CITATION: *QBE Insurance v Territory Insurance Office (2019) NTLC 020*

PARTIES:	QBE Insurance (Australia) Limited v Territory Insurance Office
TITLE OF COURT:	Work Health Court
JURISDICTION:	Work Health
FILE NO(s):	21419370
DELIVERED ON:	16 January 2019
DELIVERED AT:	Darwin
HEARING DATE(s):	19, 20, 21, 22, and 23 June 2017
JUDGMENT OF:	Chief Judge Lowndes

CATCHWORDS:

WORK HEALTH – LIABILITY AS BETWEEN APPROVED INSURERS – PURPOSE AND EFFECT OF SECTION 126A OF THE RETURN TO WORK ACT – RELEVANCE OF ACCEPTANCE OF LIABILITY – EXISTENCE OF AN AGREEMENT WITHIN THE MEANING OF SECTION 126 (3) – WAIVER – WHETHER THERE WAS A COMPENSABLE INJURY DURING PERIOD OF RISK – STATUTORY PRECONDITIONS FOR ENTITLEMENT TO COMPENSATION – MATERIAL CONTRIBUTION TO INCAPACITY – APPORTIONMENT OF CONTRIBUTION BETWEEN INSURERS

Return to Work Act s 126A (2) and (3)
Allianz Australia Insurance Limited and Territory Insurance Office [2008] NTCA 12 applied

REPRESENTATION:

Counsel:

Applicant:	Mr D Churilov
Respondent:	Mr M Doyle

Solicitors:	
Applicant:	Roussos Legal Advisory
Respondent:	Hunt & Hunt
Judgment category classification:	A
Judgment ID number:	[2019] NTLC 020
Number of paragraphs:	234

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21419370

BETWEEN:

QBE Insurance (Australia) Limited
Applicant

AND:

Territory Insurance Office
Respondent

REASONS FOR JUDGMENT

(Delivered 16 January 2019)

CHIEF JUDGE LOWNDES

THE NATURE OF THE PROCEEDINGS IN THE WORK HEALTH COURT AND THE ISSUES TO BE DETERMINED

1. The applicant commenced proceedings in the Work Health Court pursuant to s 126A (3) of the *Return To Work Act* (NT), seeking full reimbursement by the respondent of $91,587.78, being statutory compensation paid by the applicant for the period from 27 August 2013 to 13 February 2014 to, or for, Mr Craig Webber (the worker) in discharge of the liability of Airnorth (the employer) under the Act, following the applicant's acceptance of the worker's claim for compensation.

2. By way of background, the employer's approved insurer for the period prior to 30 June 2010 was the respondent and for the period from 30 June 2010 the approved insurer was the applicant.

3. The applicant says that on 9 September 2013 the worker made a claim for worker's compensation under the Act for a mental injury suffered in the course of his employment as a result of being present at the scene of a plane crash at the Darwin International Airport on 22 March 2010. At all relevant times the employer was liable to pay compensation to or for the worker in respect of the injury under the provisions of the Act and at all relevant times the respondent, (being the approved insurer at the time of the plane crash) was wholly liable to indemnify the employer for its liability to pay compensation to or for the worker.

4. The applicant says that in accordance with, and solely by virtue of s 126A(1) of the Act, the applicant indemnified the employer for the full amount of its liability to pay compensation to or for the worker under the Act in respect of the March 2010 injury in the period from 27 August 2013 to 13 February 2014. The applicant further says that in accordance with s 126A(2) (a) of the Act it notified the respondent that the respondent may be liable to wholly indemnify the employer.

5. The applicant further alleges that on 14 February 2014 the respondent accepted liability to wholly indemnify the employer in respect of its liability to pay compensation to and for the worker and assumed sole administration and/or management of the claim under the Act. At all relevant times since 14 February 2014 the respondent has solely administered and /or managed the worker's claim.

6. The applicant says that the respondent has agreed to fully reimburse it for the amounts of statutory compensation paid by it, such agreement constituting an agreement within the meaning of s126A(3)(a) of the Act.

7. Accordingly, the applicant seeks full reimbursement of the monies paid or in the alternative as the Court determines in accordance with s 126A(3)(b) of the Act.

8. By way of answer to the applicant's claim for reimbursement the respondent denies that the worker's claim for compensation was specifically made in respect of, or confined to, the March 2010 incident, although it admits the worker suffered a mental injury as a result of being present at the scene of the plane crash.

9. The respondent alleges that the employer's liability to pay compensation to and for the worker arose out of not only the mental injury sustained as a result of the March 2010 incident but also out of an aggravation (occurring by way of a gradual process over a period of time) of that injury. It is alleged that the respondent's liability in respect of the subsequent injury arose due to the fact that the post 30 June 2010 employment duties and activities of the worker materially contributed to the aggravation of the earlier mental injury. In particular, the respondent says:

    a. the nature and conditions of the worker's employment with Airnorth in the period from 1 July 2010 to 9 September 2013, including the demands of his workload and the additional responsibilities assumed in consequence of his promotion to the position of "Operations Centre Manager" from 28 May 2-12 and/or

    b. the worker's involvement and/or knowledge of, leading up to, during and following Airnorth's participation in a disaster relief recovery program, "Exercise Flame", run in conjunction with the Darwin International Airport in August 2013.

    materially contributed (in the sense of being "the real, proximate or effective cause") to the aggravation of the original mental injury.

10. The respondent also alleges that the worker suffered a comorbid major depressive disorder that was of gradual onset over a period of time which was materially contributed to by the post 30 June 2010 employment duties and activities of the worker. Those duties and activities were the real, proximate or effective cause of the worker's major depressive disorder.

11. The respondent says that both the aggravation of the 2010 injury and the comorbid major depressive disorder, which occurred during the time the applicant was the approved insurer, resulted in or materially contributed to the worker's incapacity for work.

12. The respondent denies the alleged agreement as to contribution between the two insurers; and submits that in accordance with s 126A of the Act the Court should consider apportioning the contribution between the applicant and the respondent on a 50-50 basis.

13. These proceedings give rise to a number of issues – namely:

    a. What is the purpose and effect of s 126A of the Act;

    b. What is the relevance (if any) of the applicant's acceptance of liability to the determination of liability under s 126A of the Act as between approved insurers.

    c. Was there an agreement between the applicant and the respondent within the meaning of s 126A (3).

    d. Was there a waiver.

    e. Did the worker suffer a compensable injury or injuries during the period the applicant was the approved insurer on risk.

    f. Were the statutory preconditions for an entitlement to compensation satisfied.

    g. Did any subsequent injuries result in or materially contribute to the worker's incapacity or impairment.

    h. If the employer was liable to pay compensation to the worker as a result of a subsequent injury or injuries, what is the proportion in respect of which the applicant and respondent should make contribution (indemnify in whole or part) in relation to the employer's liability to pay compensation to the worker.

THE PURPOSE AND EFFECT OF SECTION 126A OF THE ACT

14. The proper construction and operation of s 126A of the *Work Health Act* (which was renamed the *Workers Rehabilitation and Compensation Act*) was comprehensively considered by Martin (BR) CJ, Mildren and Thomas JJ in *Allianz Australia Insurance Limited and Territory Insurance*

Office [2008] NTCA 12. The conclusions reached in that decision have equal application to s 126A of the *Return to Work Act* as that provision is in the same terms as s 126A under the previous legislation.

15. The Court of Appeal began by referring to the provisions of s 126A:

> (1) Subject to subsection (2), where an employer is liable under this Act to pay compensation to a worker, the approved insurer of the employer at the time the claim is made shall indemnify the employer for the full amount of the employer's liability to the worker notwithstanding that the approved insurer may allege that, at the time the injury was sustained or the disease was caused, the liability to indemnify the employer (whether in whole or in part) was that of another approved insurer.
>
> (2) Where an approved insurer who has indemnified an employer for the employer's liability to pay compensation to a worker under this Act is aware that another approved insurer may be liable to indemnify the employer for all or a part of the compensation paid, the first mentioned insurer –
>
> (a) shall notify the other insurer as soon as practicable after becoming aware of the insurer's potential liability; and
>
> (b) may, within 6 months after becoming aware of the other insurer's potential liability or such longer period as the Court may allow –
>
> (i) commence proceedings under Division 4 of Part VI to recover from the other insurer all or a part of the compensation paid; or
>
> (ii) where other proceedings in respect of the claim for compensation have been commenced under that Division, join the other insurer as a party to those proceedings.
>
> (3) Where an approved insurer has indemnified an employer for the employer's liability to pay compensation to a worker under this Act and it is subsequently established that another approved insurer was liable to indemnify that employer

in whole or in part, that other insurer shall reimburse the first mentioned insurer such amount or amounts –

(a) as agreed between the 2 insurers; or

(b) in the absence of such agreement, as the Court determines.

(4) In this section "approved insurer" includes –

(a) as self-insurer; and

(b) the Territory

16. It is clear from the judgment of Mildren J (with whom Martin (BR) CJ and Thomas J agreed) that an employer is liable under the Act to pay compensation to a worker if that worker suffers a compensable injury.[1] An injury is compensable if a worker suffers an injury within or outside the Territory and that injury results in or materially contributes to his or her:

a. death;

b. impairment; or

c. incapacity.[2]

17. As Mildren J went on to explain:[3]

> "Injury" is defined by s 3 and it includes a physical or mental injury; or a disease; or the aggravation, acceleration, exacerbation, recurrence or deterioration of a pre-existing disease, provided that the injury arose out of or in the course of the worker's employment.[4]

[1] *Allianz Australia Insurance Limited and Territory Insurance Office* [2008] NTCA 12 at [21].
[2] *Allianz Australia Insurance Limited and Territory Insurance Office* [2008] NTCA 12 at [21].
[3] *Allianz Australia Insurance Limited and Territory Insurance Office* [2008] NTCA 12 at [24].
[4] Mildren J referred to s 4 of the Act which defines the expression "arises out of or in the course of the worker's employment".

18. His Honour then observed that "where the injury results in or materially contributes to incapacity or impairment, subject to giving notice in accordance with s 80, the employer is liable to pay weekly payments or other compensation to the worker".[5] Mildren J added: [6]

> There is no reason to limit "injury" to a single injury. If the worker suffers a series of injuries which result in or materially contribute to his incapacity or impairment he is still entitled to compensation under the Act.

19. In accordance with ss 64 and 65 of the Act and the definition of "incapacity" in s 3 and consistent with the decisions in *Arnotts Snack Products Pty ltd v Yacob* (1985) 155 CLR 171, *Foresight Pty Ltd v Maddick* (1991) 1 NTLR 209 and *Work Social Club v Rozycki* (1998) 129 NTR 9, Mildren J stated that "the employer's liability to pay compensation for incapacity does not arise until the incapacity results in financial loss". [7]

20. His Honour went on to discuss certain circumstances that are relevant to the liability as between approved insurers pursuant to s 126A of the Act:[8]

> In the normal course of events, the insurer who is at risk at the time when the employer becomes liable to pay compensation under the Act, is liable to indemnify the employer. This will frequently be at, or shortly after, the injury. In the case of a claim for weekly benefits, although the liability might not arise until months or years after the injury because the injury did not immediately result in financial loss, the insurer at risk at the time of the injury is the insurer liable to indemnify the employer against incapacity once it supervenes.[9] The employer is required under s 53 to pay compensation for weekly payments if the injury "results in or materially contributes" to his incapacity. Since the decision of the Privy Council in *Bushby v Morris* [10] an injury or incapacity may be attributable to more than one cause.[11]

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[5] *Allianz Australia Insurance Limited and Territory Insurance Office* [2008] NTCA 12 at [25].
[6] *Allianz Australia Insurance Limited and Territory Insurance Office* [2008] NTCA 12 at [25].
[7] *Allianz Australia Insurance Limited and Territory Insurance Office* [2008] NTCA 12 at [26].
[8] *Allianz Australia Insurance Limited and Territory Insurance Office* [2008] NTCA 12 at [27] – [28].
[9] *Manufacturers Mutual Insurance Ltd v Ors v National Employers' Mutual General Insurance Association Ltd & Ors* (1991) 6 ANZ Insurance cases 61-038 at 76; *Accident Compensation Commision v C E Heath Underwriting & Insurance (Aust) Pty Ltd* (1994) 68 ALJR 525 at 526.
[10] [1980] 1 NSWLR 81.
[11] *Accident Compensation Commission v CE Heath Underwriting & Insurance (Aust) Pty Ltd* (1994) 68 ALJR 525 at 527.

If a worker suffers the incapacity as a result of more than one injury or if the incapacity is materially contributed to by more than one injury, the worker can claim in respect of each injury against his employer. If more than one employer is involved he may claim against each employer. Liability is attracted to each employer and each injury on risk at the time of each injury. It follows from this that if the incapacity results from or is materially contributed to by more than one injury, each employer, if there is more than one, is liable to pay the full amount of compensation payable under the Act in respect of the incapacity and each employer is entitled to indemnity from its respective insurer at the time of the relevant injury. Similarly, if there is only one employer, but more than one insurer, each insurer is liable to indemnify the employer for the full amount of the compensation payable in respect of the incapacity.

21. Mildren J then proceeds to discuss the right to recovery under s 126A of the Act:[12]

The purpose of s 126A(1) is to require the insurer of the employer at the time the claim is made by a worker to indemnify the employer for the full amount of the employer's liability to the worker, notwithstanding that another insurer is wholly or partially liable to indemnify the employer. The words "at the time the claim is made" are ambiguous. What is the claim being referred to? I think the context suggests that it is the claim made by the worker. Until a claim is made in accordance with s 82, the machinery provisions of the Act dealing with acceptance, deferment or disputing liability are not triggered.[13] Once a claim for weekly compensation is accepted, the employer cannot cancel or reduce weekly payments, except as provided by s 69. One of the circumstances where the worker may cancel weekly payments under s69 without notice is where the worker has returned to work.[14] If the worker has ceased to be incapacitated for work, but has not returned to work, the statement required by s 69(1) must be accompanied by a medical certificate as required by s 69(3). If the worker, having returned to work suffers a further injury resulting in incapacity or otherwise becomes incapacitated as a result of the original injury, the worker would need to lodge a further claim under s 82. The worker, for example may have returned to work prematurely or may have returned to work on light duties but have been unable to perform them. In any event, it is the employer's insurer at the time the claim is made who must indemnify the employer and this is so even if the incapacity giving rise to the claim is the result of, or was materially contributed to by, an injury which occurred at a time when that insurer was either not liable to indemnify the employer at all or only liable to provide a partial indemnity to the employer.

[12] *Allianz Australia Insurance Limited and Territory Insurance Office* [2008] NTCA 12 at [40].
[13] See s 85 of the Act.
[14] See s 69(2) (a) of the Act.

22. His Honour goes on to discuss the situations in which the insurer at the time of the claim may be required to indemnify the employer:[15]

> The concept of partial liability to indemnity could arise when there are separate injuries both of which caused separate compensable consequences. There may an injury to the right arm, for example, resulting only in medical expenses under s 73, but no impairment and an earlier injury to the eft arm resulting in impairment as well as medical expenses. The claim for both injuries might arise at the same time. More usually, the two injuries may combine to a cause a single "permanent impairment" of the whole person.[16] In each of these situations, the insurer at the time of the claim must indemnify the employer.

23. Finally, his Honour points out the broader ambit of s126A (3): [17]

> …I do not consider that s 126A(3) is limited to cases of double insurance. It may apply also to cases where the insurer liable at the time of the claim is obliged under s 126A (1) to indemnify an employer in circumstances where the injury giving rise to the incapacity occurred at a time when another insurer was on risk and it may also apply in relatively rare cases where there are separate injuries with separate consequences which apply to each insurer.

24. The applicant submitted that Parliament did not intend "the other/earlier insurer to have recourse to section 126A of the RTWA in order to recover compensation paid by it to or for the worker under the RTWA", especially in "the case of having voluntarily assumed liability to make compensation payments".[18]

25. The respondent made submissions to the contrary.[19]

26. With respect I agree with the submissions made by the respondent and reject the applicant's submissions.

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[15] *Allianz Australia Insurance Limited and Territory Insurance Office* [2008] NTCA 12 at [41].
[16] See s 70, s 71 and s 72 of the Act.
[17] *Allianz Australia Insurance Limited and Territory Insurance Office* [2008] NTCA 12 at [50].
[18] See [43] – [65] of the Applicant's Submissions dated 4 September 2017 and in particular [55] and [61] – [62]. See also the applicant's oral submissions: pages 43-44 and pages 53-54 of the transcript of proceedings on 5 September 2017.
[19] See [22] – [31] of the Respondent's Written Submissions dated 4 September 2017. See also the respondent's oral submissions: pages 62 – 64 of the transcript of proceedings on 5 September 2017.

27. A submitted by the respondent, s126A(3) is "a substantive provision by which the Court is empowered to determine liability and apportion contribution between insurers of a single employer": it is "a unique and direct source of the Court's power".[20] The Court is not "constrained in its power to determine 'contribution' between approved insurers only because of the lack of any specific reference to that term": *Allianz v TIO* at [50] per Milden J and at [73] per Thomas J".[21]

28. It must be borne in mind that s 126A is:[22]

> a remedial provision [which] should be given a broad construction consistent with the purpose of the Act so as to give the most complete remedy consistent with the language employed and to which its words are fairly open: *Allianz v TIO* at [51] per Mildren J.

29. Therefore, s 126A(3 should be "interpreted as conferring wide and extensive powers upon the Court to apportion liability between insurers: *Allianz v TIO*."[23]

30. As further submitted by the respondent, s 126A(3) is " a stand-alone substantive provision" which permits the Court to determine and apportion liability as between the two approved insurers in the present case in the manner contended by the respondent.[24] This interpretation is supported by the Second Reading Speech which makes it clear that the one of the purposes of the reform to the *Work Health Act* was to enlarge the powers of the Court to "handle disputes between insurers where an attempt may have been made to transfer liability to a previous insurer".[25]

31. Finally, the interpretation of s 126A(3) as conferring wide and extensive powers on the Work Health Court to determine liability and apportion contribution between insurers is in no way

[20] See [26] of the Respondent's Written Submissions dated 4 September 2017. See *Work Health Administration Act* ss 14(a)(ii), 14 (c), 14 (d), (15(2) and 15(3).
[21] See [24] of the Respondent's Written Submissions dated 4 September 2017.
[22] See [25] of the Respondent's Written Submissions dated 4 September 2017.
[23] See [27] of the Respondent's Written Submissions dated 4 September 2017.
[24] See [28.2] of the Respondent's Written Submissions dated 4 September 2017.
[25] See [28.7] of the Respondent's Written Submissions dated 4 September 2017.

inconsistent with the detailed discussion of the purpose of s 126A in *Allianz v TIO* at [47] – [49] by Mildren J.

THE RELEVANCE OF THE APPLICANT'S ACCEPTANCE OF LIABILITY TO THE DETERMINATION OF LIABILITY UNDER S 126A

32. At the invitation of the Court the parties made supplementary submissions as to the relevance of the applicant's decision to accept liability dated 13 September 2013 to the determination of liability under s 126A of the Act – and in particular to the following issue which was raised by the Court:[26]

> *Whether or not the acceptance of liability was in respect of one or two injuries may be significant. If liability was accepted in respect of two injuries then the only issue for the purposes of the present proceedings is whether the worker's incapacity resulted from or was materially contributed to by more than one injury. The issue becomes merely a matter of medical causation – there being no need to examine whether an injury/injuries (as defined in the Act) occurred.*

33. The applicant submitted that:[27]

> …acceptance of liability in respect of Mr Webber's claim for compensation was only in respect of the mental injury suffered by him as a result of being present at the scene of the plane crash on or about 22 March 2010. Specifically, there was no acceptance of liability for any purported mental injury suffered by Mr Webber on 29 August 2013 or for any purported gradual process aggravation mental injury referable to employment with Airnorth post 30 June 2010.

34. In the alternative, the applicant contends that if the Court finds to the contrary and "not decide for itself the question of whether the alleged gradual process aggravation mental injury as relied upon by the respondent is compensable in accordance with the RTWA[28] it would fall into error [because] acceptance of liability does not stop the applicant from re-opening the issue of liability

[26] See email dated 27 November 2018 to the parties raising the issue and inviting further submissions.
[27] See [12] of the Applicant's Supplementary Submissions.
[28] With the respondent carrying the onus of proof in establishing that Mr Webber's employment with Airnorth post 30/6/10 was the real, proximate or effective cause of such injury.

before the Court in this proceeding and putting in issue the compensability under the RWTA of the alleged gradual process aggravation mental injury as relied upon by the respondent".[29] The applicant submits that "the correct legal approach requires the Court to consider for itself the question of the compensability under the RTWA of the alleged gradual process aggravation". [30] The applicant submits that:[31]

> …the Court's task in this proceeding is to take into account all of the evidence adduced (including the medical and lay evidence which was not available as at the time of the liability decision conveyed by the applicant's letter on 13/9/13) leading to the Court making its own findings and coming to its own decision in respect of the compensability under the RTWA of the gradual process aggravation mental injury …It would be an error of law were the Court only to consider the state of affairs as at the time of the liability decision.

35. In advancing its argument the applicant relies upon the following remarks made by the Court of Appeal in *Disability Services of Central Australia v Regan* [1998] NTCA 77; 8 NTLR 73, which it says supports the approach to be taken in the present proceedings:[32]

> In dealing with an appeal under s 69, the Court is not called on to decide whether or not the employer was justified in the action it took because there was evidence to support the action. The question which has to be decided is whether, upon a consideration of all of the evidence in the case…the employer has proved the facts set out in the certificate, and if so, whether as a matter of law those facts support the conclusion that worker's weekly compensation payments should be cancelled or reduced, as the case may be, as from the relevant date, which is 14 days after service of the Form 5 notice.

36. The applicant also relies on the following observations made in *Carl Carlsen v AAT Kings Tours Pty Ltd* [1999] 126 NTR 1 at [17]-[18]:[33]

> In our opinion, there is nothing in the *Work Health Act* which goes so far as to create an estoppel when an employer accepts liability; or having failed to comply with s 85 is deemed to have accepted liability. In both cases the employer is obliged to make payments of compensation vide s85(2). Indeed, even if the employer defers making a decision, the

[29] See [13] of the Applicant's Supplementary Submissions.
[30] See [38] of the Applicant's Supplementary Submissions.
[31] See [39] of the Applicant's Supplementary Submissions.
[32]See [40] of the Applicant's Supplementary Submissions.
[33] See [41] of the Applicant's Supplementary Submissions.

> employer is obliged to commence making payments: see s 85(4)(b). However, in those circumstances s 87(7) provides that the payments do not amount to an admission of liability and are irrecoverable by the employer notwithstanding that the employer may not be liable under the Act. It is questionable whether payments required to be made under s 85(2) can be recovered in all circumstances where the employer ultimately is found not to be liable.
>
> It was held in *Perfect v Northern Territory* (1992) 107 FLR 428 at 435-6 per Mildren J that one of the objects of the provisions of Div 5 of Pt V of the Act was to ensure that a worker's claim was dealt with speedily by his employer, and to that end, the time limits and the procedures laid down by s 85 for dealing with claims must be strictly complied with. Given the very short period of time within which an employer must accept, reject or defer a claim, and the consequences of failing to comply with the provisions, it would be surprising if the legislature had intended that a decision to admit liability was irreversible, even if mistakenly made, or made in the absence of information not then available which shows that the claim is groundless.

37. The applicant placed further reliance on the observations made by Angel J in *Regan v Disability Services Pty Ltd* [1998] NTSC 65 which were to the effect that an employer could have recourse to s 104 of the Act by way of a substantive application if it wished to reopen "the whole issue of liability". [34] As pointed out in the Applicant's Supplementary Submissions at [44]:

> On appeal Mildren J (with Thomas and Priestley JJ agreeing) confirmed this was the case. The Court of Appeal further confirmed an employer's (an consequently an approved insurers') ability to challenge "whether there was ever an injury at all" as part of its application under s 104, or as part of a worker's application to the Court if he/she had broaden the scope of the issues to be outside the Form 5 Notice: *Disability Services Central Australia v Regan* [1998] NTCA 77; 8 NTLR 73.

38. In further support of its contention the applicant points out that in "some instances an approved insurer can join the other approved insurer as a party to the proceeding which has already been commenced in respect of the claim for compensation (employer/worker dispute) (section 126A (2)(b)(ii) of the RTWA)".[35] The applicant contends that "it would be a matter of great injustice, and illogicality, if in such a proceeding an employer (and consequently an approved insurer

[34] See [43] of the Applicant's Supplementary Submissions.
[35] See [46] of the Applicant's Supplementary Submissions.

subrogation) could re-open the issue of liability in the context of its dispute with a worker, but the same approved insurer could not do so in the context of its dispute with another approved insurer in the same proceeding and one involving the same factual/legal matrix". [36] The applicant concludes:[37]

> If it is the case that re-opening the issue of liability is permitted across the board in a proceeding involving a worker and two approved insurers….then it must equally be permitted in this proceeding which was commenced by the applicant in accordance with section 126A(2)(b)(ii) of the RTWA.

39. Finally, the applicant submits that its construction of s 126A – which allows the whole issue of liability to be re-opened – is consistent with and supported by the remedial nature of the section and its underlying rationale. [38]

40. The submissions made by the respondent in general accord with the tenor of the applicant's submissions.

41. The primary submission made by the respondent is couched in these terms:[39]

42. The respondent respectfully submits that in the present case, which involves the determination of liability as between approved insurers under s 126A of the *Return To Work Act*, it is neither necessary nor appropriate to determine what injuries were accepted by QBE's decision dated 13 September 2013.

The core issues between the parties are:

a. whether the worker suffered an injury arising out of or in the course of the employment within the meaning of section 4 of the Act in the period during which the applicant QBE was on risk; and

[36] See [47] of the Applicant's Supplementary Submissions.
[37] See [47] of the Applicant's Supplementary Submissions.
[38] See [45] and [48] of the Applicant's Supplementary Submissions.
[39] See [2] – [3] of the Respondents' Supplementary Submissions.

b. in the event that such an injury was suffered, whether incapacity and impairment (for which the worker has received admitted payments of compensation pursuant to Part 5 Division 3, Subdivisions B and D and Division 4 of the Act) resulted from or has been materially contributed to by such injury (refer s53).

43. The respondent proceeded to make the following submissions:[40]

> Whether, as a matter of fact, the insurer making a payment of compensation by way of indemnification of the employer's liability considered, at the time of the payment, that the payment was being made in respect of incapacity or impairment arising from a particular injury is largely if not wholly immaterial to that insurer's right to seek reimbursement of contribution from the other. This must necessarily follow from the reasoning[41] of the Court of Appeal in *Allianz v TIO* [2008] NTCA 12; (2008) 23 NTLR 186 as to the purpose of s 126A, which reasoning is binding on this Court.
>
> What is material to the latter right (if it exists) is simply whether an injury suffered during a period when the 'target' insurer was 'on risk' (if there was one) results in, or has materially contributed to, the incapacity or impairment in respect of which compensation has been paid. A corollary consideration is whether the act of one insurer in indemnifying the employer serves to discharge the other insurer of its coordinate liability".[42]

44. The respondent submits consistent with the principles relevant to the application of s 126A as articulated by Mildren J in *Allianz v TIO* at [ ]:[43]

> Liability to pay compensation arises in respect of the incapacity or impairment (or medical expenses incurred) consequent upon an injury (injuries). That is to say it is payable for the

[40] See [5] – [6] of the Respondent's Supplementary Submissions.
[41] "The purpose of section 126A(1) is to require the insurer of the employer at the time the claim is made by a worker to indemnify the employer for the full amount of the employer's liability to the worker, notwithstanding that another insurer is wholly or partially liable to indemnify the employer": per Mildren j at p 1797, [40]. "(Another) underlying purpose is to enable the insurer who has met a claim to obtain reimbursement, in whole or in part, from another insurer who was liable to indemnify the employer in whole or in part": per Mildren J at p 200 [47].
[42] "The question is what is the risk or happening which gave rise to the insured's loss or liability and is each insurer liable to indemnify [the employer] against that loss in whole or in part. In such a case as this, the relevant happening is the incapacity resulting from or materially contributed to by the respective injuries, because it is that happening which gave rise to the loss against which each insurer is liable to indemnify the employer. If one insurer had met [the employer's claim, [the employer] could not have sought indemnity form the other in respect of the worker's claim for weekly payments arising from his incapacity": per Mildren J at p 196 [35].
[43] See [7] and [8] of the Respondent's Supplementary Submissions.

effects of the injury; it is not payable for the injury itself.[44]

45. As regards the acceptance of the worker's claim the respondent made the following submission:[45]

> In a case such as the present, neither the form nor content of the claim form, or the decision by which the claim was accepted, are determinative of the factual issues in contest between the parties as articulated in paragraph 3 hereof (or more broadly) in the context of the exercise upon which the Court is required to embark under s 126A.

46. However, the respondent conceded that the worker's claim form and the Notice of Decision may have some potential evidentiary value – it being a matter for the Court to attribute some value as it sees fit. [46]

47. The respondent made the following final submission: [47]

> In conclusion, the respondent respectfully submits that notwithstanding any evidentiary value that may be attributed from the 9 September 2013 claim form and the 13 September decision, the Court is charged with the task of considering and making findings in the light of the evidence as a whole as to the core issues between the parties as identified in paragraph 3 hereof; and further the Court is not constrained in that exercise, in reference to the issue identified in 3.1, by the terms of the claim form and decision made in respect of it.[48]

48. Having considered the submissions of the two insurers, it follows from the reasoning of the Court of Appeal in *Allianz v TIO*, and in particular the language used in s 126A(3), that the court must determine the two core issues identified by the respondent in its submissions in light of the evidence as a whole which was adduced at the hearing. In discharging that function the Court is

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[44] *Williams v Metropolitan Coal Ltd* (1948) 76 CLR 431 per Starke J at 444; *Hicks v Bridgestone Australia Ltd* [1997] NTCA 65 per Martin CJ, Gallop. See also dicta of the South Australia Full Supreme Court in *Cristea v Workers Rehabilitation & Compensation Corporation* (1963) 61 SASR 487 at p 489 per King CJ and in *Mitsubishi Motors Australia v Harbord* (1997) 69 SASR 75 at p 82 per Doyle CJ.

[45] See [9] of the Respondent's Supplementary Submissions.

[46] See [10] –[19] of the Respondent's Supplementary Submissions.

[47] See [20] of the Respondent's Supplementary Submissions.

[48] The core issues are those described in the respondent's primary submission referred to above, p 11 . The issue identified in 3.1 of the respondent's submissions is whether the worker suffered an injury arising out of or in the course of the employment within the meaning of section 4 of the Act in the period during which the applicant QBE was on risk.

not confined to considering the evidence that was available at the time the worker lodged his claim and the claim was accepted by the applicant - including the claim form and the notice of decision and their contents. The Court must consider all further evidence that subsequently came to light and which was presented at the hearing. The latter is made abundantly clear by the following words (emphasis added) which appear in s 126A(3):

> Where an approved insurer has indemnified an employer for the employer's *liability to pay compensation to a worker under tis Act and* ***it is subsequently established that another approved insurer was liable to indemnify that employer in whole or in part*** *(emphasis added) that other insurer shall reimburse the first mentioned insurer…*

49. It also follows that whether the applicant accepted liability for not only the initial injury but also for a second subsequent injury is immaterial; though as submitted by the respondent the worker's claim form and the notice of decision may have some evidentiary value which assists the Court in determining whether the worker suffered a compensable injury subsequent to the initial mental injury in March 2010.

50. A construction of s 126A which requires the Court determine for itself the whole question of liability as between approved insurers on the whole of the evidence is not only consistent with the remedial nature of the provision and its rationale but is also consistent with the jurisprudence that has evolved in relation to other comparable areas of worker's compensation law in cases such as *Disability Services of Central Australia v Regan* [1998] NTCA 77; 8 NTLR 73; *Carl Carlsen v AAT Kings Tours Pty Ltd* [1999] 126 NTR 1 at [17]-[18]; *Perfect v Northern Territory* (1992) 107 FLR 428 at 435-6 per Mildren J; *Regan v Disability Services Pty Ltd* [1998] NTSC 65.

WAS THERE AN AGREEMENT BETWEEN THE INSURERS WITHIN THE MEANING OF SECTION 126 A (3) OF THE ACT

51. A crucial issue in these proceedings is whether there was ever an agreement between the parties as contemplated by s 126A (3) of the Act. If there were such an agreement then the Court has no jurisdiction to determine and apportion liability as between the applicant and the respondent.

52. Whilst it is clear that the subsection provides a mechanism for approved insurers to resolve potential disputes as to their respective liability to indemnify an employer in respect of its liability to pay compensation to a worker, and to reach an agreement as to reimbursement of monies paid by way of compensation to a worker, it is not immediately apparent how that process was intended to operate. Furthermore, it is not clear as to what would constitute an agreement within the meaning of the section.

53. The effect of s 126A is that it enables an insurer to commence proceedings in the Work Health Court against another insurer or to join another insurer in subsisting proceedings between a worker and an employer in respect of a claim for compensation for the purposes of establishing that the other insurer was in fact liable to indemnify the employer and claiming reimbursement of such amounts of compensation as have been paid by the first insurer in discharge of the employer's liability to pay compensation to a worker. The section also empowers the Court to determine the amount or amounts to be reimbursed

54. However, s 126A(3) allows insurers to resolve a potential dispute between them as to their liability to indemnify an employer (where it is subsequently established that another insurer was liable to indemnify the employer in whole or in part) by reaching an agreement as to the amounts or amounts of compensation to be reimbursed - without recourse to legal proceedings in the Work Health Court. This construction of the subsection is not only consistent with the broad language of the provision, but also accords with statements made in the relevant Second Reading

Speech as to the purpose of the section.[49] This process does not offend the "contracting out" provisions of s186A of the Act because s 126A(3) expressly permits insurers to resolve any disputes between them by agreement without invoking the jurisdiction of the Court.

55. In my opinion, s 126A(3) is so broadly expressed that it also allows insurers already involved in legal proceedings pursuant to s126A(2) to avail themselves of the mechanism provided for in s 126A(3) (a) at any time prior to the Court's determination as to the amount or amounts of compensation to be reimbursed by one insurer.

56. However, the question that remains is what amounts to an "agreement" for the purposes of s126A(3). Neither the section nor the interpretation section of the Act (s3) provides any guidance as to the meaning of the words "agree" or agreement" as they appear respectively in ss 126A(3) (a) and (b).

57. First, it is necessary to consider the situation where two insurers may – rather than invoke the jurisdiction of the Court under s 126A – agree as to their respective liability and the amount or amounts to be reimbursed. In these circumstances the agreement must, in my opinion, satisfy the requirements of a legally binding agreement: in other words, an enforceable contract.

58. There are sound public policy reasons for imposing such a strict requirement. As an agreement under the relevant section has the effect of:

    a. ousting the Court's jurisdiction to hear and determine disputes relating to liability as between insurers and determine apportionment; and

    b. depriving the parties of a statutory right to seek a determination of the Court under s 126A

[49] The Second Reading Speech contains this statement:
" [The Bill gives] the Work Health Court power to handle disputes between insurers where an attempt may have been made to transfer liability to a previous insurer. The Bill makes it clear also that liability will rest with the current insurer until such time as the matter is resolved either between the insurers or by the court".

the agreement must strictly conform to the requirements of an enforceable contract – and nothing short of that will suffice.

59. There is yet another and important reason why the agreement must be a legally binding agreement. In the event of one party defaulting under the agreement, the innocent party would be unable to enforce a non –binding agreement by way of legal action[50] under either the *Return to Work Act* or at common law (except possibly by way of the doctrine of promissory estoppel).

60. In order for a contract to be enforceable, the classic elements of a contract need to be present: an offer and acceptance coupled with consideration.

61. Whether an agreement has been reached is foremost determined by whether there has been an offer and an acceptance.

62. An offer is an expression of willingness to contract on the terms stated: *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 93 CLR 546 at 555 cited by JW Carter in Carter's Guide to Australian Contract Law at [2.04].

63. It is important, of course, to distinguish an offer from an invitation to offer. The latter is not an offer because it is in effect nothing more than an expression of willingness to negotiate[51] – not an expression of willingness to contract on the terms stated.

64. As stated by Carter, "the acceptance of an offer may be defined simply as compliance with the requirements, if any, stated in the offer".[52] Put another way a contract results when the offeree accepts the offer in accordance with its stated terms.[53] The acceptance must be unequivocal ie the offer and acceptance must correspond.[54]

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[50] See [37] of the Respondent's written submissions dated 4 September 2017.
[51] Burrows, A. (2009). Offer and Acceptance. A Casebook on Contract (2nd ed., pp. 5). Portland, OR, North America: Hart Publishing. (Original work published 2007).
[52] JW Carter *Carter's Guide to Australian Contract Law* at [2.23].
[53] Carter n 52 at [2-43].
[54] Carter n 52 at [2-25].

65. The offer can only be accepted by the person to whom was made (the offeree);[55] and acceptance of an offer is not effective until such time as it has been communicated to the offeror.[56] Although the acceptance need not be communicated by the offeree, "it is not sufficient for the offeree merely to decide to accept the offer".[57]

66. As pointed out by Carter, consideration is present if 'the promise confers a benefit on the promisor or suffers some detriment" or if "the promise has purchased the promisor's promise".[58] Given the difficulties that can arise when identifying the consideration that has been provided for a promise, agreements are often expressed in a deed: "consideration is not required in contracts executed as a deed". [59]

67. In the present case what is alleged is that the relevant agreement came into existence as a result of conduct between the two insurers prior to the filing of the Originating Application and subsequent Statement of Claim as well during the course of proceedings. This is not a case where the alleged agreement came into existence independently of and prior to the commencement of legal proceedings. However, as mentioned earlier, the applicant is able, in the circumstances, to seek to rely upon the alleged agreement.

68. It seems to me that in the circumstances of this case the relevant agreement would have to consist of either an enforceable contract as discussed above or duly signed consent orders reflecting the agreement between the parties. The latter would be enforceable as orders of the Court.

69. The question that needs to be answered is whether the Court can be satisfied that the applicant and respondent entered into an agreement constituted by an enforceable contract or consent

[55] Carter n 52 at [2-23].
[56] *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria)*(1957) 98 CLR 93 at 111 cited by Carter n 52 at [2-26].
[57] Carter n 52 at [2-26].
[58] Carter n 52 at [3-02].
[59] Carter n 52 at [3.05].

orders. The question is whether objectively considered, the conduct of the two insurers in this case clearly demonstrates that an agreement was reached between the parties in either manner.

70. The negotiations and correspondence between the two insurers in respect of the alleged agreement are to be found in Exhibit A3. It is necessary to examine those documents in order to determine on an objective analysis whether an agreement within the meaning of s 126A(3) was reached, such as to preclude the Court from determining liability as between the two insurers pursuant to the section (as contended by the applicant).

71. The first document in the Exhibit is a letter from the legal representative of QBE to TIO dated 28 November 2013 and sent via email. That correspondence contains a claim made against TIO under s 126A WRCA in respect of compensation paid by QBE to the worker.

72. The second communication is an email from QBE's legal representative to TIO (sent on 5 December 2013) which is in the nature of a follow up to its earlier letter.

73. The next communication contained in Exhibit A3 is a further email from the legal representative for QBE to TIO sent on 16 December 2013, following up the absence of a response to their earlier email.

74. That email is followed by a response by way of email from the legal representative for TIO sent on 17 December 2013, who advised that he was in the process of seeking instructions regarding the matters raised by QBE's legal representative.

75. The next document in the Exhibit is an email from the legal representative of QBE to TIO's legal representative sent on 19 December 2013. That email reiterated the claim against TIO and threatened the commencement of proceedings in the Work Health Court in the event of the claim not being accepted by 23 December 2013.

76. That correspondence was followed by an email sent by the legal representative to TIO's legal representative on 2 January 2014. The contents of that email are set out in full:

> I refer to your telephone conversation with Melanie Blackman on 23 December 13. I understand you were to send us a letter by COB 23 December 13 about TIO taking over the claim. We have not received anything yet.
>
> On 19 December 13, Nicole Waterhouse (Ramsay Health/Northside Clinic) sought from QBE a three week extension to Mr Webber's admission to Northside, based on the recommendation of Dr Prem Naidoo. I attach a copy of Dr Niadoo's report dated 19 December 13.
>
> I also attach Margaret Grant's (Northside Clinic) letter to QBE dated 30 Decembers 13 regarding the Day Program, which is scheduled to commence on 13 Jan 14. You will see Ms Grant notes Mr Webber's request that he attend the Program two times per week, over a three month period.
>
> This is the sort of decision that TIO should be making. I encourage you to write to us as soon as practicable to confirm TIO is taking over the management of this claim.
>
> After that, we can then articulate the costs claimed from QBE (both claim expenses and legal costs).
>
> Unless you contact us to the contrary, on or after Mon 6 Jan 14, Monica Nancarow of QBE will contact Ms Bianca Portelli-Reidy to discuss the mechanics of the changeover (as QBE will need to negotiate over to TIO the provider agreements (Northside Clinic etc).

77. This correspondence was followed by an email from Monica Nancarrow to TIO which was sent on 10 January 2014. The following are extracts from that email:

> … Thank you for meeting with me on Tuesday 7/1/14 to discuss ongoing management of this claim……..You were to meet with others within TIO and advise how to handle the changeover….
>
> You requested that QBE continue to manage the claim for the present as TIO were still assessing circumstances…

78. That email was followed by a letter dated 3 February 2014 from QBE's legal representative to TIO's legal representative (which was sent by email), requesting advice as to what steps had been taken by TIO in assuming conduct of the claim.

79. The next document in the Exhibit is an email sent by QBE to TIO on 14 February 2014 which, inter alia, stated:

> As agreed, we have informed both Craig Webber and Leigh Greig that TIO will be taking over management of this claim and you mentioned that you would be liaising directly with the Northside Clinic regarding Craig's readmission.
>
> QBE will provide TIO with a notice of recovery within the next week.

80. This communication is followed by a letter dated 16 April 2014 (one day prior to the filling of the Originating Application in the Work Health Court) from QBE's legal representative to TIO's legal representative. That letter stated that QBE seeks reimbursement for compensation and legal costs paid during the period 27 August 2012 and 13 February 2014. A schedule of costs was enclosed. The claim was for $77,344.10 for compensation paid together with legal costs of $3500, making a total of $80,844.10.

81. The next document contained in Exhibit A3 is an email from TIO's legal representative to QBE's legal representative sent on 18 May 2014 requesting copies of tax invoices relating to the management of the worker's claim by QBE.

82. This was followed by an email from QBE's legal representative to TIO's legal representative (which was sent on 29 May 2014) advising that an Application was filed in the Work Health Court on 17 April 2014 and that the TIO would be served with the Application "if there no is outcome satisfactory to QBE". The email went on to impose and outline the following timetable:

> In relation to time frames, we indicate the following:
>
> a. Monica Nancarrow to meet with Melanie Lister by 3 Jun 14.
> b. QBE and TIO to agree the amount to be reimbursed by 6 Jun 14.
> c. TIO to pay QBE the amount set out in the Schedule ($77,344.10) or as agreed, by 10 Jun 14.
>
> Regarding legal costs, in our letter dated 16 April 14, we claimed $3500 on behalf of QBE. Since then, there have been further costs and the claim for costs is $4500.
>
> Please confirm the time table by Friday this week.

83. The next communication between the parties occurred on 24 June 2014 when QBE's legal representative sent an email to TIO's legal representative pointing out that QBE has not been contacted by TIO to agree the amount to be reimbursed and TIO has not made any payment to QBE. The email also inquired as to whether the legal representative for TIO had instructions to accept service of the Application filed in the Work Health Court.

84. TIO's legal representative sent a letter to QBE's legal representative on 26 June 2014 confirming instructions to accept service of the Application.

85. The next document contained in Exhibit A3 is a letter from TIO's legal representative to QBE's legal representative dated 24 September 2014 in relation to ongoing discovery and the upcoming Directions Conference.

86. This correspondence was followed by a long letter from QBE's legal representative to TIO's legal representative dated 24 September 2014. That letter enclosed a Schedule of Claims Expenses as at 24 September 2014 (totally $91,587.78). The letter went on to deal with:

a. the worker's claim for worker's compensation;
b. TIO's liability for Mr Webber's medical condition;
c. the steps taken by QBE since the claim was made (including correspondence with TIO about assuming management of the claim);
d. correspondence after TIO assumed management of the claim;
e. costs and interest on account of the efforts made by QBE before and after the making of the Application in attempting to come to an agreement about the matter;
f. reservation of rights to pursue any other cause of action against the TIO (including estoppel by conduct); and
g. QBE's claim.[60]

87. The next communication is a letter from TIO's legal representative to QBE's legal representative dated 6 January 2015 which stated:

> We refer to our conversation on 18 December 2014.
>
> In addition to managing the worker's claim, TIO have instructed us that they will reimburse QBE for amounts paid to/or for the worker for the period 27 November 2013 to date. Accordingly, can you please provide us with an updated schedule of QBEs claims expenses.
>
> In light of the above we feel there is no longer any need for QBE to continue with their current application against TIO in the Work Health Court. We ask QBE withdraw their application and file and serve a Notice of Discontinuance at the earliest convenience.

[60] The letter stated that as at 24 September 2014, QBE claims:
(a) $91, 587.78
(b) $3, 928.61 interest
(c) $9400 plus GST for legal costs.

88. The final correspondence contained in Exhibit A3 is a letter from QBE's legal representative to TIO's legal representative dated 21 January 2015. The letter begins by referring to the matters stated in the earlier letter from TIO's legal representative. It then goes on to refer to the Schedule setting out a claim for $91587.78. The letter states that QBE is seeking reimbursement of the amounts paid by it to, or for, the worker along with interest and costs. The letter attaches a draft Consent Order in that regard, pointing out that the calculation of interest is subject to change (depending on when the amount is paid). The draft consent order provided for payment by the TIO of QBE's costs at 100% of the Supreme Court Scale – certified for counsel, to be taxed in default of agreement. The correspondence ended with:

> We look forward to your reply and to your agreement regarding the Consent Order.

89. It cannot be inferred from the correspondence and conduct of the parties that the parties entered into an enforceable contract as regards the reimbursement of compensation or the apportionment of contribution between the insurers.

90. First, it is doubtful whether, strictly speaking, the applicant ever made an "offer" in the contractual sense. The letter from QBE's legal representative to the TIO of 5 December 2013 inviting it to reimburse the expenses paid by QBE might be considered to be nothing more than an invitation to treat or at the highest an offer to settle the matter in advance of litigation. Otherwise the correspondence from QBE's legal representative is replete with the language of "claims and demands". However, the analysis that follows proceeds on the basis that the applicant made an offer in the contractual sense.

91. Bearing in mind that any agreement under the relevant subsection must relate to the amount or amounts to be reimbursed, the email sent by the legal representative for QBE to TIO's legal representative on 29 May 2014 is especially telling. That email indicated that QBE and TIO were yet to agree the amount to be reimbursed and TIO to pay QBE the amount set out in the Schedule

($77,344.10) or as agreed by a fixed date. That email must definitely does not evidence any acceptance of any offer made by the applicant.

92. The email sent by QBE's legal representative to the TIO's legal representative on 24 June 2014 still leaves at large agreement as to the amount to be reimbursed.

93. The long letter sent by the legal representative for QBE to TIO's legal representative on 24 September 2014 was nothing short of an adamant claim or demand, but at best an invitation to treat[61] - but nonetheless treated as an offer for present purposes. Almost 4 months later TIO's legal representative advised by way of letter dated 6 January 2015 that "in addition to managing the worker's claim, TIO have instructed us that they will reimburse QBE for amounts paid to/or for the worker for the period 27 November 2013 to date". In that same letter QBE was requested to provide an updated schedule of payments. Clearly, this correspondence could not be considered to be an acceptance of any offer made by the applicant. I respectfully agree with the submission made on behalf of the respondent that the subject correspondence was merely a statement of intention, subject to verification of the amounts of compensation that had been paid and due consideration thereof.[62]

94. It is patently clear from the correspondence passing between the parties that no enforceable contract came into existence. If there were an offer (in the contractual sense) no such offer was accepted by the respondent or communicated to the applicant. At its highest, what was communicated was a decision to accept the offer subject to further information.

95. But even if there were an acceptance of an offer, the applicant has failed to prove the presence of consideration. Whilst I accept the difficulties in the present case of identifying the nature of the consideration,[63] those difficulties could have been overcome by reducing the agreement

[61] See the respondent's oral submissions at page 115 of the transcript of proceedings on 1 June 2017.
[62] See the respondent's oral submissions at page 115 of the transcript of proceedings on 1 June 2017.
[63] Neither counsel attempted to express a view as to what might amount to consideration in the circumstances of the present case.

(constituted by an offer and acceptance) to writing in the form of an executed deed. A deed would have overcome the absence of consideration. No such deed was executed in the present case.

96. The applicant's reliance on the draft consent orders (including relevant correspondence) as evidence of the relevant agreement is equally problematic.

97. Throughout its correspondence with the TIO and its legal representative QBE claimed not only reimbursement of compensation that had been paid to or for the worker, but also interest and legal costs. The claim for interest and costs was so inextricably linked to the claim for reimbursement that it is simply not possible to disentangle one claim from the other. Insofar as the claims amounted to an offer (in the strict contractual sense) the various components of the offer were inseparable such that the offer as expressed was not capable of being accepted unless all of its elements were accepted.[64]

98. It is clear on the evidence that there was never full acceptance of the offer- nor any part thereof. Even if the letter dated 6 January 2015 from TIO's legal representative to QBE's legal representative were to be considered an acceptance of an offer to reimburse QBE (which is found not to have been the case) that acceptance did not extend to the payment of interest and legal costs.

99. The fact that subsequently QBE's legal representative submitted under cover of its letter dated 21 January 2015 a draft consent order which dealt with all three components of the purported offer (reimbursement of compensation paid, interest and legal costs) does not advance the applicant's case. It is particularly telling that the letter concluded with the sentence: "We look forward to your reply and to your agreement regarding the consent order". Neither the TIO nor

[64] Put another way, even if the offer to reimburse QBE was accepted (which is not the case), that acceptance alone – without acceptance of the other two elements of the offer- would at best be only a counter offer, which remained to be either accepted or rejected by the applicant.

its legal representative ever communicated agreement with the consent order. It is trite law that acceptance can never be implied from silence.[65]

100. Significantly, the consent orders, which were clearly intended to encapsulate and record the agreement between the parties, were never signed by TIO's legal representative on behalf of the TIO. Therefore no agreement for the purposes of s 126A(3) ever came into existence.

WAIVER

101. The applicant submitted that by virtue of the respondent's conduct prior to and during the course of the proceedings the respondent has "deliberately and voluntarily adopted a position which has brought about a change in the relationship of the parties" and has thereby "waived its claim for a set off and/or to seek any contribution from the Applicant in respect of the statutory compensation paid, or to be paid, to or for Mr Webber under the RTWA".[66]

102. The conduct sought to be relied upon to establish the waiver was:[67]

    a. the respondent's voluntary assumption of administration/management of the worker's claim for compensation;

    b. the respondent's assumption of being the sole indemnifier of the employer in respect of compensation paid to or for the worker under the Act in the period from 14 February 2014 and ongoing;

    c. the respondent's agreement to reimburse the compensation paid to or for the worker under the Applicant (either in the period from 27 August 2013 to 13 February 2014 or from 27 November 2013 to 13 February 2014).

103. The applicant further submitted:[68]

> Waiver can be inferred from the Respondent's deliberate conduct. Its function is to hold the parties to the relationship brought about by it and to ensure "fair dealing in the conduct of litigation". No detriment is required to be demonstrated by the Applicant since putting the parties back to their earlier relationship, in these circumstances, is itself a detriment:

[65] Carter n 52 at [2-28].
[66] See [66] of the Applicant's Submissions dated 4 September 2017.
[67] See [66] of the Applicant's Submissions dated 4 September 2017.
[68] See [66] of the Applicant's Submissions dated 4 September 2017.

> "…And, in a sense, so it is, for there could be no certainty that the parties would thereafter secure the rights against each other that marked the relationship brought about by the failure to take an available point… (*Commonwealth v Verwayen* [1990] HCA per 39 per Gaudron J at [26].

104. The respondent submitted that the applicant's estoppel/waiver argument is not sustainable because of the absence of any evidence of relevant detriment.[69] The respondent also submitted that "there is absolutely no evidence of any agreement by TIO to say that it was going to waive its rights for the future to ever come back and ask QBE for contribution in respect of the payments it made".[70] The respondent further submitted that just because "an insurer picks up the liability, indemnifies the employer, that doesn't amount to a waiver of rights against another insurer".[71] In conclusion, the respondent submitted:[72]

> So it's being suggested …that somehow by TIO actually making payments under its policy, that meant that it had brought about a state of affairs which was inconsistent with making a claim against the other insurer in the future.
>
> …the indemnification of the employer under a policy of insurance doesn't amount to a waiver of rights for contribution against another insurer. They are separate liabilities and obligations,

105. Waiver is a very complex area of the law characterized by a lack of coherence or consistency.[73] This is neither the time nor place to exhaustively analyse the law of waiver, especially given the limited submissions received from both parties on this contentious point. However, in my opinion, the issue of waiver can be readily disposed by applying some basic principles governing the concept of waiver.

106. In my opinion, the applicant's argument based on the concept of waiver cannot be sustained.

[69] See [47] of the Respondent's Submissions dated 4 September 2017.
[70] See the oral submissions of the respondent at p 64 of the transcript of proceedings on 5 September 2017
[71] See the respondent's oral submissions at p 74 of the transcript of proceedings on 5 September 2017.
[72] See the respondent's oral submissions at p 74 of the transcript of proceedings on 5 September 2017.
[73] Carter n 52 at [7.26].

107. The primary meaning of "waiver" is a unilateral abandonment of a right or claim "in such a way that the other party is entitled to plead the abandonment by way of confession or avoidance if the right is thereafter asserted and is either express or implied from conduct".[74]

108. Where the waiver is not express, "it may be implied from conduct which is inconsistent with the continuance of the right, without the need for writing or for consideration moving from, or detriment to, the party who benefits by the waiver".[75] However, mere acts of indulgence will not amount to waiver; and a party may not benefit from the waiver unless that party has altered their position in reliance on it.[76]

109. In order for waiver to be established there "must be unequivocal words or conduct, including a deliberate abstention from asserting a right up to the latest point in time for its assertion".[77]

110. A careful analysis of the correspondence between the applicant and the respondent as contained in Exhibit R 3 does not disclose an express waiver. Nor it can be inferred from the correspondence that the respondent unilaterally abandoned rights or claims under s 126A of the Act. There is an absence of unequivocal words or conduct on the part of the applicant evincing an abandonment of legal rights. Furthermore, there is no evidence of "a deliberate abstention [on the part of the respondent] from asserting a right up to the latest point in time for its assertion".

111. In my opinion, the applicant's argument based on the concept of waiver cannot be sustained.

[74] See 16(2) *Halsbury's Laws of England 4th ed para 385* reproduced in *Words and Phrases Legally Defined 4th ed Vol 2 L-Z* p 1296. See also JRL Davis *Contract General Principles Laws of Australia* at [7.6.30].
[75] See 16(2) *Halsbury's Laws of England* n 74.
[76] See 16(2) *Halsbury's Laws of England* n 74..
[77] See *Commonwealth v Verwayen* (1990) 170 CLR 394 referred to by Davis n 74 at [7.6.1380].

DID THE WORKER SUFFER A COMPENSABLE INJURY OR INJURIES DURING THE PERIOD THE APPLICANT WAS THE APPROVED INSURER ON RISK

112. A core issue to be determined by the Court is whether the worker suffered an injury or injuries subsequent to the initial mental injury in March 2010 during the period the applicant was the approved insurer on risk.

113. As is apparent from the Defence and Counterclaim the respondent alleges that the worker suffered two subsequent injuries, the first being in the nature of a gradual process aggravation mental injury and the second being in the form of a comorbid major depressive disorder. The respondent alleges that the employer was liable under the Act to pay compensation to the worker in respect of both injuries and that the applicant, as the approved insurer during the period that these injuries were sustained, was liable to indemnify the employer for the full amount of the employer's liability to the worker.

114. It is accepted between the parties that the respondent bears the onus of establishing the occurrence of these injuries and the liability of the employer to pay compensation to the worker as well as the liability of the applicant (as the approved insurer) to indemnify the employer.

115. Insofar as it is alleged that the worker suffered a gradual onset aggravation of the initial mental injury the respondent carries the burden of establishing that (a) that the worker suffered such an injury during the period that the applicant was the approved insurer and (b) that the worker's employment materially contributed to that injury in that it was the real, proximate or effective cause of the injury.

116. As regards the alleged comorbid major depressive disorder, the respondent again bears the onus of proving the occurrence of such an injury and in order to establish the occurrence of that injury the respondent needs to prove that the injury occurred by way of a gradual process over a period

of time (during the period that the applicant was the approved insurer), and that again the worker's employment was the real, proximate or effective cause of the injury.

117. There is a well –established line of authority that has judicially considered the expression "real, proximate or effective cause". [78] The causal test established by the use of these words requires a court to ascertain as a matter of common sense the dominant, effective or operative cause.[79]

118. As pointed out by the applicant in its submissions[80] - and as made clear by Lord Shaw of Dunfermline in *Leyland Shipping Company Limited v Norwich Union Fire Insurance Society Limited* [1918] AC 350 at 369-370 – proximity in time is not determinative:

> What does "proximate" here mean? To treat proximate cause as if it was the cause which is proximate in time is, as I have said, out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed.
>
> …In my opinion, accordingly, proximate cause is an expression referring to the efficiency as an operating factor upon the result. Where various factors or causes are concurrent, and one has to be selected, the matter is determined as one of fact and the choice falls upon the one to which may be variously ascribed the qualities of reality, predominance, efficiency.

119. The view expressed by Lord Shaw continues to prevail. In *Hams v CGU Insurance Limited* [2002] NSWSC 273 Einstein J said at [257]:

> …the proximate cause of a loss is the cause which is proximate in efficiency; the "real", "effective" or "dominant" cause.

120. Earlier at [163) Einstein J noted:

> I accept that the question of causation is to be determined by the commonsense evaluation of the relevant facts. I further accept that the last causal event to occur will usually be an effective contributing cause, especially where it has a cumulative and independent origin: *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350; *National & General Insurance Co Limited v Chick* [1984] 2 NSWLR 86 at 97*; City Centre Cold Store Pty Ltd v Preservatrice Scandia Insurance Ltd* (1985) 3 NSWLR 739 at 744-745;

[78] See *City Centre Cold Store Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 739; *HIH Casualty & General Insurance Ltd v Waterwell Shipping Inc* (1998) NSWSC 436; *Lasermax Engineering Pty Limited v QBE Insurance (Australia) Limited* [2005]NSWCA 66.

[79] See [7] of the Applicant's Submissions dated 4 September 2017.

[80] See [8] of the Applicant's Submissions dated 4 September 2017,

Petersen v Union des Assurances de Paris IARD (1995) ANZ Ins Cases 61-244 at 75249, (1997) 9 ANZ Ins Cases 61-366 at 77034

121. In *National & General Insurance v Chick* [1984] 2 NSWLR 84 at 97 Samuels J made the following observations:

> By "proximate" cause is not meant the latest, but the direct (per Lord Summer *in Becker, Gray and Co v London Assurance Corporation* [1918] AC 101 at 114), real or common-sense (per Lord Summer ibid at 112), dominant (per Lord Dunedin in Leyland at 363), operative or efficient one (per Lord Shaw of Dunfermline ibid at 369, 370 and per Viscount Cave in *P Samuel and Co Ltd v Dumas* [1924] AC 431 at 447). "A loss may be the combined effect of a whole number of causes, but, for the purposes of insurance law, one direct or dominant cause must in each case be singled out": Colinvaux *The Law of Insurance* 4th ed (1979) par 4-32 at 77 citing Lord Dunedin in Leyland (at 363). Common sense is the final arbiter in determining what is the proximate cause of the loss. "The choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common-sense standards. Causation is to be understood as the man in the street, and not as either the scientist or metaphysician, would understand it": per Lord Wright in *Yorkshire Dale Steamship Co Ltd v Minister of War Transport* [1942] AC 691 at 706. In the same case (at 702) Lord MacMillan urged resort to "common-sense test" rather than to "the refinement of the philosophical doctrine of causation".

122. Although the applicant submitted to the contrary,[81] the true position in relation to the alleged aggravation injury is as submitted on behalf of the respondent:[82]

> The subsequent injury being in the nature of an aggravation of a prior injury, it is only necessary for the respondent to prove that the employment was the real or proximate or effective cause of the aggravation and not the sum total of the worker's condition.

123. As an aggravation of an earlier injury is an injury in itself,[83] the task of the Court is to ascertain the real, proximate cause of that particular injury. In that regard the Court needs to be satisfied that the worker's employment was the real, proximate or effective cause of the aggravation injury.

[81] See [9] – [13] of the Applicant's Submissions dated 4 September 2017. See also [8] – [24] of the Applicant's Supplementary Submissions dated 12 October 2018.
[82] See [7.4] of the Respondent's Supplementary Submissions dated 12 October 2018.
[83] See *Evans v Northern Territory of Australia* (unreported decision of the Work Health Court delivered on 31 January 1996 per Trigg SM, p12.

124. The question that remains is whether the respondent has established on the balance of probabilities that during the period the applicant was the approved insurer the worker suffered a gradual onset aggravation of the initial mental injury or a comorbid major depressive disorder such as to render the employer liable to pay compensation to the worker during the period that the applicant was the approved insurer.

125. The answer to that question depends upon the particular circumstances of this case and the medical and lay evidence that was presented at the hearing.

126. The starting point is the evidence of the two medical practitioners: Dr Shaikh and Dr Farnbach.

127. In his report dated 16 October 2013 Dr Shaikh[84] dealt with the history he received from the worker regarding his psychiatric symptoms. The worker reported that although his symptoms had been present over the last three years he had been able to maintain a persona, whilst masking his distress underneath. He further reported that in recent months he had found it difficult to mask his symptoms, the following being significant: insomnia, vivid dreams in relation to the plane crash, racing thoughts, flashbacks, avoidance of colleagues, memory loss, reduced socializing, hypervigilance, anxiety when flying, emotional instability and ideas of self-harm.

128. The worker believed that the recent deterioration in his mental state was perhaps related to the triggering of his symptoms during a disaster recovery program. He reported having since an exaggeration of his symptoms with an increase in impulsivity and sensitivity to agitation.

129. Dr Shaikh stated that the worker presented with symptoms consistent with a diagnosis of PTSD. He concluded that the worker's condition was "causally and consequentially related to the incident of 2010".

130. In his further report dated 18 April 2017 Dr Shaikh confirmed that the worker's condition was reflective of the condition of PTSD. The doctor expressed the opinion that "the plane crash

[84] Part of Exhibit A10.

incident of 22 March 2010 is the most significant contributory factor to Mr Webber's experienced condition of PSTD" and that he has perceived work stressors, and involvement in the Exercise Flame project were only triggers leading to the eventuation of his symptomology and receipt of psychiatric treatment". Dr Shaikh went on to say that "it would appear that between 2010 and 2013 his symptoms gradually progressed to impair his social and occupational functioning". He added that the plane crash and the worker's involvement in the incident was the real cause of his psychiatric condition.

131. Dr Shaikh disagreed with Dr Hundertmark's opinion that the worker did not suffer from a fully diagnosable PTSD, but rather from a major depressive disorder. He stated that the worker did not present with any work capacity and that his PTSD materially contributed to that incapacity.

132. Dr Farnbach provided three reports.

133. In his first report dated 2 September 2014 Dr Farnbach recounted the history given to him by the worker. That history included the worker having been exposed to the plane crash in 2010 and the commencement of symptoms immediately after the accident. Dr Farnbach said that the worker reported feeling unhappy and anxious and having intrusive recollections. However, he did not have any insight into his abnormal condition and he was not offered any counselling. Nor did he receive any counselling.[85]

134. According to the further history given by the worker, he continued at work until August 2013. Prior to then he had been on a disaster recovery program committee, and because of the information and discussions concerning the activities of the committee the worker came to realise that he was ill because of traumatization. He was then referred to a psychologist who diagnosed PTSD.

[85] However, this is not consistent with Dr Fernando's medical certificate which mentions that the worker saw a psychologist on two occasions, but then stopped consulting him or her.

135. Dr Farnbach said that immediately after the accident the worker felt horrified and helpless and was derealised. He immediately began to develop symptoms of PTSD, but continued on at work, depressed and very anxious and drinking excessively to relieve his anxiety. His condition was unrecognized and undiagnosed until August 2013.

136. Dr Farnbach's diagnosis of the worker's condition was chronic PTSD with co-morbid major depressive disorder and anxiety.

137. Dr Farnbach expressed the opinion that the worker's psychiatric condition was "a direct consequence of the psychological trauma that he experienced on 22.03.2010".

138. The doctor expressed the opinion that the worker was totally incapacitated for work as a result of his injury, which is PTSD and major depression. He went on to say that the worker's injury occurred on 22 March 2010 and that traumatic event is "solely and completely responsible for Mr Webber's psychiatric condition and his incapacity for work".

139. In his second report dated 23 December 2014 Dr Farnbach stated that the history given by the worker was consistent with him "having developed PTSD [at the time of the crash] or at least a number of symptoms of the condition even if he did not have the full syndrome". He went on to say that "the psychologist's report supports a diagnosis of PTSD which had started before August 2013".

140. Dr Farnbach stated as follows:

> …it is entirely possible, from a clinical point of view, for him to have developed some PTSD symptoms, or the whole syndrome, soon after the accident, and for him to have continued working and functioning without realizing what was wrong with him. He was anxious, he was having flashbacks, he slept badly and he drank too much, without recognizing that there was a connection between the disturbance of his mental state and his behavior patterns and his having experienced the traumatic event.
>
> What appear to have happened in August 2013 when he attended the disaster recovery program was that the material presented to and discussed with the participants intensely reminded him of his traumatic experience and in doing so it, in effect, re-traumatised him. There is nothing in that version of events which in any way conflicts with clinical reality.

141. The doctor went on to say that the worker was apparently capable of fulfilling the requirements of his work duties until August 2013 when his condition became more severe. He said that although the worker needed treatment in the earlier period, due to his lack of insight into his condition he apparently did not complain to a doctor about his condition. Consequently, a diagnosis was not made and treatment was not initiated; but this does not deny that he required treatment.

142. In his second report, Dr Farnbach addressed the following question:

> *Considering Mr Webber's demonstrated capacity to perform his pre-injury duties and hours as deputy operations manager since the original incident dated 22.03.2010 do you consider that the incident in August 2013 was the cause for Mr Webber to become totally unfit for all work and the reason why he cannot return to his pre-injury duties and hours?*

143. The doctor responded thus:

> Mr Webber's capacity to fulfil his work duties and hours from the time of the accident until August 2013, after which he became unfit for all work, is not exceptional. It may, superficially, appear to be highly improbable to the extent of being scarcely believable, but what he claims happened is realistically quite possible. Many police officers are traumatized and develop PTSD and they continue on at work for months or years, anxious, irritable, anger-prone, having flashbacks and drinking too much until some incident triggers a worsening of their symptoms which then persists.

144. Dr Farnbach also addressed the following question:

> *If you are of the opinion that Mr Webber did sustain an injury during the course of his employment from the original incident dated 22.03.2010, considering Mr Webber only became incapacitated following the second incident date in August 2013 do you consider he sustained an aggravation.*

145. To that question the doctor answered in the affirmative.

146. In his third final report Dr Farnbach confirmed a view expressed in his earlier report:

> In my report dated 23/12/2014 I expressed the opinion that Craig Webber's PTSD originated immediately after the crash that killed two of his friends on 22/03/2010 and that his involvement in the planning for Exercise Flame was not a cause of his PTSD, but that it triggered a change in him, in that his PTSD symptoms became acknowledged by him, and they were more severe, distressing and disabling.

147. Dr Farnbach used a case study to make his point about the effect of "triggers":

> I recall a patient of mine, whom I treated extensively for PTSD, several years ago. She was a middle-aged woman, married with a young adult family. She had spent much of her childhood in an orphanage run by the church. She was sexually abused by the visiting priest. She did not develop overt PTSD, but those who knew her would have considered her to be very difficult at times, oversensitive and irritable. She was depressed and anxious. She apparently functioned very well in her unpaid work, training children in a particular sport and was well –regarded. Then, one night, with her family present, she watched a television program relating to the sexual abuse of children and had a catastrophic breakdown which marked the onset of clear and obvious PTSD. The condition was entirely caused by the sexual abuse that she had suffered and the TV program was only a trigger and not a significant traumatic event in itself.

148. The doctor then went on to express the following three opinions:

> In my opinion, the pattern of Craig Webber's PTSD regarding its causation in 2010 its sub-clinical course after that time, its exacerbation probably as a result of overwork and its final open expression triggered by his brief involvement in planning Exercise Flame, has been comparable to that of my patient.
>
> In my opinion, Craig Webber's involvement with Exercise Flame was not intrinsically traumatic (unless there is evidence that other people who were involved in the planning, and not the exercise itself, were traumatised to the extent of needing medical or psychological attention) and that the traumatic event of 22/03/2010 was the single cause of his PTSD and that his involvement in the planning for Exercise Flame was simply a trigger and not a traumatic event.
>
> It may be that Craig Webber's PTSD became more severe after the Exercise Flame planning, in which case it may be considered that his involvement was an aggravation of his PTSD. This takes us into the area of speculation, as it could be contended that his PSTD was destined or programmed to ultimately escalate to its present level of severity, which is that his condition appears to be treatment-resistant and it is significantly disabling.

149. In addition to his three reports which were tendered as evidence, Dr Farnbach gave evidence at the hearing.

150. Dr Farnbach stood by the opinions he expressed in those reports. He repeated his opinion that the worker's PTSD became more severe after his involvement with the planning of Exercise Flame.

151. In expressing the latter opinion, Dr Farnbach understood that the worker's involvement in the planning process was "fairly peripheral, not as intense, in other words nothing like the intensity that you would experience if he had been involved in Exercise Flame itself". However, he was not aware of what would be the worker's actual involvement. In particular he was not aware of

the fact that it had been proposed from the outset in the course of the planning process that he would be in effect the communication or operations centre hub for Airnorth in dealing with the the Airnorth response to the mock disaster scenario.

152. When it was put to Dr Farnbach that it was proposed that the worker would be playing the same role that he was performing at the time of the crash Dr Farnbach stated:

> …anything which reminded him of the original accident would have been – could have been sufficient to have aggravated his condition and logically, the more realistic or the more intense the reminder, well then the more it would be in causing him – causing an exacerbation of his symptoms.

153. Dr Farnbach confirmed his diagnosis of the worker's condition as PTSD with a comorbid major depressive condition. He said that comorbid anxiety disorders or depressive disorders are very common with PTSD.

154. He went on to say that the symptoms of the depression would not necessarily reflect any connection with PTSD or with the cause of the PTSD.

155. Dr Farnbach agreed that a major depressive disorder, being a form of depressive illness, is "frequently seen in association with people who are employed in occupations which excessively demanded their time to the exclusion of other areas of their life". He said that he had done a number of Work Cover assessments in relation to workers who had been "overwhelmed " by their workload and suffered depression as a result.

156. When questioned about the effect of the worker taking on an increase in his workload and responsibilities, Dr Farnbach said that "it would be likely that when he was suffering the stress of overwork, it is likely that this would have – could have, rather, increased his PTSD symptoms and could have either initiated depression if it wasn't already there or made it worse if it was already there".

157. The doctor confirmed his opinion that at the time he saw the worker in September 2014 he had fully developed post-traumatic disorder with a comorbid major depressive disorder.

158. Dr Farnbach gave the following evidence:

> …there's no doubt that he was severely affected after his involvement in the Exercise Flame and it would be most likely that he was – he did have the full condition at that time.

159. The doctor agreed that the meeting the worker attended in July 2013 brought the 2010 incident "all back to him and re-aggravated the whole problem". He agreed with the proposition that the meeting had re-traumatised him.

160. When asked whether the worker's failure to recognize Mr Foster after the worker had stormed out of the meeting was typical of PTSD, Dr Farnbach stated:

> Not specifically PTSD. I think it's typical of somebody who's overwhelmed with anxiety which is – that's typical of PTSD…. For him to be in that kind of dissociated state or whatever it was, was not typically PTSD. It's typically extremely severe anxiety but I have no doubt that this was caused by his PTSD. No other cause.

161. Dr Farnbach gave the following evidence as to what caused the worker's response at the meeting:

> …I think just the general sort of situation of being in that meeting and where it's all talked about. The original accident comes – if its' not directly referred to…conversation or discussion would have reminded Webber of what had happened in the accident and sensitized him, if you like. But I think that the Hargrave's ..inappropriate and brutal ..of the company's performance was just the …I think the cherry on the cake. I think it was he became obviously he became extremely angry, but that's…in keeping with PTSD.

162. Dr Farnbach described the difference between PTSD and a trigger in the following terms:

> …PTSD is a syndrome or a collection of symptoms which arise after somebody goes – witnessed one way or another a traumatic event which is – would normally be regarded as being outside the range of ordinary human experience. That's PTSD, that's the illness. A trigger is – in the case of PTSD, would be some extent which may be trivial which would remind – or leads to the person – reminds the patient, the PTSD patient, one way or another of the incident, the traumatic – the original traumatic event. .. this will then lead to sort of the patient probably having flashbacks which are intense and intrusive realistic recollections such as with the feelings and so on which the first time, and the condition there is made worse, even temporarily.

163. By way of clarification the doctor referred back to the case study that he referred to in his third report.

164. Dr Farnbach said that in the case of a trigger an exacerbation of symptoms could either be temporary or lasting. In the worker's case, the exacerbation appeared to be lasting.

165. Dr Farnbach was referred to his comment in his third report to the effect that "it could be contended that his PTSD was destined or programmed to escalate to its present level of intensity". Dr Farnbach gave this evidence:

> ..it is possible that…if Exercise Flame had never occurred and his involvement wasn't possible , that his condition, his PTSD may have stayed at that sort of low level and he would have continued being able to work and function and so on, although he was having some problems. It's also possible that he could have – his condition could have at some time in the future, in response to for no reason at all, no apparent reason, or in response to some trigger…it would've been exacerbated or aggravated rather. It's also possible that Exercise – his involvement in Exercise Flame, and the rate of his PTSD and I think it's – no, nothing's obvious, but the fact is that it is extremely unlikely that his PTSD would have escalated the way it did if he had not been involved in Exercise Flame.

166. Dr Farnbach said that it could be the case that the PTSD caused the worker's depression.

167. Of course, the expert medical evidence presented at the hearing must not be viewed in isolation and the lay evidence also needs to be considered as part of the fact finding process, with a view to making ultimate findings as to whether the worker suffered a subsequent injury or injuries.

168. A number of civilian witnesses gave evidence at the hearing: Michael Bridge, Phil Hargrave, Leigh Greig, Ron Pratt and Danny Foster.

169. Mr Bridge, current director of Airnorth, gave the following evidence:

- Following the plane crash in March 2010 counselling services were made available to Airnorth staff. Mr Bridge did not believe the worker availed himself of those services;

- Mr Bridge said that 18 months prior to the worker ceasing work he noticed very minor things concerning the worker's behavior at work. Bigger issues came to his attention probably within 6 months of his cessation of work;

- Mr Bridge discerned what he described as "a progressive escalation" of issues that started to affect the worker in the workplace following the 2010 accident. He said "whether that was reflective of workload and normal operational

frustrations, or whether that was something that would be later diagnosed as his condition. I'm not exactly sure…it was an escalation well past the accident date".

- The sort of issues that came to Mr Bridge's attention were the worker yelling at other colleagues "in the extreme", raising his voice in meetings "in the extreme" , demonstrating open frustration particularly with anyone not taking on board his suggestions of wishes involving safety issues and communicating inappropriately with pilots and cabin attendants;

- The worker became overly safety conscious and vigilant in respect of matters of safety. He saw safety deficiencies which neither Mr Bridge nor other key managers believed existed;

- It was brought to Mr Bridge's attention after the plane crash that the worker was of the view that Airnorth had not learnt from the mistakes leading to the crash;

- Mr Bridge believed that safety comments were raised as part of Exercise Flame. He did not recall any such comments or concerns outside of that process.

170. The next witness to give evidence was Phil Hargrave,[86] whose evidence may be summarised as follows:

- Mr Hargrave said that the position of Operations Centre Manager (the position the worker assumed in 2012) was demanding;

- He said that when the worker moved into the position he was "struggling indeed" and "was struggling with a great deal of the communication and the support of the multiple departments...that he had to liaise with". He further said that he "just struggled repeatedly with being able to get the right information or the right answers";

- Mr Hargrave said that after the worker assumed the role of Operation Centre Manager in May 2012 the worker did not say anything to him about his workload directly. However, the worker told him over the telephone on at least two occasions, after Mr Pratt left in December 2012, that he was "doing both areas now";

[86] Mr Hargrave was the General Manager for Engineering at Airnorth up until 2017.

- After Mr Pratt left he Mr Hargrave recalled receiving a telephone call from the worker after hours during which the worker sounded "extremely distressed that he couldn't get a hold of people" and was complaining that "it's like this all the time". The worker said that he "couldn't get decisions" and information. The worker was quite angry, distressed and "very frustrated";

- Mr Hargrave had a view about the worker being involved in the planning of or participating in Exercise Flame. In his opinion, people directly involved in the emergency response in 2010 (which included the worker) should not have been involved. As to why he held that view in relation to the worker, he stated:

- Because, Mr Webber was still experiencing difficulties knowing that two crew members had died and he was familiar with those two people and on the day of the emergency – on the day of the accident in 2010, Mr Webber was actually at the crash site, so the visual effects there were obviously quite significant.

- Mr Hargrave said that he attended the planning meeting that the worker also attended. Mr Hargrave commented that "this manual still hasn't been revised. We're still working on a manual that doesn't address all the lessons we leant out of the accident of March 2010". Mr Hargrave then gave examples of things missing in the manual which had not yet been published and included in the manual. It was at that point that the worker reacted badly presumably because he had misheard or misunderstood what Mr Hargrave was attempting to communicate. Mr Hargrave said that the worker became verbally abusive and left the meeting.

171. Leigh Greig, former Human Resources Manager at Airnorth, was the third lay witness to give evidence at the hearing. The salient parts of her evidence were as follows:

- Ms Leigh gave evidence that on 7 August 2010 the worker came to see her and had told her that he had been diagnosed with PTSD due to the crash and was going to lodge a work health claim. She said that the worker then told her of some of the symptoms that he was experiencing such as his dislike of the dry season because of the smell of the burn-offs and the smell of barbeques, as well as sleep deprivation and withdrawal from friendships with pilots at work.

- Ms Leigh said that about a week before the worker came to see her about his diagnosis the worker raised his working hours with her.

172. The fourth civilian witness to give evidence was Ron Pratt, former Operations Centre Manager at Airnorth. His evidence may be summarised as follows:

- Mr Pratt said that upon assuming the role of Operation Centre Manager the worker's duties, tasks and responsibilities increased;

- Mr Pratt said before he left Airnorth the worker's workload was "quite high and he was only replaced sometime after he left;

- He said that when he left the worker's workload would have increased by between 50 and 80 per cent;

- Mr Pratt described the worker's work performance in these terms:

- Most probably a little bit tough and tight…Most probably – he was coping with it but it was probably – there were cracks I suppose is a good way to put it. There were cracks most probably forming around the work load… there were some tasks that were most probably allocated to what Craig was doing that he was falling behind in or not getting on top of and just seemed to be always behind the eight ball trying to catch up with stuff a little bit. His mind most probably wasn't 100 per cent in – at that time.

173. The final lay witness was Danny Foster, former General Manager of Airlines Operations. Mr Foster's evidence was as follows:

- Mr Foster said that when the worker first assumed the role of Operations Centre Manage he was "very good at his job" and "he was very diligent and very hard working…he was a good Operation Centre Manager;

- Mr Foster said that the position of the Operation Centre Manager was "a very high pressure role and it involved a lot of responsibilities, daily operations responsibilities for high pressure situations and the intention of that role was to concentrate all of those high pressure activities or daily operations activities to one role while there was an accompanying role, Network Operations Manager". He added: "that position was looking ahead and taking a more holistic view of the operation and Operations Centre Manager role was in the thick of it";

- Mr Foster said that the position of Operations Centre Manager was more demanding than that of Network Operations Manager;

- Mr Foster said that he did not discern any change in the manner in which the worker was handling his role as Operations Centre Manager prior to Mr Pratt's departure. However, after Mr Pratt left he noticed that the worker was "intemperate with his peers" and "more intolerant and impatient with people". He said this change was "certainly noticeable";

- Mr Foster said that it was intended that the worker would take a critical role in Exercise Flame:

- …the operations centre manager has a critical role in an airport emergency, so the operations centre manager becomes the communications hub or communications connection, between the crisis control centre and the … They have an integral role, so Craig was definitely to be involved in the exercise.

- Mr Foster said that he had had conversations with the worker about his involvement with Exercise Flame because of his involvement in the plane crash in 2010 and the sensitivity of him being part of Exercise Flame. However, the worker was very keen to be involved because he wanted to improve emergency response and to make sure that it was done better next time;

- Mr Foster said that there were two meetings for Exercise Flame – the second of the two being "far more detailed in respect to planning";

- Mr Foster said that the second plaining meeting occurred shortly before the worker consulted a psychologist through the employee assistance program;

- Mr Foster said that during the course of the second planning meeting Phil Hargraves made a comment to the effect that he thought the 2010 response "worked well from his perspective and that we shouldn't be looking to change anything". He said that greatly upset the worker who was sitting next to him and he personally witnessed the effect that comment had on him. He went on to describe his observations of the worker at that time:

  > I was observing him physically ticking to the extent where he was having to sit on his hands because he couldn't control his hands from ticking and he was very agitated and you know, you could feel there was an outburst coming that I was unable to control and he very shortly had an outburst, yelled. I can't recall the extent to what he'd actually said but something to the effect of, you know, that wasn't his experience and it wasn't good enough to not change, you know it wasn't good enough to not take and record lessons and then be abruptly left the meeting. Left his things in the room.

- Mr Foster said that went looking for the worker and located him about 200 metres up the road. He found the worker walking round, quite incoherent. The worker did not recognise him and he couldn't communicate with him. He said that he recalled touching the worker and him "getting a very big fright even though he was looking at [him]";

- Mr Foster said that he had followed the worker after he had left the meeting because he had " a sense that it was more than just an outburst… had a sense that something had gone very badly wrong for him";

- Mr Foster said that prior to the second meeting the worker's concern with safety issues and over-estimation of risks was " a progressively escalating pattern";

- Mr Foster could not recall whether the worker told him that his diagnosis of PTSD was connected with the 2010 plane crash.

174. Having regard to the whole of the evidence, I am satisfied that the respondent has established on the balance of probabilities that subsequent to the initial mental injury which was suffered in March 2010 the worker suffered, during the period that the applicant was the approved insurer, an aggravation of the earlier mental injury – that aggravation being by way of a gradual process.

175. Although the medical evidence before the Court is the primary evidence as to whether or not the worker suffered an injury or injuries subsequent to the initial injury that evidence must be viewed in the context of any relevant non –medical evidence. The totality of the evidence must be examined in order to determine whether the worker suffered a subsequent injury or injuries. It must be remembered that any such determination must be viewed through the lens of the definition of "injury" under the Act.

176. Dr Shaikh's opinion that between 2010 and 2013 the worker's symptoms "gradually progressed to impair his social and occupational functioning" is significant as it points to the gradual development of his fully – blown PTSD, which manifested itself at the time of the second planning meeting of the Exercise Flame Project. The evidence shows that the worker's mental condition went from a sub –clinical PTSD to a full diagnosis of PTSD over a substantial period of time.

177. It is noted that Dr Shaikh's opinion was that the worker's involvement in the Exercise Flame Project and work stressors were "only a trigger leading to the eventuation of his symptomology and receipt of psychiatric treatment". Dr Shakih did not explain what he meant by "trigger".

However, a "trigger" is commonly considered to be something that sets off a memory tape or flashback, transporting the person back to the event of his or her original trauma.

178. The doctor's opinion that work stressors and the worker's involvement in Exercise Flame were only a trigger seems to trivialize the significance of the work stressors and the worker's participation in the project in relation to the diagnosis of PTSD in 2013. However, this so called "trigger" operated over a significant period of time at his workplace, and indeed was an integral part of his employment and attendant duties. Exercise Flame was a key characteristic of his employment or condition of his employment: it was "part and parcel" of the worker's employment duties.

179. Doubtless, the worker's involvement in Exercise Flame would have set off flashbacks, transporting the worker back to the traumatic incident in March 2010. By its very nature Exercise Flame would have inevitably had that effect because the whole point of the exercise was to recreate the incident with a view to improving emergency responses in the future. As Exercise Flame would have been a constant reminder of the 2010 plane crash over a sustained period of time, it is little wonder that his involvement led to the eventuation of his symptomology and need for psychiatric treatment. The sensitivities of the worker becoming involved in Exercise Flame was clearly recognized by Mr Hargrave.

180. Dr Shaikh's opinion that the March 2010 plane crash "is the most significant contributory factor to Mr Webber's experienced condition of PTSD" strongly suggests the existence of another contributory factor or other contributory factors. Similarly, the doctor's opinion that the worker's exposure to the plane crash was "the real cause of his psychiatric condition" implies that there may have been another cause or other causes. These two opinions leave open the real possibility that something other than the worker's exposure to the plane crash contributed to the worker's PTSD condition which manifested itself in 2013 – some years after the plane crash – and that

there may be some other cause or causes of the psychiatric condition that the worker presented with in 2013.

181. According to Mr Bridge counselling services were made available to Airnorth staff after the plane crash; however it would appear that the worker only availed himself of those services to a limited extent and did not continue with the counselling. According to Dr Farnbach the worker needed treatment, but neither sought or received such treatment. Therefore, the mental injury suffered by the worker went untreated (as well as being unrecognized and undiagnosed) during the continuing period of his employment which came to an end in August 2013. Clearly, something was occurring at the workplace during the period of the initial mental injury (being in the nature of a sub-clinical PTSD) and the manifestation of a fully blown PTSD in 2013.

182. As stated by Dr Farnbach, as result of his involvement in Exercise Flame the worker "came to realise that he was ill because of traumatization". Hitherto, the worker had lacked insight into his abnormal mental state. In my opinion, the involvement in Exercise Flame was a watershed in the development of the worker's psychiatric condition as diagnosed in 2013. Although, like Dr Shaikh, Dr Farnbach regarded the involvement in Exercise Flame as a "trigger", that characterization should not in any way reduce the significant contribution that the worker's participation in that project made to the psychiatric condition that was diagnosed in 2013.

183. In his second report, Dr Farnbach said that it was possible, and not exceptional, that a person may develop PTSD, but continue on at work for months or years "until some incident triggers a worsening of their symptoms which then persists". In my opinion, this is exactly what happened in relation to the worker. The worker's involvement in Exercise Flame, culminating in the second planning meeting, led to a worsening of the worker's symptoms – which then persisted, leading to a diagnosis of PTSD.

184. It is significant that in his second report, Dr Farnbach agreed that in light of the fact that the worker only became incapacitated following the second incident in August 2013 the worker had suffered an aggravation of his earlier mental injury.

185. In his third report Dr Farnbach, expressed the opinion that the worker's involvement in Exercise Flame was not a cause of his PTSD; however he said that "it triggered a change in him, in that his PTSD symptoms became acknowledged by him, and they were more severe, distressing and disabling". The doctor's use of the word "triggered" is particularly significant because it connotes "bringing about or causing something to happen", and thereby acknowledges the important part that the worker's involvement in Exercise Flame played in the development of the worker's fully blown PTSD as diagnosed in 2013.

186. Therefore, there is a clear acceptance in Dr Farnbach's third report that the worker's involvement in Exercise Flame brought about a change in the worker's symptomology and increased the severity of his symptoms.

187. Similarly, although in the case study mentioned in his third report Dr Farnbach concluded that the cause of the patient's PTSD was entirely caused by the sexual abuse she had suffered during her childhood, he found that the patient's exposure to the TV program (the "trigger") led to "a catastrophic breakdown" and resulted in the onset of clear and obvious PTSD. He acknowledged the contribution made by the "trigger" to the patient's PTSD.

188. In the present case the worker was, on the face of things, exposed to a far greater stimulus reminding him of the original trauma than the patient in Dr Farnbach's case study. If the stimulus to which the patient was exposed was sufficient to have such a catastrophic effect on her to the extent it led to the onset of a PTSD it is not too difficult to accept that the constant exposure to reminders of the 2010 plane crash through involvement in Exercise Flame (including his attendance at the second planning meeting) would have had a deleterious effect on the worker,

and resulted in the worsening of his symptoms to the extent that he was diagnosed with PSTD in August 2013.

189. It is difficult to imagine anything more traumatic to a person in the position of the worker than a constant reminder of an original traumatic incident entrenched in a structured and formal program in which the worker became a key participant.[87]

190. Dr Farnbach referred to the "sub –clinical" course that the worker's condition took after the 2010 exposure to the plane crash and "its exacerbation probably as a result of overwork and its final open expression triggered by his brief involvement in planning Exercise Flame". Again, the doctor acknowledges the significant role that Exercise Flame had in exacerbating the worker's sub-clinical PTSD, leading to the manifestation of a fully developed PTSD in August 2013. However, this time he mentions "overwork" as a contributory factor.

191. Although Dr Farnbach says that the worker's involvement in Exercise Flame was not intrinsically traumatic, that does not mean that his involvement was not traumatic for the worker.

192. Most importantly, Dr Farnbach says that "it may be that Craig Webber's PTSD became more severe after the Exercise Flame planning, in which case it may be considered that his involvement was an aggravation".

193. The doctor's comment that "this takes us in the area of speculation, as it could be contended that his PTSD was destined or programmed to ultimately escalate to its present level of severity" is immaterial. The matter to be determined is simply whether there was an aggravation of the earlier mental injury in 2010.[88]

[87] As previously noted that it had been proposed from the outset in the course of the planning process the worker would be in effect the communication or operations centre hub for Airnorth in dealing with the Airnorth response to the mock scenario disaster. As stated by Foster it was intended that the worker would have a critical and integral role in Exercise Flame.

[88] See the applicant's oral submissions at page 18 of the transcript of proceedings on 5 September 2017.

194. particular repeated that the worker's PTSD became more severe after his involvement with the planning of Exercise Flame. Upon learning that it was proposed that in relation to Exercise Flame the worker would be performing the identical role that he was performing at the time of the plane crash, Dr Farnbach stated that "anything which reminded him of the original accident …could have been sufficient to have aggravated his condition and logically the more realistic or the more intense the reminder [the greater the exacerbation of his symptoms]".

195. Dr Farnbach believed that the worker was severely affected after his involvement in Exercise Flame. He considered the worker's attendance at the planning meeting in July 2013 to be pivotal in that it brought the 2010 incident "all back to him and re-aggravated the whole problem". Indeed, in the words of Dr Farnbach, "the meeting had re-traumatised him".

196. Dr Farnbach said that in the case of a "trigger" an exacerbation of symptoms could either be temporary or lasting; and in the worker's case, the exacerbation appeared to be lasting.

197. Once again, viewing the worker's involvement in Exercise Flame as a mere "trigger" overlooks or devalues the contribution it made to the development of the fully blown PTSD that the worker presented with in August 2013. If the worker's involvement in Exercise Flame was a "trigger", then it was far from being a trivial "trigger": it was a major trigger with very significant consequences.

198. Finally, it is significant that Dr Farnbach stated that it was likely that the due to the increase in his workload and responsibilities the worker was suffering from the stress of overwork and this could have increased his PTSD symptoms.

199. The evidence given by the various lay witnesses also supports the hypothesis that following the March 2010 incident the worker suffered an aggravation (by gradual process) of the mental injury he suffered arising out of that incident.

200. The fact that Mr Bridge noticed 18 months prior to the worker ceasing work very minor things in relation to the worker's behavior at work, with larger issues coming to the fore within 6 months of his cessation of work, fits within the pattern of a gradual aggravation of the earlier mental injury. Mr Bridge's evidence that there was "a progressive escalation of issues that started to affect the worker in the workplace following the 2010 accident" clearly fits within the pattern of a subsequent injury. Significantly, he says that the "escalation was well past the accident date".

201. As previously referred to, those issues comprised yelling at colleagues, raising his voice at meetings, the expression of open frustration, inappropriate communication with pilots and cabin attendants and an excessive sense of safety consciousness and vigilance in respect of matters of safety (raised in the context of Exercise Flame).

202. Although Mr Bridge could not be sure what was behind "the progressive escalation of issues", he said that it was reflective of either the worker's workload and operational frustrations or the worker's yet to be diagnosed PTSD. It is likely that it was a combination of the two, in light of Dr Farnbach's evidence that the worker's stress from overwork (due to the increase in workload and responsibilities) could have increased the worker's PTSD symptoms.

203. Mr Hargrave's evidence also lends weight to the hypothesis of a second subsequent injury in the nature of an aggravation (by way of a gradual process) of the initial mental injury.

204. Mr Hargrave said that when the worker took on the demanding position of Operations Centre Manager he was "struggling" with the demands of the position and recalled receiving a telephone call from the worker after Mr Pratt left Airnorth, during which conversation he was angry, extremely distressed and very frustrated. This evidence shows that the job was having an effect on the mental health of a worker whose mental well -being was already affected by a mental injury in the form of sub clinical PTSD which required treatment, but which remained unrecognized and untreated.

205. Mr Hargrave gave evidence that at the time Exercise Flame was being planned he held the view that the worker should not be involved in the planning of Exercise Flame – nor should he be a participant. This is significant because it acknowledges the vulnerability or susceptibility of the worker to further trauma through involvement in Exercise Flame.

206. Ms Greig gave evidence that about a week before the worker came to see her about his diagnosis of PTSD he raised his working hours with her. This gives rise to a possible connection between the worker's workload and responsibilities and the development of his fully blown PTSD: in other words an increase in the worker's PTSD symptoms due to stress from overwork.

207. The evidence given by Mr Pratt also lends weight to the hypothesis of a subsequent injury (aggravating the initial injury) insofar as it was caused by the increased workload of the worker and the demands of his new position.

208. As noted earlier, Mr Pratt gave evidence that when the worker took over the position of Operations Centre Manager his duties and responsibilities increased, and by the time he left the employment of Airnorth the worker's workload was "quite high". Mr Pratt identified various deficiencies in the way the worker was performing the role of Operations Centre Manager. He referred to those deficiencies as "cracks forming around the workload" and being "always behind the eight ball". His overall view of the worker was that "his mind most probably wasn't 100 per cent…at the time".

209. It is noted that Mr Pratt was not replaced immediately; and according to Mr Pratt, the worker's workload would have increased by between 50 and 80 percent at the time he left Airnorth.

210. Mr Pratt's evidence establishes the high workload carried by the worker when he assumed the role of Operations Centre Manager, as well as the fact he was experiencing difficulties in performing the role – including the level of his mental functioning. It can be reasonably inferred that with his workload being substantially increased with the departure of Mr Pratt the worker would have continued to experience those difficulties – if not greater difficulties with a

decreased level of mental functioning. It is not too difficult to see how the stresses of the worker's workload and responsibilities might have aggravated the symptoms of the workers sub –clinical PTSD.

211. The evidence given by Mr Foster has particular probative value for a number of reasons.

212. First, Mr Foster gave evidence that the position of Operations Centre Manager was a very high-pressure role - requiring the incumbent to deal with high-pressure situations – and involved multiple responsibilities.

213. Secondly, Mr Foster said that when he first took over the role of Operations Centre Manager the worker was diligent and "very good at his job". However, upon Mr Pratt's departure from Airnorth there was a very noticeable change in the worker's behavior at work. The worker became "intemperate with his peers" and "more intolerant and impatient with people".

214. Thirdly, Mr Foster said that prior to the second planning meeting in relation to Exercise Flame the worker's concern with safety issues and over-estimation of risks was "a progressively escalating pattern".

215. Mr Foster's evidence is significant because it reveals a very noticeable change in the worker's behavior at work in a high pressure and stressful position. It is also reveals a likely connection between the worker's employment and involvement in Exercise Flame on the one hand and the worker's progressively escalating concern with safety issues and over-estimation of risks on the other. The observations made by Mr Foster indicate a gradual deterioration in the worker's behavior and his ability to properly assess issues of safety and risks.

216. In my opinion the whole of the evidence establishes that the worker suffered an aggravation of the earlier mental injury and that aggravation occurred by way of a gradual process during and over the course of the worker's post June 30 2010 employment with Airnorth. That gradual process occurred in the context of the worker's involvement in Exercise Flame and the

performance of his role as Operations Centre Manager between 30 June 2010 and the worker's cessation of employment in August 2013.

217. The meaning of "aggravation" was comprehensively discussed in *Johnston v Commonwealth of Australia* [1982] 56 ALJR 833 by Gibbs CJ, Mason and Wilson JJ at 835 – 836. It follows from the joint judgement that an "aggravation", considered in the context of an injury of disease, signifies an "increasing in gravity or seriousness" or "being increased in gravity or seriousness".[89] An "aggravation" signifies that the injury or disease has been made worse. Furthermore, in order for there to be an aggravation there needs to have been some external stimulus which has worsened the injury or disease.[90] An aggravation of any injury or disease may be evidenced by the production of additional symptoms or an intensifying of existing symptoms where some external stimulus is applied.[91] Finally, but not least, "the question whether there has been an aggravation… is essentially one of fact…the answer depends upon whether for the sufferer the consequences of his affliction have become more serious".[92] That can only be determined by "the results of observation of conduct and demeanour and from what the patient says".[93]

218. In my opinion, the whole of the evidence clearly shows that in the present case the worker's injury or disease was worsened in the relevant sense. There was either a production of additional symptoms of his earlier mental injury or an intensification of existing symptoms.[94] The workers mental injury went from a sub-clinical PTSD to a fully developed PTSD. The evidence also establishes that for the worker "the consequences of his affliction" had become more serious.

[89] [1982] 56 ALJR 833 at 835.
[90] [1982] 56 ALJR 833 at 835.
[91] C.P. Mills *Workers Compensation NSW* Butterworths 1969, p 169.
[92] *Federal Broom Co Pty Ltd v Semlitch* (1964) 110 CLR 626 at 637 per Windeyer J.
[93] *Federal Broom Co Pty Ltd v Semlitch* (1964) 110 CLR 626 at 637 per Windeyer J.
[94] Alternatively, the worker's underlying psychiatric condition was made symptomatic: *Commonwealth Banking Corporation v Burns* (unreported FC No G352/89 20 July 1990.

This is principally based on the observations of the conduct and demeanour of the worker by others; but also on the worker's final realization that he was suffering from PTSD.

219. The evidence establishes that the worker's earlier sub-clinical mental injury (which made the worker more vulnerable to the development of a full blown PTSD) was worsened by the application of an external stimulus. That stimulus was the worker's post 30 June 2010 employment as Operations Centre Manager and his concomitant involvement in Exercise Flame.

220. Finally, the evidence establishes that the aggravation of the earlier injury did not occur once and for all at a particular point of time, but occurred over a period of time (some years) during which there was a gradual worsening of the worker's injury or disease – culminating in the manifestation of a fully blown PTSD in August 2013.

221. Given that the aggravation injury relied upon in the present case is said to have occurred by way of a gradual process, in order for that injury to be compensable under the Act the worker's employment must have been the real, proximate or effective cause of the aggravation injury. That is a question of legal causation.

222. Although a medical expert may proffer an opinion as to the cause of a particular injury (as did both Dr Shaikh and Dr Farnbach in the present case), the Court is the final arbiter of what caused the injury, applying the relevant test of legal causation.

223. As stated earlier, the question is whether the worker's employment was the real, proximate or effective cause of the aggravation injury which was of gradual onset.[95]

224. It is not sufficient that the aggravation occurred in the course of the worker's employment. There must be proof of some "event or occurrence in the course of that employment or some characteristic of the work performed by the worker or conditions in which the work was

[95] See p 28 above.

performed";[96] and that event or occurrence, characteristic of the work or conditions in which the work was performed must be found to have been the real, proximate or effective cause of the aggravation.

225. In my opinion, the post 30 June 2010 worker's employment in the onerous and demanding position of Operations Centre Manager (including its attendant duties and responsibilities) coupled with the worker's involvement in Exercise Flame – being specific characteristics of the work being performed by the worker – was the real, proximate and effective cause. Indeed it was the sole cause of the aggravation injury.[97] There is no evidence of any other cause or causes outside those characteristics or conditions of the worker's employment during the post 30 June 2010 period.[98]

226. It remains to consider whether the worker also suffered a further second injury in the nature of a major depressive disorder during the period that the applicant was the approved insurer.

227. In my opinion the occurrence of such an injury is also established on the balance of probabilities.

228. There is ample evidence that the worker suffered a mental injury in the form of a major depressive disorder during the course of his post 30 June 2010 employment with Airnorth and that the real, proximate or effective cause of that injury was the nature and conditions of his employment during that period – namely the worker's increased workload and additional responsibilities due to his promotion to the position of Operations Centre Manager and subsequent departure of Mr Pratt from the employment of Airnorth.

229. Dr Farnbach's diagnosis of the worker's condition was chronic PTSD with co-morbid major depressive disorder and anxiety. Similarly, Dr Hundertmark preferred a diagnosis of major depressive disorder over PTSD.

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[96] Mills n 91, p 172.

[97] The worker's exposure to the plane crash is irrelevant to the determination of the real, proximate or effective cause of the aggravation injury.

[98] See [7.5] of the Respondent's Supplementary Submissions dated 12 October 2018.

230. Dr Farnbach stated that co-morbid anxiety disorders or depressive disorders are very common with PTSD. It was his opinion that the symptoms of the depression would not necessarily reflect any connection with PTSD or with the cause of the PTSD.

231. Significantly, Dr Farnbach agreed that a major depressive disorder, being a form of depressive illness, is "frequently seen in association with people who are employed in occupations which excessively demanded their time to the exclusion of other areas of their life". He said that he had done a number of Work Cover assessments in relation to workers who had been "overwhelmed " by their workload and suffered depression as a result. Furthermore, he said that "it would be likely that when he was suffering the stress of overwork, it is likely that this would have – could have, rather, increased his PTSD symptoms and could have either initiated depression if it wasn't already there or made it worse if it was already there".

232. The evidence given by the various lay witnesses reveals that the worker was under considerable mental stress following his promotion and the subsequent departure of Mr Pratt from the employment of Airnorth. This is consistent with the gradual development of a major depressive disorder (due to increasing stressors arising out of the worker's employment) which did not manifest itself until the July 2013 aggravation injury. The manifestation of this psychiatric illness coincided with the immediate onset of the worker's fully developed PTSD.

WERE THE STATUTORY PRECONDITIONS FOR AN ENTITLEMENT TO COMPENSATION SATISFIED

233. The fact that the worker suffered two subsequent injuries during the period that the applicant was the approved insurer is not the end of the matter as the applicant submitted that the requirements

of ss80 - 82 of the Act had not been satisfied;[99] and that the liability of an employer to indemnify a worker does not arise unless those requirements are met.

234. The applicant submitted that the only notice of injury given by the worker was in respect of PTSD caused by the plane crash: either no notice of the alleged second injuries was given or if there was notice it was not given as soon as practicable.[100] The applicant relied upon the submissions set out in [76] of its submissions dated 4 September 2017.

235. The applicant also submitted that the worker had not given or served a claim for compensation in respect of the alleged second injuries, as required by s 82(1) of the Act.[101]

236. Finally, the applicant submitted that the worker had failed to comply with the Statement of Fitness requirements under ss 82(1)(b) and 82(2) of the Act.[102]

237. By way of response the Respondent made the submissions set out in [44] –[45] of its Written Submissions dated 4 September 2017.

238. In my opinion the Court needs to be satisfied that the statutory preconditions to an entitlement to compensation have been satisfied before the Court can exercise the power conferred upon it by s 126A(3) for the reason that the liability of an employer to pay compensation to work rests upon notice of injury having been given and a claim for compensation having been made in accordance with the provisions of the Act.

239. I am satisfied that there was sufficient compliance with the relevant requirements in the present case.

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[99] Section 80 (1) provides that a person shall not be entitled to compensation unless notice of the relevant injury has, as soon as practicable, been given to the worker's employer. Subsection (2) provides that an employer who receives a claim for compensation shall be deemed to have been given notice of the injury to which it relates.
Section 81 provides for the form of notice of injury which may be given either orally or in writing and is to include the name and address of the person injured and the date on which the injury occurred and the cause of the injury.
Section 82 provides for the form of claim which must be in the approved form and be accompanied by a statement of fitness for work in a form approved by the Authority.

[100] See [76] of the Applicant's Submissions dated 4 September 2017.

[101] See [77] of the Applicant's Submissions dated 4 September 2017.

[102] See [78] of the Applicant's Submissions dated 4 September 2017.

240. As stated in *Global Insulation Contractors (NSW) V Keating* [2012] NTSC 04 at [64] a finding of whether notice of injury has been given is a finding of fact. In that regard the purpose of the notification provisions (namely to ensure the employer has the information necessary to consider and respond to the notification) need to be taken into account.[103] What should also be considered is the extent to which the circumstances allowed the worker to inform the employer of the cause of the injury.[104]

241. The following extract from the judgment of Blokland J *in Global Insulation Contractors (NSW) V Keating* [2012] NTSC 04 at [70] is particularly apposite:

> To interpret and apply s 81 in such a way that suggests a worker who does not know the mechanism of the injury would be excluded from the Act does not accord with the principles of interpretation of the Act…[105] The date and cause of the injury can only relate to factors that are within the worker's knowledge that are capable of being conveyed at the time of giving notice.

242. Equally relevant are the following observations made by her Honour: [106]

> … s81(d) was not intended to be applied to exclude workers from the operation of the Act for not notifying of the specified matters that are not within their knowledge or are clearly within the knowledge of the employer. If workers who did not possess such particular knowledge were excluded, that would lead to absurd applications of s 81(1)(d).

243. As the making of a claim can amount to notice of injury, it is necessary to consider the purpose of a claim made in accordance with s 82 of the Act.

244. As stated by Mr Trigg SM in *Evans v Northern Territory of Australia* (unreported decision of the Work Health Court delivered 31 January 1996 at p 12):

> It is clear from the format of the various claim forms that it is not intended (nor is it necessary) for the claimant to specify precisely the exact nature of the injury, and clearly this may be impossible in a large number of cases… The "injury" requires general description only in the claim form. In a non-disease injury it is generally linked to a particular incident on a particular day at a particular place.

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[103] *Global Insulation Contractors (NSW) P/L v Keating* [2012] NTSC 04 at [69].
[104] *Global Insulation Contractors (NSW) P/L v Keating* [2012] NTSC 04 at [69].
[105] As discussed for example in *Thompson v Groote Eylandt Mining Co Ltd* (2003) 173 FLR 72.
[106] *Global Insulation Contractors (NSW) P/L v Keating* [2012] NTSC 04 at [75].

245. By way of further explanation of the function of a claim form Ms Oliver SM in *Ruthven v Woolworths* [2011] NTMC 14 at [12] and [14]:

> the contents of the authorized form make it clear that what is required for a valid claim is for the employer to be provided with basic information about the worker, the incident which led to the injury and whether the nature of the claim is for time off work and/ or associated medical treatment. The purpose for requiring the claim to be in a particular format is to ensure that the employer is provided with sufficient, albeit basic, information in order to confirm the occurrence of an incident that may give rise to liability and consider whether liability for the alleged incident will be admitted, refused or deferred for consideration. The medical certificate is required to provide independent evidence of the inability to work if that is part of the claim.
>
> The content of the form is such that it provides the basic information that an employer requires in order to consider the question of liability. That in my view is why s 82(3) provides that "a defect, omission or irregularity in a claim or certificate shall not affect the validity of the claim unless the defect, omission or irregularity relates to information which is not within the knowledge of or otherwise ascertainable by, the employer or his or her insurer". The aim is to provide employers with standard, though brief information from which an employer may accept liability or be in position to investigate the claim prior to accepting or denying liability.

246. In *Perfect v Northern Territory* [1993) 107 FLR 428 at 434 Mildren J discussed the purpose and function of a claim form and the accompanying medical certificate:

> From the nature of the information in the claim form and the fact that it is accompanied by a medical certificate it is possible for the employer to work out (at least in most cases) if the worker is entitled to weekly payments.
>
> The claim form and the medical certificate deal with whether the worker stopped work because of his injury or disease, whether he has yet returned to work, what the "injury" is, the alleged cause of the injury, whether the injury is consistent with the alleged cause, if he is fit for work, and if not, for what period of time he will remain unfit. However, in some cases, this might not be apparent. If this so, the employer can proceed either via s 85(1)(b) or (c) or dispute liability. If the employer wishes further medical information before making a decision, it can avail itself of the provision of s 85(7), (8) (9) and (10) of the Act.

247. The purpose of a medical certificate was earlier explained by Asche CJ in *JH Constructions Pty and Davis* (SC Nos 530 &450 of 1989 p 12):

> No doubt the function of a medical certificate is to alert the employer to the probable ambit of the claim, which may assist such immediate enquiries as he may wish to make, but the employer can then seek more information under Section 85 (1) (c) and then govern the situation by requiring the worker to seek medical or rehabilitation treatment under Section 76(1) and submit to medical examination, Section 91.

248. Having regard to respective purposes and functions of giving notice of injury, making a claim and providing a medical certificate (or statement of fitness for work), I am satisfied that the worker's notice of injury and the claim that he made (including the accompanying medical certificate) were sufficient in the circumstances to put the employer on notice of a possible subsequent injury or injuries.

249. The starting point is the claim form (dated 9 September 2013) that was served on the employer.[107]

250. In answer to the question "When did your injury happen or you first become aware of the disease" the worker stated "29 August 2013 at 12:30 pm. When asked about the nature of the incident the worker referred the employer to the accompanying medical certificate (completed as per advice from G.M. Corporate Services). The type or injury was described as PTSD. By way of further information the worker stated that he had reported the injury or disease to Leigh Greig (GM Corporate Services) on 29 August 2013 at 13:00 pm. The worker also stated that he was treated by Michelle Maher (psychologist) and Dr Fernando on 29 August 2013.

251. The medical certificate or statement of fitness for work that was dated 27 August 2013 contained, inter alia, the following information:

> Date and time injury occurred: 20/3/10
>
> Presenting complaint: patient C/O of feeling agitated feeling stress on and off after an air craft crash 2010 he was working in ground and he lost 2 good friends – since then he has recurrent thoughts on and off including feeling night mares and flashbacks avoiding situations.

252. The certificate also stated that just after the accident the worker had attended two sessions with a psychologist, but then stopped.

253. Dr Fernando certified the worker fit to return to pre-injury duties, but requiring further treatment.

[107] R5 /199.

254. The medical certificate was silent as to the type of injury or disease that was suffered by the worker. The certificate was also silent as to how the injury or disease occurred.

255. In my opinion, it is clear on the evidence that the worker gave notice of his injury which was labelled as "PTSD". On the 7 August 2013 he informed Leigh Greig and Rick Howell that he had been diagnosed with PTSD.[108] The worker again notified the employer of his injury on 29 August 2013 as recorded in the worker's claim for compensation.[109] It is also clear that notice of the injury was given as soon as practicable within the meaning of s 80(1) of the Act.

256. The real question is whether the notice of injury given by the worker and the claim for compensation made by him can properly be considered to be notice of the second injuries as well as a claim for compensation in respect of those injuries. In my opinion, the answer must be in the affirmative.

257. When the worker gave notice of his injury and made the claim for compensation, he was putting the employer on notice that he had suffered a mental injury. At that stage "PTSD" was merely a label describing the nature of the injury – no doubt based on early information that the worker had received. The precise nature of the mental injury is not something that would have been within the peculiar knowledge of the worker – nor is it a matter that the worker would have been capable of determining.[110] Whether the injury was a single injury caused solely by exposure to the plane crash or comprised a primary injury arising out of that incident followed by an aggravation of that original injury is a matter that the worker is most unlikely to have peculiar knowledge of. Similarly, the development of a comorbid condition such as a major depressive disorder is also most unlikely to have been in his peculiar knowledge.

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[108] R5/310. It should be noted that on 29 July 2013 the worker accessed the employee assistance and consulted Michelle Maher at Darwin Consultant Psychologists.

[109] In the claim form the injury was again labelled "PTSD".

[110] The complexity of arriving at a proper diagnosis is demonstrated by the fact that Dr Hundertmark's diagnosis was that the worker had suffered a major depressive disorder rather than PTSD. Furthermore, the mental injury which occurred in March 2010 was diagnosed by Drs Shakih and Farnbach as sub-clinical PTSD which developed into fully blown PTSD. Both doctors also diagnosed a comorbid major depressive disorder.

258. As pointed out in *Global Insulation Contractors (NSW) V Keating* [2012] NTSC 04 at [64] the cause or mechanism of an injury may not be within a worker's knowledge; and therefore the worker is unable to convey such information at the time of giving notice of an injury or making a claim for compensation. Undoubtedly, neither the cause nor causes of his mental injury or its underlying mechanism would have been known to the worker except for it being related to the 2010 plane crash.

259. All that is required to be included in a claim form is a general description of the injury – and this is particularly so in relation to an injury in the form of a "disease". That requirement was satisfied in the present case.

260. In my opinion the information that was provided in the claim form was sufficient to satisfy the purpose of a claim form as discussed in Perfect and the other cases referred to above.

261. Similarly, the medical certificate provided by Dr Fernando which accompanied the claim form was sufficient to alert the employer as to the probable ambit of the claim.

262. The breadth of the worker's claim is evident from and reflected in the correspondence between QBE and the worker and the employer.

263. In QBE's letter to the worker dated 13 September 2013 advising of acceptance of liability for his claim the date of injury is stated as being 29 August 2013 which post - dates by a considerable period the worker's exposure to the March 2010 plane crash. The attached Notice of Acceptance of Liability specifies 29 August 2013 as being the date of injury by accident or approximate date of onset of the condition. Significantly, the nature of the incapacity is stated to be "Stress – Psychological" which is a more generic label than "PTSD", and one which is capable of including either PTSD or a major depressive disorder or both conditions. QBE's letter to the employer (attaching the Notice of Acceptance) on the same date is to the same effect.

264. In my opinion, the employer was well and truly alert as to the probable ambit of the worker's claim.

265. In conclusion, I am satisfied that in respect of both the alleged subsequent injuries the worker gave notice as required by s 80(1) of the Act and made a claim as required by s 82(1). I am also satisfied that the medical certificate that accompanied the claim form complied with the requirements of s 82 of the Act.

DID THE SUBSEQUENT INJURIES RESULT IN OR MATERIALLY CONTRIBUTE TO THE WORKER'S INCAPACITY

266. As pointed out by Mildren J in *Allianz v TIO* [2008] NTCA 12 at [21] and [22] in order for an employer to be liable to pay compensation for an injury arising out of or in the course of the worker's employment that injury must have resulted in or materially contributed to the worker's impairment or incapacity.[111]

267. Therefore, having established that the applicant was liable to indemnify the employer in respect of the two subsequent injuries, the respondent carries the burden of proving that those injuries resulted in or materially contributed to the worker's incapacity.

268. As submitted by the respondent, compensation under the Act is "payable to the extent that an injury results in or materially contributes to the incapacity or impairment, not for the injury per se: *Williams v Metropolitan Coal Co Ltd* (1948) 76 CLR 431 per Starke J at 444 [20]; *Hicks v Bridgestone Australia Limited* [1997] NTCA 65 at pp 5-8 per Martin CJ and Gallop J".[112]

269. As further pointed out by the respondent:[113]

> The question as to what is the cause of the incapacity (and impairment and any need for medical treatment) is a separate question from the question of causation of any injury or disease: *Allianz v TIO* [2008] NTCA 12 at [21-28].

[111] Incapacity means "an inability or limited ability to undertake paid work because of an injury".
[112] See [40] of the Respondent's Written Submissions dated 4 September 2017.
[113] See [38] – [39] of the Respondent's Written Submissions dated 4 September 2017.

> The only requirement in the sense of a relevant connection between the incapacity (or impairment) on the one hand and the injury or disease on the other is that the injury or disease must result in, or materially contribute to, the incapacity (or impairment).

270. The requirement that the injury or disease must have materially contributed to the incapacity or impairment requires proof that the injury or disease was a factor that contributed to the incapacity or impairment in a material way.[114] The reference to materiality:

> …serves to make it clear that the contribution required is a contribution of a causal nature, that a contribution which is de minimis, which did not influence the course of events or which is so tenuous as to be immaterial is to be ignored. The term "material" is here used not in the loose sense set out in definition 12 of the Macquarie dictionary, namely of "substantial import or much consequence but rather in its legal sense of pertinent or likely to influence".[115]

271. The factor is not required "to be the real, proximate or effective cause" of the incapacity or impairment".[116] The contributing factor need only be established as a factor that is casually connected as a matter of probability and not mere possibility or conjecture.[117]

272. In the present case the Court has found that the worker suffered an aggravation (by a gradual process) of the earlier mental injury as well as a comorbid major depressive disorder. Both injuries occurred subsequent to the original injury in March 2010. As explained in *Miller v ABC Marketing and Sales Pty Ltd* [2012] 31 NTLR 97 at [53]:

> There is no factual presumption that merely because a later injury is an aggravation of an earlier injury the effects of the later injury are also a contributing cause to later incapacity: *Starr v NT* [1998] NTSC 89 – effects of the later injury may have been spent leaving just the effects of the earlier injury.

273. In my opinion, this statement has application not only to the aggravation injury suffered by the worker in the present case, but also to development of his comorbid major depressive disorder.

274. However, although there is no factual presumption that the effects of a subsequent injury (whether in the nature of an aggravation or otherwise) it is proper to commence from an

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[114] *Treloar v Australian Telecommunications Commission* (1990) 26 FCR 316.
[115] See *Repatriation Commission v Bendy* (1989) 10 AAR 323 at 325 cited in *Treloar v Australian Telecommunications Commission* (1990) 26 FCR 316 at 320.
[116] *Treloar v Australian Telecommunications Commission* (1990) 26 FCR 316.
[117] *Treloar v Australian Telecommunications Commission* (1990) 26 FCR 316.

inference which any commonsense person would draw from a sequence of events: it is legitimate to rely upon a sequence of events where common experience suggests a connection between the injury and incapacity*: Adelaide Stevedoring Co Ltd v Forst* (1940) 64 CLR 538 per Rich ACJ.

275. However, at the end of the day, the observations made by King CJ in *Australian Eagle Insurance Co Ltd v Federation Insurance Limited* (1976) at p 292 provide the best guide to a court charged with the often difficult task of determining whether a subsequent injury contributed to a later incapacity:

> If, at the time of the second accident, the physical consequences of the first accident have stabilized to the degree that they fairly be regarded as spent and is leaving only a vulnerability to injury from future trauma, the incapacity flowing from the second accident cannot be regarded as the result of the first accident but must be regarded as the result of the second accident only…If, however, the workman's condition is still unhealed more unstable and the incapacity would not have occurred but for that unhealed or unstable condition, the incapacity must be regarded as resulting from the first accident as well as from the second accident. Moreover, where the second accident is a mere aggravation or recurrence of the injury sustained in the first accident…the consequent incapacity must…be regarded as the result of the first accident as well as the result of the second accident.[118]

276. In the present case, it is clear on the evidence that the during the worker's post 30 June 2010 period of employment up until the time of the second planning meeting for Exercise Flame he was suffering from "an unhealed sub-clinical or sub-syndromal PTSD arising from the March 2010 injury".[119] This can be overwhelmingly inferred from the incontrovertible fact that as at July or August 2013 the worker presented with a full blown PTSD condition.

277. The medical opinion was that as a result of the mental injury the worker suffered in March 2010 due to his exposure to the plane crash he needed treatment. It appears that the worker attended only two sessions of counselling following the plane crash and there was no subsequent effective

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[118] This statement received judicial approval in *Harris v South* [1998] NTCA and *Allianz v TIO* [2008] NTCA 12 at [21-28] and [38] per Mildren J: see [42] of the Respondent's Written Submissions dated 4 September 2017.
[119] See [43] of the Respondent's Written Submissions dated 4 September 2017.

medical management of his injury. The injury went untreated. Apart from remaining untreated and unhealed, the worker's sub-clinical PTSD remained unstable.[120]

278. It has been established that the worker suffered an aggravation of that unhealed and unstable injury to the point that the worker developed a full blown PTSD condition, leading to the worker's incapacity.[121]

279. As it is clear that the worker's incapacity would not have occurred but for the unhealed and unstable injury suffered by the worker in March 2010. Accordingly, the worker's incapacity (which manifested itself on or about 25 July 2013) must be regarded as the result of the first injury as well as the result of the second aggravation injury.

280. It follows that "the incapacity which the worker suffered with effect from 25 July 2013 was materially contributed to [in the relevant sense] by the March 2010 injury and by the further injury which occurred by way of a process of gradual development, and which injuries together materially contributed to the onset of the worker's incapacity for work (and consequent impairment and need for medical and like treatment)".[122]

281. The gradual development of the worker's major depressive disorder should be viewed in the same vein, resulting in a finding that the incapacity which the worker suffered was materially contributed to by the March 2010 and by the subsequent injury in the form of major depressive disorder (which coincided with the aggravation injury) – which injuries together materially contributed to the onset of the worker's incapacity for work.

282. Finally, it is clear on the evidence that the initial injury and its aggravation, as well as the major depressive disorder, materially contributed to the worker's incapacity and impairment, and will continue to do so for the indefinite future.[123]

[120] This can be inferred from the evidence.
[121] See [43] of the Respondent's Written Submissions dated 4 September 2017.
[122] See [10] of the Respondent's Supplementary Submissions dated 12 October 2018.
[123] See [12] of the Applicant's Supplementary Submissions dated 12 October 2018

APPORTIONMENT OF CONTRIBUTION BETWEEN THE APPLICANT AND THE RESPONDENT

283. The Act provides no guidance as to how contribution between approved insurers should be apportioned.[124] The Court is left with a very wide discretion.[125]

284. In exercising that discretion the Court needs to consider and assess the part each of the injuries played by way of contributing to the worker's incapacity for work. It is not necessary – and indeed not possible – to undertake that exercise with scientific or arithmetical precision. The contribution of each of the injuries to the worker's incapacity is to be assessed by a commonsense analysis of the available evidence which includes the drawing of intuitive and reflective inferences. It is through that process the court must ultimately arrive at a proper – commonsense- apportionment of the liability as between the applicant and the respondent, albeit devoid of scientific or arithmetical accuracy.

285. In my opinion, the initial mental injury and the subsequent aggravation injury contributed equally to the worker's incapacity for work. Both injuries were needed to produce the worker's incapacity. But for the initial mental injury the worker would not have suffered sub –clinical PTSD; however, it was the aggravation of that sub-clinical mental condition that led to the development of the worker's full blown PTSD.

286. Although the worker's major depressive disorder also materially contributed to the worker's incapacity, it is not possible, on the evidence, to disentangle the contribution that injury made to the worker's incapacity from the contribution made by the aggravation injury. Both injuries occurred over a period of time by way of a gradual process and the real, proximate and effective cause of both injuries were particular characteristics and conditions of the employment that the

[124] This was acknowledged by the applicant in its oral submissions at p 45 of the transcript of proceedings on 5 September 2017.
[125] See the applicant's oral submissions at p 45 of the transcript of proceedings on 5 September 2017.

worker was engaged in during the relevant period. The aggravation injury and the major depressive disorder were both caused by the worker's increased workload and responsibilities as a result of taking on the position of Operations Centre Manager and the departure of Ron Pratt from the employment of Airnorth. Furthermore, the evidence supports the likelihood that the major depressive disorder contributed to the onset of the worker's full blown PTSD.

287. In the circumstances the contribution made by the major depressive disorder is inseparable from the contribution made by the aggravation injury; and the contribution made by the former injury must be considered to be part and parcel of the contribution made by the latter injury.

288. Accordingly I find that the initial mental injury and the subsequent aggravation injury contributed equally to the worker's incapacity; and even when the major depressive major disorder is introduced into the equation the respective contributions made by the initial mental injury and the aggravation injury/ major depressive disorder to the worker's incapacity would remain equal.

289. I would add that if one were to exclude the effect of the aggravation injury, it would be open on the evidence to find that the initial mental injury and the subsequent major depressive disorder contributed equally to the worker's incapacity for work.

290. In my opinion the contribution between the two insurers should be apportioned on a 50-50 basis.

FINAL DECISION

291. The Court makes a declaration that the applicant and respondent were liable and remain liable to indemnify the employer in respect of the compensation paid or payable on behalf of the employer to the worker following the making of the worker's claim on 9 September 2013.

292. The Court makes the following orders:

a. That the applicant and respondent account to each in respect of payments of compensation paid or payable to the worker on the basis that each share 50% of the employer's past and future liability to the worker.

b. That the applicant and respondent account to each other.

293. The Court will hear the parties in due course as to the question of costs.

Dated 16 January 2019

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Dr John Lowndes

Chief Judge of the Local Court of the Northern Territory