IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S243 of 2015**

BETWEEN:

MILITARY REHABILITATION AND COMPENSATION COMMISSION
Appellant

and

BENJAMIN EDWARD JAMES MAY
Respondent

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: STATEMENT OF ISSUES

2. This appeal raises the following issues:

   (a) Whether an "injury" in the context of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (**the SRC Act**) requires a finding of a "sudden or identifiable physiological change in the normal functioning of the body or mind" of a claimant; and

   (b) Whether for an "injury" (as formulated above), to be "identifiable", must it be the subject of a definitive diagnosis or "objective clinical evidence" or could it be proved by common sense inference of fact.

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. The Respondent has considered whether any notice should be given under s 78B of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) and does not consider that any notice is necessary.

PART IV: BACKGROUND

Factual background

4. This appeal concerns the liability of the Appellant under the provisions of the SRC Act to pay compensation for the impairment and incapacity the Respondent claims to have suffered as a result of an injury, which he sustained during the course of his employment with the Royal Australian Air Force (**RAAF**).

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5. The Respondent, Mr Benjamin May, served in the RAAF from 6 November 1998 until he was discharged on 30 July 2004[1] at the rank of Officer Cadet. His discharge was due to his suffering from a condition that the Administrative Appeals Tribunal (**the Tribunal**) said, "cut short what might have been a very promising career as a pilot of the RAAF".[2]

6. Between 10 November 1998 and 30 March 2000, shortly after joining the RAAF, the Respondent was required to undergo a series of vaccinations in the course of his employment in the RAAF. The Respondent claimed that he suffered a series of adverse reactions to these vaccinations[3]. The Tribunal accepted the truthfulness and reliability of the Respondent's claims as to the symptoms he suffered and his ongoing disability, in that he was (and became shortly after joining the RAAF) "significantly disabled"[4] by what the Tribunal called "vertigo".

7. On 29 November 2002, the Respondent applied under s 14 of the SRC Act for compensation in respect of a condition, which he described in his claim form as "low immunity, fatigue, illnesses, dizziness – immune system/whole body", and which, he maintained, he sustained during the course of his employment with the RAAF[5].

8. On 11 March 2003, a delegate of the Appellant denied the Respondent's claim noting that specialists who had examined him had been unable to diagnose any specific condition or determine a cause for his symptoms, and the delegate was, therefore, unable to connect the claimed condition with his RAAF service[6].

9. The Appellant decided to affirm that determination after conducting an internal review.

10. The Respondent then applied to the Tribunal, effectively, for review of the decision to affirm the initial determination. Pursuant to s 42B(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**the AAT Act**), the Respondent's application lodged on 10 June 2010 was dismissed. The Respondent's application lodged on 21 September 2010, pursuant to s 43 of the AAT Act, regarding the decision under review, dated 22 April 2010, was affirmed[7].

11. The Respondent appealed the Tribunal's decision to the Federal Court under s 44 of the AAT Act, which creates a right of "appeal to the Federal Court of Australia, on a question

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[1] The Tribunal records this date incorrectly as 29 November 2002.

[2] The reasons of the Tribunal in *May and Military Rehabilitation and Compensation Commission* [2011] AATA 886 (**the Tribunal's Reasons**) at AB 26, [66] ll. 22 - 28

[3] See the Tribunal's Reasons, first, at AB 18, [41] – [42], and, for a description of the symptoms suffered: at [11] – [13] AB 9 (swollen tongue, discomfort in the roof of his mouth, nausea, stomach discomfort, diarrhoea, sore teeth, swollen glands, headaches, a feeling of disequilibrium and dizziness, upper respiratory tract infection, mycoplasmal pneumonia); AB 11 at [19], at ll. 11 – 17 (nausea, loose bowel motions), ll. 20 – 21 (cough, yellow phlegm, sore abdomen), ll. 27 – 29 (diarrhoea, headache, no energy, abdominal discomfort), at [20] ll. 41 – 42 (nausea, diarrhoea); AB 12 at [21] ll. 10 – 20 (nausea, headache, sore throat, abdominal pain, diarrhoea, sore throat, dry cough, sore glands, congestion, hay fever, vomiting, abdominal cramps, lethargy, left ear ache, productive cough, left faucal ulcers, tongue swelling, difficulty talking with sore throat, lost voice). See also AB 14, [26] notification to New South Wales Public Health Unit by Dr Catherine Girdler GP and further notification to Adverse Drugs Reactions Unit at Therapeutic Goods Administration regarding adverse reactions suffered to vaccinations received.

[4] Tribunal Reasons at [48], AB 20 ll. 46 – 47, and AB 21, ll. 6 - 8

[5] Tribunal's Reasons at [2], AB 5

[6] Tribunal's Reasons at [2], AB 5

[7] AB 26

of law, from any decision of the Tribunal". A single Judge dismissed the application finding no legal error[8].

12. The Respondent appealed from the decision of the single Judge pursuant to s 24(1)(a) of the *Federal Court Act 1976* (Cth) and, in addition, brought an application to the Full Court of the Federal Court, pursuant to s 5 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (**the ADJR Act**) and s 39B of the Judiciary Act for relief in respect of the Tribunal's decision[9]. The Full Bench[10] of the Full Court of the Federal Court upheld the appeal and dismissed the application[11].

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13. Pursuant to a grant of special leave to appeal made on 13 November 2015[12], the Appellant, on 24 November 2015, filed a notice of appeal[13].

Statutory framework

14. Section 14 of the SRC Act provides:

> **14 Compensation for injuries**
>
> 20 (1) Subject to this Part, Comcare is liable to pay compensation in accordance with this Act in respect of an injury suffered by an employee if the injury results in death, incapacity for work, or impairment.
>
> (2) Compensation is not payable in respect of an injury that is intentionally self-inflicted.
>
> (3) Compensation is not payable in respect of an injury that is caused by the serious and wilful misconduct of the employee but is not intentionally self-inflicted, unless the injury results in death, or serious and permanent impairment.

30 15. At the relevant time, the word "injury" was defined in s 4(1) of the SRC Act as follows:

> ***injury*** means:
>
> (a) a disease suffered by an employee; or
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> (b) an injury (other than a disease) suffered by an employee, being a physical or mental injury arising out of, or in the course of, the employee's employment; or
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> (c) an aggravation of a physical or mental injury (other than a disease) suffered by an
> 40 employee (whether or not that injury arose out of, or in the course of, the employee's

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[8] *May v Military Rehabilitation and Compensation Commission* [2014] FCA 406 (**the single Judge's Reasons**), AB 34 – 55, and orders of Buchanan J at AB 57. See also the Full Court's discussion of the error of the primary Judge in its reasons at [229] – [232], AB 130 – 131,

[9] The applications pursuant to the ADJR Act and the Judiciary Act and the reasons of the Full Court in respect are not presently relevant. For the Full Court's discussion of these applications see *May v Military Rehabilitation and Compensation Commission* [2015] FCAFC 93; (2015) 322 ALR 330 (**the Full Court's Reasons**) at [150] – [153] AB 110 – 111, [177] - [181] AB 117 – 118, and the orders made in respect of these applications at [235] AB 132

[10] Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ

[11] See the Full Court's discussion of the process and their disposition of the appeal and application at Full Court's Reasons at [117] – [200] AB 117 – 123, [229] – [232] AB 130 – 131, and [233] – [234] AB 131. The Full Court's orders appear at AB 132.

[12] AB 136

[13] AB 140

employment), being an aggravation that arose out of, or in the course of, that employment;

but does not include any such disease, injury or aggravation suffered by an employee as a result of reasonable disciplinary action taken against the employee or failure by the employee to obtain a promotion, transfer or benefit in connection with his or her employment.

16. At the relevant time, the word "disease", was defined in s 4(1) of the SRC Act as follows:

disease means:

(a) any ailment suffered by an employee; or

(b) the aggravation of any such ailment;

being an ailment or an aggravation that was contributed to in a material degree by the employee's employment by the Commonwealth or a licensed corporation.

17. At the relevant time, the word "ailment" was separately defined under s 4(1) of the SRC Act as follows:

ailment means any physical or mental ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development).

18. Under the relevant provisions of the SRC Act, it was open to the Respondent to present his case in one or all of three ways. First, that his injury arose out of his employment with the RAAF, meaning it arose out of the work he was employed to do or was incidental to that work[14], whether or not he was injured at his place of employment (**the causal case**). Secondly, that his injury arose during the course of his employment with the RAAF, in that it arose during the "protected period" of his employment[15] with the RAAF, which constitutes a purely temporal connection (**the temporal case**)[16]. Thirdly, that his injury was to be categorised as a "disease" or "ailment", the contraction or aggravation of which his employment materially contributed (**the disease case**).

19. The Respondent did not contend for the disease case[17], but he did contend for each of the causal case and the temporal case.

The Tribunal's findings of fact

20. It warrants stating at the outset[18] that the Respondent was accepted by the Tribunal as genuinely suffering from a "condition" that it "loosely described"[19] as vertigo. This condition was accepted by the Tribunal as having been preceded by various physiological changes

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[14] See *Comcare v PVYW* [2013] HCA 41; (2013) 250 CLR 246 at [38]

[15] See *Kennedy Cleaning v Petkoska* [2000] HCA 45; 200 CLR 286 (***Kennedy Cleaning***) at [39] and the case of *Higgins v Galibal Pty Ltd* (1998) 45 NSWLR 45 at 52 therein referred to. See also the Full Court's Reasons at [56], AB 85.

[16] Both the causal case and the temporal case were given an extended operation by s 6A(2) of the SRC Act as it appeared at the relevant time.

[17] See Tribunal's Reasons at AB 21, [49] l. 14, although the Tribunal considered whether the Respondent "suffered a disease" for the sake of completeness, see [5] ll. 3 – 4, AB 21

[18] Full Court's Reasons at [22], AB 75 - 76

[19] Tribunal's Reasons at [61], AB 24

at different times: for example, a swollen tongue within 30 to 60 minutes of receiving some vaccinations, nausea with stomach discomfort, sore teeth, swollen glands, and a feeling of disequilibrium or dizziness. No doctor has been able to diagnose the true nature of the condition; no disease has been identified of which these physiological changes might be described as symptoms; no doctor had been able to identify an event (external or internal) that caused or explained these physiological changes.

21. The Tribunal made the following relevant findings of fact:

(a) It was clear from the medical tests that the Respondent underwent before he was accepted for entry into the RAAF as an Officer Cadet, that he was healthy and very fit[20];

(b) It was accepted that the Respondent had no pre-existing medical condition prior to receiving the vaccinations during the course of his RAAF service[21];

(c) The Respondent is not a malingerer[22] and is significantly disabled by his condition[23];

(d) The medical condition from which the Respondent suffers is vertigo. The evidence before the Tribunal indicated that it was this condition that he found most disabling and is the principal cause of his disability[24];

(e) The Tribunal was satisfied that there was a temporal relationship between the vaccinations and the symptoms described by the Respondent, some of which were recorded in the clinical notes during the periods after the vaccinations[25]

(f) Since 2002, the Respondent had been examined and assessed by a large number of specialists, in particular in relation to his vertigo. None of the investigations undertaken had proved definitive and none of the specialist reports had attributed any pathological cause to his vertigo[26];

(g) While Dr Loblay, a specialist immunologist upon whose evidence the Tribunal placed significant reliance, opined that it was unlikely that the Respondent had suffered from an immunologically mediated adverse reaction to the vaccinations he was given. However, he qualified his conclusions by not discounting the possibility that the Respondent's condition was related to the vaccinations[27].

The Tribunal's reasons for its decision

22. The Tribunal rejected the Respondent's claim, relevantly, because: there was insufficient evidence to establish "a sudden or identifiable physiological change"[28] that could be

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[20] Tribunal's Reasons at [53], AB 22
[21] Tribunal's Reasons at [41], AB 18
[22] Tribunal's Reasons at [52], AB 22
[23] Tribunal's Reasons at [48], AB 20 - 21,
[24] Tribunal's Reasons at [62], [48], [55], [61], AB 25, 20 – 21, 23 and 24
[25] Tribunal's Reasons at [58], AB 23
[26] Tribunal's Reasons at [55], AB 23
[27] Tribunal's Reasons at [56], [57], AB 23
[28] Tribunal's Reasons at [51], AB 21, [6] AB 7. See also [58] AB 23 - 24

attributed to the vaccinations that the Respondent received while serving in the RAAF[29]; the injury as not caused by the Respondent's employment in the RAAF[30]; and, there was insufficient medical evidence, that is, there was no formal clinical diagnosis and there was no "objective evidence" connecting the Respondent's condition with the vaccinations[31].

The Full Court's reasons for allowing the appeal

23. The Full Court held that various errors, which the Respondent asserted infected the Tribunal's decision, were made out[32]. Relevantly, the Full Court made three findings: first, that the Tribunal erred in construing "injury" such that it necessitated that the Respondent show that he had undergone a "sudden or identifiable physiological change"[33]; secondly, that the Tribunal erroneously required that his condition be attributed to a formal diagnosis and that there be objective medical evidence to support it as an essential precondition to it being satisfied that the Respondent had suffered an "injury"[34]; thirdly, that the Tribunal looked unnecessarily for more than a temporal connection between the happening of the Respondent's injury and the course of his employment with the RAAF[35].

24. The Full Court, allowing the appeal, relevantly, set aside the orders of the single Judge dismissing the appeal under s 44 of the AAT Act, and in lieu thereof, ordered that the decision of the Tribunal be set aside and the matter be remitted to it for determination according to law[36].

The application for special leave to appeal to this Court

25. The Notice of Appeal to this Court identifies three grounds of appeal[37].

26. In oral argument on the application for special leave[38] the Appellant there raised two arguments as supporting its proposed grounds of appeal. The first was that the Tribunal was correct to conclude that there was no injury other than a disease because it could not be satisfied that there was "a sudden or identifiable physiological change in the normal functioning of the body" suffered by the Respondent. The second was that in the absence of supporting physiological evidence or pathology or a known diagnosis to explain the Respondent's symptoms, the Tribunal was correct in not being able to conclude, that the Respondent suffered an injury.

27. In its written submissions to this Court, the Appellant is presently understood to have identified three bases upon which it challenges the decision of the Full Court. They appear under the following headings:

    (a) The Tribunal applied the correct concept of injury (other than a disease) (**Error 1**);

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[29] Tribunal's Reasons at [63], AB 25, see also [48] AB 20 - 21
[30] Tribunal's Reasons at [49], AB 21
[31] Tribunal's Reasons at [59], [61] AB 24, [62] AB 25, [66] AB 26
[32] See Full Court's Reasons at [19] and [20], AB 75
[33] See Full Court Reasons at [109] – [118], AB 99 – 102, [204] – [209] AB 124 - 125
[34] See Full Court's Reasons at [211] – [220], AB 126 - 128
[35] See Full Court's Reasons at [221] – [228], AB 128 – 130
[36] AB 135
[37] AB 141
[38] *Military Rehabilitation and Compensation Commission v May* [2015] HCATrans 302 (13 November 2015)

(b) The Tribunal did not require proof of a causal connection in determining that there was an injury (other than a disease) (**Error 2**);

(c) The Tribunal was entitled to treat medical science as negating any common sense inference of fact (**Error 3**);

and, it is interpolated, in each case, that the Full Court was wrong to conclude otherwise.

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28. Counsel has experienced substantial difficulty in ascertaining clearly from the text of the Appellant's Written Submissions what the issues for determination in this case are. As presently understood the issues raised by the three asserted errors identified at paragraph 27 above are:

(a) Whether the concept of "injury" in the context of the SRC Act necessitates the Tribunal being able to identify a "sudden or identifiable physiological change" in a claimant;

(b) Whether the Tribunal separately assessed and determined the two limbs of "injury"
20 under the SRC Act, namely, the temporal case and the causal case; and

(c) Whether the Tribunal was correct to conclude that there was insufficient evidence of "injury" (viz. "a sudden or identifiable physiological change") because there was no definitive diagnosis and no objective clinical evidence of the condition, which the Respondent suffered.

PART V: APPLICABLE PROVISIONS

29. The Respondent accepts the Appellant's statement of the applicable provisions in so far
30 as it relates to the legislation as it appeared at the relevant time. See [84] of the Appellant's Written Submissions.

PART VI: ARGUMENT

30. It is convenient to consider each of the three asserted errors[39] in turn.

Error 1: Whether the concept of injury requires a "sudden or identifiable physiological change in the body or organs" of a claimant

40 31. The Tribunal in giving its reasons for decision, with respect to the concept of "injury" as it appears in the SRC Act, directed itself in the following way[40]:

> In *Kennedy Cleaning Services Pty Limited v Petkoska* [2000] HCA 45; (2000) 200 CLR 286, the High Court said that a long line of decisions in Australia had recognised that for there to be 'an injury' requires that it be established that there has been "a sudden or identifiable physiological change": Gleeson CJ and Kirby J at [35]. If an injury, in what was described as the "primary sense of that word", happens in the course of the person's

[39] See the discussion at [27] and [28] herein

[40] Tribunal's Reasons at [6], AB 7. See also Tribunal's Reasons at [51], [58] and [63], AB 21, 23 and 25

employment, "it is ordinarily compensable without proof of a specific causal connection with the worker's employment": at [39].

32. The Tribunal derived the construction it gave to the term "injury" from the reasons of Gleeson CJ and Kirby J in *Kennedy Cleaning* at [35] and [39]. The Court in that case was dealing with the issue upheld by the Full Court below - that the lack of an external cause of an injury will not necessarily exclude a disabling event from being characterised correctly as a "personal injury" for the purposes the statute[41]. At [35] of *Kennedy Cleaning*, their Honours (the Chief Justice and Kirby J) said[42]:

> These included the reminder that a long line of decisions in Australia had recognised that an "injury", being a sudden or identifiable physiological change, could nonetheless qualify within the ordinary application of that expression appearing in workers' compensation legislation, although the change was internal to the body of the worker. It did not have to be external or necessarily produced by external causes (*Zickar* (1996) 187 CLR 310 at 335 per Toohey, McHugh and Gummow JJ, 347 per Kirby J referring to *Clover, Clayton & Co Ltd v Hughes* [1910] AC 242 and *Kavanagh v The Commonwealth* [1960] HCA 25; (1960) 103 CLR 547 at 553). Moreover, the inclusion in the definition of "injury" in s 6(1) of the Act of "mental injury" makes it plain beyond argument in this case that the injuries for which the Act provides are not confined to those originating externally to the body of the worker.

33. The Full Court rejected the Tribunal's approach and said that the term "injury" in the context in which it appeared in the SRC Act should not be so interpreted[43]. In support of its rejection of this construction, the Full Court made a number of points.

34. First, the Full Court clarified what their Honours (the Chief Justice and Kirby J) in fact said at [34] – [35] of *Kennedy Cleaning*. Their Honours did **not** say that a long line of decisions recognised that for there to be an injury, a "sudden or identifiable physiological change" need be established. Indeed, the long line of cases to which Gleeson CJ and Kirby J referred[44] supported the proposition that although the physiological change was internal to the body of the worker, it could, nonetheless, qualify within the ordinary application of the expression "injury" as it appeared in workers' compensation legislation. The distinction that Gleeson CJ and Kirby J sought to emphasise as significant, emerging from the long line of cases to which they referred, was that an "injury" did not have to be external or necessarily produced by external causes.

35. Secondly, the Full Court opined that the words "sudden or identifiable physiological change" were not made definitional in character by the use of the word "being" in the

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[41] *Kennedy Cleaning* at [67]

[42] The other Justices in *Kennedy Cleaning* did not employ the same wording in respect of the relevant injury. Gaudron J said that there was no doubt that, as a matter of ordinary language, the word "injury" is apt to include sudden physiological change resulting from a disease, as in the case of stroke resulting from progressive heart disease or the rupture of an aneurism as a result of the progressive weakening of an arterial wall: *Kennedy Cleaning* at [50]. Her Honour was clear that the term "injury" should be understood in its statutory context and be appropriated its ordinary meaning, unless otherwise clearly intended by that statute. That meaning, her Honour said, extended "to a sudden physiological change, even one that results from a progressive disease": *Kennedy Cleaning* at [54]. McHugh, Gummow and Hayne JJ said of the issue before them, specifically that "[t]he circumstance that a sudden physiological change has been caused or provoked by disease does not prevent it from constituting a "physical injury": *Kennedy Cleaning* at [68].

[43] See Full Court Reasons at [19], [109] – [118], [204] – [209]

[44] At [35] of *Kennedy Cleaning*

second line of [35] of *Kennedy Cleaning,* but were, rather, used by way of exemplification[45].

36. The Full Court observed that the need for a sudden or distinct physiological change to be associated with or attributable to an incident of employment (whether external or internal) derived principally from the notion of "injury by accident"[46]. Importantly, it noted, the words "by accident" have since been removed from the statute[47].

37. The Full Court concluded that the suddenness of an identifiable event is a useful means of distinguishing physiological change (which is an injury) from the natural progress of an underlying disease (which is not an injury). However, to elevate the adjective "suddenness" to a precondition necessary to the finding of injury was said to introduce "an element of fortuity or incident or accident into the concept of injury", thus, impermissibly taking the construction of the term "injury" back to a time where the additional element of "by accident" was present[48]. The adjectives "identifiable" and "sudden" are terms of indeterminate reference, in that there is no fact to which either expression refers. The adjective "identifiable" is redolent of proof of a fact, rather than providing a discrimen of the fact. Neither expression is an appropriate discrimen to apply to the very protean concept of "injury".

38. Thirdly, the Full Court observed[49] the distinction identified as significant by this Court in *Canute*[50] was the presence in the SRC Act of a distinction between mental and physical injuries. The Full Court opined that there may, or may not, be a "suddenness" attached to mental injury. As the Full Court observed, a mental injury can occur without any discernable physiological change and will often be gradual in onset. Indeed, many examples can be given of compensable injuries either mental or physical arising in the course of or arising out of an employee's employment, which do not involve sudden identifiable physiological change[51].

39. Fourthly, the Full Court recognised[52] that the seminal statement of Latham CJ in *Hume Steel* was revived by the majority plurality in *Zickar*[53] as correct. There Latham CJ said[54]:

> There is a distinction, according to the common use of language, between getting hurt and becoming sick. The former would be described as an injury and the latter would generally not be so described. But it requires little analysis to show that an injury may be either external or internal. It appears to me to be difficult to draw any satisfactory distinction between the breaking of a limb and the breaking of an artery or of the lining of an artery. One is as much an injury to the body, that is, something which involves a harmful effect on the body, as the other. Each is a disturbance of the normal physiological state which may produce physical incapacity and suffering or death. Accordingly, in my opinion the

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[45] Full Court's Reasons at [45], AB 81, [205] – [206] AB 124
[46] Full Court's Reasons at [57], AB 85 - 86
[47] Full Court's Reasons at [65] – [66], AB 88
[48] Full Court's Reasons at [112], AB 100
[49] Full Court's Reasons at [114], AB 101
[50] *Canute v Comcare* [2006] HCA 47; 226 CLR 535 (***Canute***) at [10]
[51] There are many examples of mental injury: post-traumatic stress disorder and major depression are but two. AS to physical injury, hearing loss is a key example. Consider also examples such as repetitive strain injuries; soft tissue/ musculo-ligamentous injuries including back injuries, knee and shoulder injuries with which there is no clear change in pathology associated; conditions such as asthma through repetitive exposure to harmful chemical agents and so on.
[52] Full Court's Reasons at [88] – [89], AB 94
[53] *Zickar v MGH Plastic Industries Pty Ltd* [1996] HCA 31; 187 CLR 310 (***Zickar***)
[54] *Hume Steel Ltd v Peart* [1947] HCA 34; 75 CLR 242 (***Hume Steel***) at 252-253

detachment of a piece of the lining of the artery in the present case should be held to be an injury. The death of the worker resulted from that injury.

40. While the Full Court accepted what Latham CJ said of the distinction between "injury" and "disease" in *Hume Steel*[55] has force, it said it was not to be treated as a substitute definition, but as an informing guide to the content and meaning of the word, including its relationship to ordinary meaning or common understanding[56]. The Full Court said that the notion of 'injury", subject to the specific statutory context, could be seen to include (but, it is interpolated, would not exhaust) the kinds of considerations discussed by Latham CJ in *Hume Steel*, as well as events or physiological changes that have a relationship with disease, but which cannot be said to be merely the natural progression of an autogenous disease[57].

41. Moreover, two clear propositions emerge from the Full Court's reasons.

42. First, whether the relevant circumstances reveal an "injury" is factually intensive[58]; it is not the product of the application of a formula [59]. As the Full Court said[60] it is antithetical to the use of a word like "injury" in this legal context to load it up with qualifications having the effect of narrowing or constraining the circumstances to which it might be applied, unless those qualifications or constraints are drawn from the text or structure of the statute. The degree to which an "injury" may reflect an identifiable event will depend on the circumstances. It is apposite also to bear in mind that where two constructions are possible, that which favours the employee should be preferred[61].

43. Secondly, the meaning of the word "injury" in s 4(1) of the SRC Act comes in part from its statutory legal context, and, what is revealed by cases such as *Hume Steel*, *McIntosh*[62], *Zickar* and *Kennedy Cleaning*. Importantly, the Full Court said that "[i]n any particular case there may be a consideration of whether there is a harmful effect on the body, a disturbance of the normal physiological state producing physical incapacity, a sudden or identifiable or distinct physiological change, whether there is an event or incident or clinical diagnosis to explain such change, and such considerations will be made against a background of a distinction in the common use of language between getting hurt and becoming sick. The circumstances and the facts will influence what weight such considerations are given in the drawing of a factual conclusion in any particular case."[63]

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[55] *Hume Steel* at 252-253

[56] Full Court's Reasons at [110], AB 99 - 100

[57] Full Court's Reasons at [91], AB 94 - 95

[58] Full Court's Reasons at [117], AB 101. See also Full Court's Reasons at [60], AB 87

[59] Full Court's Reasons at [60], [117], AB 87, 101

[60] Full Court's Reasons at [110], AB 99 - 100

[61] The rule of construction is that a workers' compensation statute, being remedial, should be construed beneficially, so that where it is susceptible of two different interpretations that which is favourable to the worker should be preferred. This principle was established by Fullagar J in his dissenting judgment in *Wilson v Wilson's Tile Works Pty Ltd* (1960) 104 CLR 328 at p 335. See also the passage of Deane and Gaudron JJ in *Bird v The Commonwealth* (1988) 165 CLR 1 at 9 to this effect.

[62] *Accident Compensation Commission v McIntosh* [1991] VicRp 65; [1991] 2 VR 253 (***McIntosh***). See the discussion of *McIntosh* at the Full Court's Reasons at [85] – [90], AB 93 - 94

[63] Full Court's Reasons at [118], AB 101 - 102 and see also [186], AB 119 - 120

44. In any event, this first alleged error as propounded by the Appellant, is academic, because, as the Full Court observed, a sudden and identifiable physiological change was found by the Tribunal on the facts of this case to have occurred[64].

45. What are the Appellant's arguments in favour of the formulation of "injury" (viz. "a sudden or identifiable physiological change") it propounds in the face of the Full Court's reasons? With respect, the Appellant's Written Submissions are highly opaque on this issue, and, generally, and its arguments for challenging the Full Court's reasons are convoluted and difficult to ascertain. So far as can presently be ascertained, the Appellant's response to the Full Court's reasoning on this issue seems to be as follows.

46. First, the Appellant seems to suggest that its propounded formulation is necessary because, without it, the meaning of "injury" will oust the "unspoken premise" of s 4(1) of the SRC Act, namely, that one may be unwell without having a compensable injury or disease within the SRC Act[65].

47. This proposition should be rejected. Not only is there no textual support for such a premise, spoken or otherwise, there is nothing in the case law which would suggest that the SRC Act is not intended to compensate injury: it is quite the opposite[66]. In any event, accepting the so-called "unspoken premise", even without the Appellant's formulation of "injury", an employee may be unwell and yet not have a compensable injury or disease within the Act, such that the proposed discrimina are unnecessary.

48. Secondly, the Appellant says that the Full Court distinguished *Zickar* and *Kennedy Cleaning*, and in so doing it fell into error because the formulation of the requirements of "injury" in *Kennedy* and *Zickar* are apposite to the facts of this case to operate as the discrimina when approaching the Respondent's "ailment"[67].

49. This proposition is wrong. The Full Court did not distinguish *Kennedy* and *Zickar*; it followed them. It identified the discussion contained in those cases as an exemplar of the meaning that can be attributed to "injury" in certain circumstances, such as the facts of those cases where the issue was whether the injury was an event distinct from an underlying disease not caused by the claimant's employment.

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[64] See Full Court's Reasons at [23] and [224], AB 76 and 129. See also the Tribunal's Reasons at [59] where it accepts physiological change but discounts these changes on the basis that there was no "objective evidence" connecting the changes there described with the vaccinations. For the reasons discussed herein this approach is incorrect.
[65] Appellant's Written Submissions at [36] and [44]
[66] For example, the Commonwealth did not mirror the legislative reform adopted by the NSW Legislature following *Zickar* to amend the statute to exclude injuries arising as separate events to an underlying disease. See the discussion in the Full Court's Reasons at [92] – [92], AB 95.
[67] Appellant's Written Submissions at [52] – [54]

50. Contrary to the Respondent's Written Submissions at [54], the Respondent's injury must necessarily be dealt with as an "injury (other than a disease)" as it was not demonstrated to be a disease, the by-product of a disease or an "ailment"[68].

51. Further to their second point, and more generally, the Appellant contends that the discussion in *Kennedy Cleaning* and *Zickar* should not be read as relating only to a case where there is an established pre-existing disease. Their Honours' discussion in those cases was more general and was designed to expand on the concept of being hurt within the statutory expression following on from *Hume Steel*[69].

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52. Certainly the reasoning of the various members of the Courts in *Kennedy* and *Zickar* derived support from what Latham CJ said in *Hume Steel* for the theses those Courts therein espoused. As already stated, it was used as a basis upon which to dispose of a case where there was an established pre-existing disease, but a distinct and sudden incident related to the disease, which the claimants in those cases contended were an "injury". That incident in both cases was, in the Courts' view, more appropriately described as "getting hurt" as opposed to "becoming sick". However, this proposition does not advance the Appellant's contention, and the Full Court took the matter into account in its reasons[70].

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53. The description of "sudden physiological change" as variously used in *Kennedy* and *Zickar* (as in others before them) was adopted as apt to assimilate both the concepts of external and internal insults on the body as "injury". This was based on the reasoning that the breaking of an artery at work could not be distinguished from the breaking of a leg at work[71]. It was for this purpose that the description "sudden physiological change" or "sudden and identifiable physiological change" had come to be attached to the concept of "injury", as it appeared in the various statutes. It was, however, not the *sine qua non* of injury per se, nor were the remarks of Latham CJ in *Hume Steel*. As the various decisions, which the Full Court discussed in its reasons[72] make clear, the wording used in those
30 cases was very much driven by the facts to which they variously pertained.

54. Thirdly, the Appellant suggests that that formulation of "injury" was accepted by all seven of the Justices in *Zickar*[73].

55. This is incorrect. None of the seven Justices in *Zickar* read the word "injury" in the relevant statute as requiring that there be a "sudden or identifiable physiological change". Of the

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[68] cf. Appellant's Written Submissions at [54]. Contrary to the assertion of the Appellant in its Written Submissions at [37], Dr Loblay did not describe the Respondent's condition as a "functional somatic disorder". See also the same inaccuracy at Appellant's Written Submissions at [39] and again at [45]. The evidence is that Dr Loblay, in a report dated 26 October 2010 said, "*Whether or not the chronic condition he developed after the vaccinations was in some way related to the post-infectious fatigue he suffered from in 1996 is uncertain. The clinical features, though significantly different, are partially overlapping with those of chronic fatigue syndrome which has also been classified as a 'functional somatic disorder'*". The Tribunal recorded that Dr Loblay opined that the Respondent's history is not characteristic of an immune reaction to vaccinations but that he acknowledged that he had not been able to find an alternative explanation for the condition. Importantly, Dr Loblay said it is not uncommon for a person to have symptoms without there being an explanation for the symptoms and without there being a diagnosable disease: Tribunal's Reasons at [32] – [35], AB 16, 17. It should also be noted that Dr Marilyn Moore, Psychiatrist, concluded that the Respondent does not suffer from a diagnosable psychiatric disorder. Tribunal's Reasons at [31], AB 16. A functional somatic disorder is a psychiatric illness.

[69] Appellant's Written Submissions at [55]

[70] See further [40] and [43] herein

[71] A phrase used by Fullagar J in *The Commonwealth v Hornsby* [1960] HCA 27; (1960) 103 CLR 588, referred to by Kirby J in *Zickar* at 318. See also the same analogy referred to by Latham CJ in *Hume Steel* at 75 CLR at 252-253 wherein the Chief Justice referred to the breaking of a "limb".

[72] Full Court Reasons at [25] – [91], AB 76 - 95

[73] Appellant's Written Submissions at [48]

four majority justices Toohey, McHugh and Gummow JJ do not mention the formulation and adopted *Hume Steel*[74] per Latham CJ. Likewise, Kirby J does not adopt the Appellant's formulation. Nor do the minority Justices. Indeed the passage quoted from *Zickar*[75] is inconsistent with the formulation of "injury" propounded because it notes that "a sudden identifiable physiological change **may** be an injury"[76] if certain condition are satisfied, namely, "if it results from some external cause during the course of employment". The attachment of this proviso makes clear that this statement is clearly not intended to be definitional.

56. Fourthly, the Appellant asserts that in *Kennedy Cleaning* "the High Court" adopted the Appellant's propounded formulation[77]. The Appellant also asserts that *Canute* at [10] supports or is consistent with the Appellant's formulation[78].

57. As the discussion at [32] to [37] above demonstrates, the references that the Appellant makes to *Kennedy Cleaning* as supporting its formulation, do not support this proposition. Nor does *Canute*. Indeed, the Appellant has not effectively explained how either does.

58. The requirement that there be a definition or prescribed formula to the determination of injury is antithetical to the historical approach of courts to the various statutes in which the concept has appeared. "Injury" is a protean concept, which should not be limited or constrained.

59. Lastly, the Appellant also contends that the Full Court's approach devalues and eviscerates the important statutory distinction between "injury" and "disease" and diminishes the effect of the higher threshold imposed on proving "disease" injuries[79].

60. This submission is wrong. The approach adopted by the Full Court does not deprive the concept of disease of utility in the legislative scheme. In support of this proposition, the Full Court[80], in fact, relied on what Gleeson CJ and Kirby J pointed out in *Kennedy Cleaning* at [40], namely, that "the disease provisions remain as alternative and additional heads of entitlement where a disease pathology exists with the appropriate employment connection, and does not manifest itself in the kind of sudden physiological change or disturbance of the normal physiological state that will constitute an "injury" in the primary sense." Further, even if the Appellant's proposed formulation were not adopted there will necessarily be "diseases" which do not amount to "injuries" under the SRC Act.

61. As the review of legislative changes regarding the approach to the compensation for injuries at work reveals, compensation legislation no longer considers the concepts of "injury" and "disease" as mutually exclusive. This was the substantive breakthrough in the omission of the requirement of "by accident" from the legislation.

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[74] At 252 – 253
[75] Appellant's Written Submissions at [48.1]
[76] Emphasis added
[77] See at Appellant's Written Submissions at [51] referring to *Kennedy Cleaning* at [35] 298.7, [36] 299.2, [39] 300.6 per Gleeson CJ and Kirby J; [50] 303.4, [54] 304.8, per Gaudron J, and [68] 308.6 per McHugh, Gummow and Hayne JJ.
[78] Appellant's Written Submissions at [69]
[79] Appellant's Written Submissions at [62] and [43.2]
[80] Full Court's Reasons at [115]

Error 2: Whether the Tribunal separately assessed and determined the two limbs of "injury" under the SRC Act, namely, the temporal case and the causal case

62. As noted at [18] and [19] above, the Respondent ran his case in the Tribunal in two ways: a temporal case and a causal case. The temporal case does not require the injury be caused by employment, the causal case does.

63. The Tribunal said that it was the causal connection between the vaccinations the Respondent received and the reaction he claimed to have suffered following the vaccinations, which was the critical issue in the case. Yet, it was Tribunal's view that there was no medical evidence to establish a connection between the Respondent's vertigo and the vaccinations he received while in the RAAF, and, this was decisive of this issue [81].

64. The Full Court held that in dealing with the temporal case, the Tribunal erroneously required that it be satisfied of the causation of the Respondent's injury[82]. The Full Court observed that the case law places beyond doubt the proposition that for an "injury" to arise in the course of an employee's employment (as distinct from arising out of employment) there is no requirement for a causal link between the employment and the injury, beyond the temporal one[83].

65. As presently understood, and again, the Appellant's submission are by no means clear on this issue, the Appellant appears to advance two contentions in support of why the Full Court was wrong to so hold.

66. The first is that because the Respondent sought to satisfy both a temporal case and causal case by attributing his injury to and temporally connecting it with the vaccinations, the Tribunal was entitled to respond to that case, which it did. It, however, rejected the case on the basis of the "overwhelming medical evidence that the vaccinations did not lead to the symptoms"[84].

67. The first difficulty with this submission is that it is internally inconsistent. By suggesting, as the Appellant does, that the Tribunal's rejection of case was due to the "overwhelming medical evidence that the vaccinations did not lead to the symptoms" acknowledges that the Tribunal was, in fact, looking for a causal connection.

68. The second reason why this submission is untenable is because this is not how the Respondent ran his case. The Respondent ran both a temporal and a causal case: that his injury arose temporally to the vaccinations and the injury was caused by the vaccinations. To suggest otherwise is simply incorrect.

69. The third reason why this submission should not be accepted it that there was no debate that the Respondent was required to undergo the vaccinations as part of his employment with the RAAF, that he underwent them during his employment with the RAAF, and that the physical effects he described in his evidence (which was not questioned) arose during performance of his duties as a member of the RAAF, and indeed some of them within 30

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[81] See Tribunal's Reasons at [5] – [7], [48] – [49] and [59], AB 6 – 7, 20 – 21 and 24
[82] Full Court's Reasons at [223], AB 129
[83] Full Court's Reasons at [226], AB 129
[84] Appellant's Written Submissions at [72] and [74]

minutes of the vaccinations[85]. For the purpose of deciding whether the Respondent had suffered an injury in the course of his employment the Tribunal did not need to be satisfied of anything more than that the Respondent suffered an injury during the "protected period of work hours", without any further contribution from his employment[86].

70. A further basis for rejecting this submission is that it is clear that the Appellant has misconstrued the Tribunal's reasons. The Full Court's construction of the Tribunal's reasons is correct: the Tribunal's reasons clearly demonstrate a vacillation between and elision of the relevant concepts[87]. The Appellant's contention glosses over the clear absence of a consistent and correct direction in the mind of the Tribunal to its statutory task.

71. In any event, the object of the review undertaken by the Tribunal has been said to be to determine what is the "correct or preferable decision"[88]. This means, in effect, that even if the Respondent were to have run only a causal case (which he did not), the Tribunal, correctly directed, and in the proper exercise of its function, should have approached the Respondent's case in accordance with the dictates of fairness and in conformity to the statutory task, and analysed whether the facts gave rise to the temporal case, the causal case and/or the disease case. It was certainly not within the Tribunal's remit to confine itself to a case as presented by a litigant in person. The reasons for this are well established[89].

72. The Tribunal, in fact, demonstrated that it appreciated the import of its function by its decision to consider the possibility of a disease case, despite it not being a case run by the Respondent[90]. Therefore, that it did not deal with the difference between the temporal case and the causal case infers that the Tribunal did misdirect itself and fell into error as the Full Court found it did.

73. The second contention apparently advanced by the Appellant[91] (but again it is not at all clear) as to why the Full Court erred is that Full Court misconstrued the Tribunal's reasons. The Appellant submits that the Tribunal was not incorrectly looking for a causal connection because it did not need one to deny liability. That is, it was not satisfied there was an "injury" in the first place[92].

74. This submission is erroneous for the following reasons.

75. First, the Full Court did not misconstrue the Tribunal's reasons. As set out at [63] above, the Tribunal was looking for a causal connection and as discussed at [67] above, the Appellant in its own written submissions acknowledges this fact.

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[85] Full Court's Reasons at [224], AB 129
[86] Full Court's Reason's at [226], AB 129
[87] See eg. Tribunal's Reasons at [5], [6], [49], [58], 59] and [63], AB 6, 10, 21, 23, 24, 25. See also the discussion in Full Court's Reasons at [221]- [228], AB 128 - 130
[88] See *Shi v Migration Agents Registration Authority* [2008] HCA 31 at [140 citing *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589, 591 per Bowen CJ and Deane J; *Nevistic v Minister for Immigration and Ethnic Affairs* [1981] FCA 41; (1981) 34 ALR 639 at 646 per Deane J, 651 per Lockhart J; *Freeman* [1988] FCA 294; (1988) 19 FCR 342 at 345; *Hospital Benefit Fund of Western Australia Inc v Minister for Health, Housing and Community Services* [1992] FCA 599; (1992) 39 FCR 225 at 234.
[89] See eg. *Hamod v State of New South Wales* [2011] NSWCA 375 at [306]-[316] as cited with approval in *SZRUR v Minister for Immigration and Border Protection* [2013] FCAFC 146 at [37]
[90] Tribunal's Reasons at [64] - [65], AB 25 - 26
[91] See particularly at [70] of the Appellant's Written Submissions
[92] The Appellant in support of this submission gives no references to the Tribunal's Reasons.

76. Second, the Tribunal found an injury: vertigo. There is no other way to read the Tribunal's Reasons at [62][93].

77. Thirdly, it is very clear that the Tribunal inextricably linked the task of finding what it refers to as an "injury simpliciter" with its ability or inability to connect causally the Respondent's vertigo with the vaccinations. There is no other way to read the Tribunal's concluding paragraphs at [62] and [63] of its reasons[94]. As has already been discussed above, this approach only pertains to the causal case. And so, one comes back to the proposition that the Tribunal failed to address the temporal case, and in so doing, erred as the Full Court found it did.

78. A more general and perhaps, important, response to these arguments and the Appellant's asserted error is that they are not the subject of a ground in the Notice of Appeal and were not the subject of special leave to appeal to this Court.

Error 3: Whether the Tribunal was correct to conclude that there was insufficient evidence of "injury" (viz. "a sudden or identifiable physiological change") because there was no definitive diagnosis and no objective clinical evidence of the condition, which the Respondent suffered

79. The Tribunal was unable to find "injury" in this case because there was an absence of any physiological evidence, pathology or a known diagnosis to explain the symptoms that the Respondent suffered or a psychiatric disorder to account for them[95].

80. The Full Court held[96] that the Tribunal erred in requiring as an essential precondition to finding "injury" (as formulated by it), that there be a formal diagnosis or objective medical evidence corroborating the physiological changes reported by the Respondent. The Full Court said that such evidence was not necessary. The only inquiry was whether the Respondent suffered an injury[97].

81. The Full Court said that there was no warrant in the statute or the case law to require diagnosis and a medically ascertained cause[98] of an "injury". Neither the terms of s 4 of the SRC Act, nor the authorities, preclude an "injury" being established on the basis of an account by a claimant of the disturbances to her or his body or mind, absent a diagnosis of a recognised medical condition, or corroborating pathology or medical opinion. While medical evidence or opinion is relevant, it may not be determinative. The place of common-sense lay inference derived from a clear sequence of events is to be recognised, as long as any such inference is not denied by medical science.

82. The Full Court said that neither the SRC Act nor the case law requires one form of proof (viz. medical opinion) than some other[99]. In any particular case there may be a consideration of whether there is a harmful effect on the body, a disturbance of the normal

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[93] AB 25
[94] AB 25
[95] See eg. Tribunal's Reasons at [52], AB 22. See also [59], [61], [62] AB 24, 25
[96] Full Court's Reasons at [210] – [220], esp. [211], AB 125 – 128, esp. 125 - 126
[97] Full Court's Reasons at [211] – [212], AB 125 - 126
[98] Full Court's Reasons at [209], AB 125
[99] Full Court's Reasons at [212], [217], AB 126, 127

physiological state producing physical incapacity, a sudden or identifiable or distinct physiological change, whether there is an event or incident or clinical diagnosis to explain such change, and such considerations will be made against a background of a distinction in the common use of language between getting hurt and becoming sick. The circumstances and the facts will influence what weight such considerations are given in the drawing of a factual conclusion in any particular case. Whether or not the evidence of a claimant will be sufficient, if it is not supported, corroborated or confirmed by independent medical opinion or pathology, will be a matter for the Tribunal's satisfaction on the evidence in each particular case[100].

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83. The Full Court pointed out that the Tribunal accepted that the Respondent was genuinely reporting the physiological effects he was suffering, was not malingering, and did in fact experience vertigo and the other effects about which he gave evidence[101]. Even if there was a need for "physiological evidence, pathology or a known diagnosis", the Tribunal itself had made a finding (at [48] of its reasons) that the condition the Respondent found "the most disabling" was vertigo. There is no other way to read [48] of the Tribunal's reasons than that it accepted, as a matter of fact on the evidence and material before it, that the Respondent suffered from vertigo at the time of its review[102]

20 84. As Rich ACJ said in *Forst*[103], "[i]f medical knowledge develops strong positive reasons for saying that the lay common-sense presumption is wrong, the courts, no doubt, would gladly give effect to this affirmative information. But, while science presents us with no more than a blank negation, we can only await its positive results and in the meantime act on our own intuitive inferences."[104]

85. The Appellant does not dispute that the Tribunal did require as an essential precondition of finding "injury" (as formulated by it), that there be a formal diagnosis or objective medical evidence corroborating the physiological changes reported by the Respondent[105]. However, at [75] – [80] of its Written Submissions, (especially [80]) the Appellant contends
30 that, at least "in cases of the present kind" (of which kind, it does not specify), in order for a claimant to establish "a sudden or identifiable physiological change" he or she must point to a formal diagnosis or objective medical evidence.

86. Why the Appellant contends that the Respondent's condition needed to be corroborated by a formal diagnosis or objective medical evidence is, yet again, difficult to comprehend. Its reasons for saying so appear at [80.1] – [80.6] of its Written Submissions.

87. The Appellant cites the dissentient observations of Dixon J (as his Honour then was) in *Forst* at 569[106] in support of its proposition. There Dixon J said:

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> ... I think that upon a question of fact of a medical or scientific description a court can only say that the burden of proof has not been discharged where, upon the evidence, it appears

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[100] Full Court's Reasons at [118], [209], [212], AB 102 – 103, 125, 126
[101] Full Court's Reasons at [125], AB 103
[102] Full Court's Reasons at [210], AB 125
[103] *Adelaide Stevedoring Co Ltd v Forst* [1940] HCA 45; (1940) 64 CLR 538 (***Forst***) at 564.2 - 4. See the reference to the same in Full Court's Reasons at [217], AB 127
[104] Full Court's Reasons at [217], AB 127
[105] See Tribunal's Reasons at [59], [61], [62] and [66], AB 24, 25 and 26
[106] It should be noted that Dixon J's statement in *Forst* was in dissent and is inconsistent with the reasoning of the majority: see the discussion at footnote 110 below.

that the present state of knowledge does not admit of an affirmative answer and that competent and trustworthy expert opinion regards an affirmative answer as lacking justification, either as a probable inference or as an accepted hypothesis.

88. In addition, the Appellant says that Dixon J's observations support the Tribunal's conclusion that before they would find a sudden or identifiable physiological change there had to be a formal diagnosis for objective medical evidence supporting the Respondent's case. The Appellant does not explain how it does support this proposition.

89. There are a number of responses to this, the first of which is that the case law does not support this requirement[107].

90. The second point is the statement of Dixon J, as difficult as it is to construe, is inapposite to support the proposition that definitive diagnosis or objective medical evidence is required. The reasons for this are as follows.

91. First, the issue that was being dealt with in *Forst* was not whether an injury existed; an injury was identified in that case, it was coronary thrombosis. The issue was the causation of that injury, namely, was it caused by exertion at work? Dixon J's statement does no more than elaborate upon the general onus, which lies upon a plaintiff where the issue of causation lies outside the realm of common knowledge and experience[108].

92. In *Tubemakers of Australia v Fernandez,* in this Court, Mason J (as his Honour then was) made the same point[109]. His Honour cited the passage of Dixon J in *Forst* as one of several statements on the question of plaintiff's onus of proof in cases, the circumstances of which raised a presumption of a causal connection between an incident and the relevant medical condition.

93. Secondly, as is made apparent by Dixon J's reasons in *Forst* at 568.3, the issue that his Honour was considering was "an unmixed question of fact, medical and scientific in character, and therefore to be decided upon expert testimony". The determination of whether an "injury" exists cannot be said to fall into such a category.

94. Thirdly, Dixon J was in dissent. The other members of the Court (Rich ACJ, Starke, and McTiernan JJ) did not reason in the same way as his Honour[110].

95. Fourthly, as Nettle JA said in *Amaca v King*[111] "[n]othing in what Dixon J said ...requires 'competent and trustworthy' expert opinion to state an affirmative answer upon a disputed fact as a matter of probability before the tribunal of fact is authorised to decide, on all the evidence, that the plaintiff has established that fact as a matter of probability".

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[107] See the cases referred to in the Full Court's Reasons at [219], AB 128, in particular, see *Amaca Pty Ltd v Ellis* [2010] HCA 5; (2010) 240 CLR 111 at 121-122 [6]; *Allianz Australia Ltd v Sim* [2012] NSWCA 68 at [48].

[108] See the discussion of the Full Court of the Federal Court in *Re Waltraud Fuderer v Commonwealth of Australia* [1983] FCA 326 (Woodward, Kelly and Neaves JJ), for example.

[109] (1976) 50 ALJR 720 at 724; 10 ALR 303 at 311.10, (Barwick CJ and Gibbs J agreeing)

[110] Rich ACJ supported an approach commencing from the presumptive inference which a "sequence of events would naturally inspire in the mind of any common-sense person uninstructed in pathology": *Forst* at 564.2 – 4; Starke J was persuaded the premise that courts are entitled and bound to act upon the probabilities of the case despite the fact that the medical evidence is inconclusive and come to his own common sense conclusion, as his Honour did: *Forst* at 565.5 – 9 and 567. McTiernan J upheld the Court of Appeal's "more balanced view" which considered what was the proper inference to draw from the whole of the evidence, that is to say, the facts and circumstances of the case and the medical opinion: see eg. *Forst* at 574.

[111] *Amaca Pty Ltd (under NSW Administered Winding Up) v King* [2011] VSCA 447; 35 VR 280 at [88]

96. Similarly, as Glass JA stated in *Fernandez v Tubemakers of Australia Ltd*[112]:

> The issue of causation involves a question of fact upon which opinion evidence, provided it is expert, is receivable. But a finding of causal connection may be open without any medical evidence at all to support it: *Nicolia v Commissioner for Railways (NSW)* (1970) 45 ALJR 465, or when the expert evidence does not rise above the opinion that a causal connection is possible: *EMI (Australia) Ltd v Bes* [1970] 2 NSWR 238; appeal dismissed (1970) 44 ALJR 360N. The evidence will be sufficient if, but only if, the materials offered justify an inference of probable connection. This is the only principle of law. Whether its requirements are met depends upon the evaluation of the evidence.

97. As has been noted at [21(g)] above Dr Loblay could not discount the possibility that the Respondent's vertigo was not caused by the vaccinations.

98. As decisions such as *Jones v Great Western Railway Co*[113], *Carr v Baker*[114], *Caswell v Powell Duffryn Associated Collieries Ltd*[115] and *Luxton v Vines*[116] demonstrate, the test is whether, on the basis of the primary facts, it is reasonable to draw the inference that common sense would suggest.

99. Fifthly, the difference between curial and administrative proceedings should be borne firmly in mind. Dixon J's passage was referring to the onus of proof in curial proceedings. The general rule in administrative proceedings is that nobody need persuade the decision-maker (positively or otherwise) to make a particular decision due to the inquisitorial nature of administrative proceedings[117].

100. Sixthly, the Appellant's submission assumes that its formulation of "injury" (viz. "sudden or identifiable physiological change") is correct. For the reasons set out at [33] – [61] above, it is not. Even if the asserted test of "injury" were correct, there is nothing in the notions of suddenness or identifiability, which would make expert medical evidence the only acceptable form of proof.

101. Seventhly, as referred to at [83] above, the Appellant does not deal with the Full Court's point at made at [210] of its reasons, that even if there were, as the Tribunal put it, a need for "physiological evidence, pathology or a known diagnosis", the Tribunal itself had made a finding[118] that the condition the Respondent found "the most disabling" was vertigo.

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[112] (1975) 2 NSWLR 190 at 197C
[113] (1930) 47 TLR 39 at 45 per Lord Macmillan
[114] [1936] NSWStRp 20; (1936) 36 SR(NSW) 301 at 306 per Sir Frederick Jordan
[115] [1940] AC 152 at 169-170 per Lord Wright
[116] [1952] HCA 19; (1952) 85 CLR 352 at 358
[117] *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at [40], referring to the examples of *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 573-574 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow J; *Abebe v The Commonwealth* [1999] HCA 14; (1999) 197 CLR 510 at 544-545 [83] per Gleeson CJ and McHugh J; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 673 [195] per Callinan J. The AAT Act provides at s 33(1)(a) and (b), relevantly, that the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of the AAT Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit; and that the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.
[118] Tribunal's Reasons at [48], AB 21

102. Finally, as the Full Court remarked the requirement for objective medical evidence and diagnosis misdirected the enquiry for substantiating material and tended to raise a requirement for an identifiable event or incident or cause that had a connection (of more than a temporal character) with employment[119]. It matters not whether the injury is one that can be identified with a label of a recognised medical condition or any observable pathology. A diagnosis is not the indispensible element in identifying whether or not a person has undergone a physiological change. Rather, the focus is on the resultant effect, indeed, as the case may be, the symptoms. It is the symptoms, which have the effect of incapacitating or impairing one, not the name medical science has attributed to their cause. It is the incapacity and impairment that the SRC Act is intended to compensate.

Conclusion

103. The Appellant has not demonstrated a single basis upon which the Full Court's decision should be overturned. The Full Court's decision, with respect, is correct and should stand.

104. Where the intention of the SRC Act is to compensate, the Appellant has not identified a sufficient ground for excluding an idiopathic condition from the category of conditions to which the concept of "injury" pertains. There is, particularly, no warrant for the Appellant's formulation of "injury" and approach generally when it is well known that advances in medical science improve etiology[120] and nosology[121]. Thus, regarding any particular condition or disease, as more root causes are discovered, and as events that seemed spontaneous have their origins revealed, the percentage of cases designated as idiopathic will decrease. That does not mean that, in the meantime, they are ineligible for compensation under the SRC Act.

105. Simply put, that idiopathic conditions are eligible for compensation under the SRC Act is made clear by the fact that the temporal case and the causal case are in the alternative. For example, an employee falls at work due to black out and sustains an injury. The cause of the injury sustained by this fall (ie. tripping on a misplaced object, or, perhaps, syncope due to a congenital cause) is unknown and cannot be proved. Its cause is, thereby, idiopathic. But, because it occurs in the course of the employee's employment it is compensable under the SRC Act. There is no warrant for distinguishing this category of case or idiopathic injury to that which the Respondent was accepted as having sustained.

106. The Court should dismiss the appeal. The Respondent notes that as a condition of leave to appeal the costs of the Respondent in this Court are to be paid by the Appellant in any event.

Part VII: NOTICE OF CONTENTION

107. The Respondent does not rely on a Notice of Contention.

Part VIII: ORAL ARGUMENT

108. The Respondent estimates that he will require 1 hour to present his argument.

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[119] Full Court's Reasons at [211], AB 125 - 126
[120] The study of causes of diseases.
[121] The classification of diseases.

Dated: 1 February 2016

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