Response to Questions on Notice

The CHAIR: Before I conclude, I have a point of clarification. Damien, going back to your first question,

you put a broad question to the panel asking whether any of them have any anything to say about or disagree with

anything that was said by the peak law bodies. In the exchange, the only person who responded was Mr Dougall

and then we moved on to another line of questioning. I want to make it clear that I'm not sure whether silence

meant consent or not in that case. Are there any other parties at the table here or on the videoconference who want

to demur from what the consensus position that was arrived at, subject to Mr Dougall's comments? Or do we take

it as consent to the positions reflected in the two peak law bodies contributions, both through submissions and

orally today?

DAVID JONES: I was in the waiting room for the last 15 minutes of the evidence so without the benefit

of viewing the transcript, I can't indicate if I agree with the propositions which were made.

The CHAIR: That's a completely reasonable answer. Perhaps you might wish to take that on notice. That

might be the way of dealing with it.

Section 11A

The responses of the NSW Bar representatives to questions posed at the hearing on 16 May 2025 did not indicate a proper understanding of the operation, content and effect of the amended section 11A.

Currently, that section provides a defence in cases in which the injury results from action taken or proposed to be taken by the employer “with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers”.

The employer is required to demonstrate that:

1. That the worker's injury was wholly or predominantly caused by management action falling within one or more of the seven specified categories of action, and,
2. That such action is reasonable.

Employers routinely fail to satisfy the criteria of section 11A, because

- the worker's injury is either found to result from causes other than any of the seven section 11A categories,
- because any management action is not the whole or predominant cause of the worker's injury, and/or
- because the action in question is found not to be reasonable (for substantive and procedural reasons).

The scope of the proposed section 11A is substantially expanded by reason of a proposed definition of "reasonable management action" which will include 14 categories of management action, with scope for even further expansion via the regulations. That of itself might not be a matter worth dying in a ditch over, as Senior Counsel remarked.

What should be cause for concern however is the way in which section 11A will be capable of being used to defeat a claim in respect of an injury which does satisfy the definition of "relevant event", and which would otherwise be compensable.

This is illustrated by the following example:

> Worker A is involved in an altercation in the workplace with worker B, is assaulted by Worker B, and suffers physical injuries to his body and a psychological injury (PTSD).
>
> Both workers are suspended, pending an investigation. Worker A, considering himself to be a victim, is aggrieved by the action of being suspended, and develops depression.

The circumstances of injury included in the above example involve "being subjected to an act of violence or threat of violence" as contemplated by the proposed section 8E(1)(a). The PTSD symptoms would satisfy the proposed definition of psychological injury", being "a mental or psychiatric disorder that causes significant behavioural, cognitive or psychological dysfunction".

Notwithstanding the occurrence of such an injury giving rise to significant dysfunction, an employer would be able to rely upon section 11A to defeat a claim in respect of such injury by asserting that "a significant cause" of the worker's psychological injury was reasonable management action taken or proposed to be taken in relation to the worker, which had resulted in a depressive disorder. In this respect, an employer would, as held in Northern NSW Local Health Network v Heggie [2013] NSWCA 255, not be considered to have acted unreasonably when conducting an investigation and suspending a worker pending the outcome of such

investigation. This would be so, even if the suspended worker is ultimately found to have committed no act of misconduct.

Under the proposed section 11A, the management action causing injury is required to be merely “significant”. This marks a departure from the current requirement that such action be established as the “whole” or “predominant” cause of the worker’s injury. It needs to be appreciated that notwithstanding that the main or predominant cause of the worker’s injury is, as illustrated by the above example, the act of violence to which the worker was subjected, the worker’s suspension will defeat any claim of psychological injury if that diminished cause is determined to be “significant”.

Additional Evidence regarding evidence of Dr Parmegiani's

The Hon. DAMIEN TUDEHOPE: Are we really saying that there is a problem in terms of the way that psychological injuries are assessed?
JULIAN PARMEGIANI: No, I don't think there is a problem there. I think the problem is with the system, and I am happy to expand. The problem is that there is an event, as defined, in the workplace. There is a psychological reaction to that event, which may be a perfectly normal psychological response to, perhaps, bullying or disciplining, and it upsets people. Once you embark on a system which requires you to lodge a claim and then go through the assessment process—and this is an assessment process which stretches over months if not years, if you include disputes and appeals—you have a person who has gone from having a dispute and a range of perfectly normal symptoms and responses, to having a conflict which is then stretched over months and years. There is sleeplessness, loss of identity and basically loss of dignity because you are now a workers compensation case.
By the end of that trajectory, which has taken long time, the injury becomes real and people have lost sleep over it. People have committed themselves. If you go to a no-win, no-fee firm, you sign your rights away and you can't withdraw from it. If you withdraw, you are liable for all costs associated with the case. Basically, you lose your house. You are committed. You've signed a contract which makes it mandatory for you to be in this state of paralysis for 18 months, two years or sometimes even longer. Then you get all the anxiety arising from disputes between assessors and your lack of capacity to generate any money to feed your children or pay the mortgage. By the end of it, you have created a mentally crippled person.

I would welcome the opportunity to provide comment in respect of the above-mentioned exchange which is extracted from page 77 of the transcript.

Dr Parmegiani criticised the conduct of solicitors who represent injured workers, suggesting that they subject workers to "no win, no fee" costs agreements which exacerbate the condition of injured workers.

No such costs agreements apply to proceedings in the Personal Injury Commission in respect of statutory entitlements pursuant to the Workers Compensation Act 1987. The fees incurred by solicitors who represent workers in such proceedings are paid by IRO grants unless the worker is an exempted worker in which case the costs are paid by the relevant insurer if the claim for the statutory benefit is successful.

Contested proceedings in the Personal Injury Commission are adversarial and obviously cause for continuing distress and exacerbation of the condition of the worker, but the suggestion that fee arrangements are a contributing factor is wholly unfounded.

The comments may be directed towards fee arrangements for workers who pursue a claim for work injury damages. As regards fees to be incurred in work injury damages proceedings, a "no win, no fee" arrangement does not preclude the right of the worker to seek a costs assessment. Moreover, contrary to Dr Parmegiani's assertion, workers are not forced to proceed with claims, against their will, and they do not risk losing their house unless they proceed. A worker is also at liberty to instruct a different law firm (whilst remaining liable to pay the fees of the former law firm at the conclusion of the matter).

The vast majority of work injury damages matters settle at mediation on terms acceptable to the worker. A handful of cases proceed to trial in the District Court, and it is only a miniscule number of cases which result in an adverse outcome for the worker which could lead to an insurer enforcing a costs order against the worker which could potentially involve the insurer recovering the quantum of costs by selling a home. The costs that an insurer can recover are restricted by Schedule 7 of the *Workers Compensation Regulation 2016* and it is highly unlikely that those costs would exceed the sum of $75,000 in the vast majority of cases. If a worker fails with a work injury damages claim they remain entitled to statutory benefits including weekly payments and medical treatment if they meet the relevant thresholds within the Act.

Yours faithfully

David Jones

Partner

Carroll & O'Dea Lawyers