to the disposition of the present case is the submission made by the Appellant that it was open to the Administrative Appeals Tribunal to find

[38] ***Review of the SRC Act Report***, February 2013, Peter Hanks QC.

as a matter of fact that the Respondent's injury arose out of her choice to engage in an activity which was outside the ambit of her employers requirement for an overnight stay[39].

59. The Respondent submits that the Tribunal was not entitled to decide what was outside the ambit of the employer's requirement for an overnight stay without relevant evidence. There was no relevant evidence. What the Appellant refers to as "findings of fact" were mere assertions by the Tribunal member. That point was taken at first instance in the Federal Court before Nicholas J. His Honour found that there was no evidence before the Tribunal of the employer's attitude to employees entertaining other people in their motel rooms during overnight stay arranged by the employer[40]. His Honour further found that there was no evidence that the Respondent's sexual activity was in any respect incompatible with the nature or terms of her employment[41]. Those conclusions were not disturbed by the Full Court, and (it is submitted) correctly so.

60. In summary, therefore, the facts of the present case can be summarised as follows:

(a) the Respondent was injured during an interval in a single period of employment covering a two day work-related trip to another city;

(b) during that interval on the evening of 26 November 2007, the Respondent was not required by her employer to carry out any duties;

(c) at the time of the injury, the Respondent was in the room that had been selected and paid for by her employer for her use on that evening;

(d) there was no evidence of the employer's attitude to any use that the Respondent might have made of her motel room during the evening;

(e) there was no evidence of Departmental guidelines or terms of employment that might have had concerned the manner in which employees were to conduct themselves during off-duty periods on work-related trips;

(f) the injury suffered by the Respondent was not the result of serious or wilful misconduct, and was not self-inflicted.

61. On those facts, the ***Hatzimanolis*** test compels the conclusion that the injury was sustained "in the course of" employment. The fact that the injury occurred during lawful sexual activity does not result in any different conclusion, any more than it would if the injury occurred as a result of some other social or recreational activity taking place in the room to which the employer had not given any particular approval or encouragement, or if the light fitting that fell on the Respondent's face had simply fallen during the night while she was asleep, as a result of being insecurely fixed to the wall. If the policy-makers responsible for the SRC Act consider that a different

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[39] Appellant's submissions, at [98].
[40] ***PVYW v Comcare (No.2)*** [2012] FCA 395 at [45]; (2012) 291 ALR 302 at 311.
[41] ***PVYW v Comcare (No.2)*** [2012] FCA 395 at [45]; (2012) 291 ALR 302 at 311.

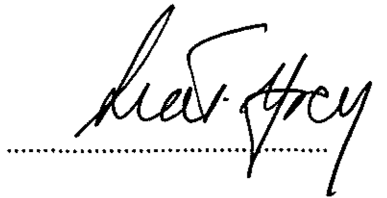
outcome should be compelled in the very rare cases involving injuries occurring as a result of sexual activity, the appropriate response lies in legislation.

62. The Respondent submits that the appeal should be dismissed.

PART VII: ESTIMATED HOURS

63. It is estimated that 1.5 hours will be required for the presentation of the Respondent's oral argument.

Dated: 28 June 2013



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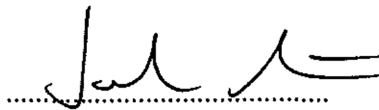

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