The 'Reasonable Management Action' Exception in Workers' Compensation Claims in Tasmania: An Analysis of Published Decisions

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Abstract

Workers who suffer a work-related psychological injury are generally entitled to claim no-fault workers' compensation, except where an injury was substantially caused by 'reasonable management action.' Workers should expect to be safe from psychological injury at work. Employers want to be able to effectively manage both their employees and the risk that managerial action could cause an employee distress. The exception protects employers from a category of claims for workers' compensation, thereby reducing the financial risks of workplace management that causes psychological injury to workers. However, this means that what 'reasonable management action' means is central to the determination of a worker's entitlement to compensation (where managerial action has contributed to their injury). The need to evaluate management behaviour within context and taking into account all of the surrounding circumstances, makes it difficult to define with certainty. This article focuses on published Tasmanian cases about 'reasonable management action' in psychological injury cases, to see how determinations by courts and tribunals have shed light upon the legal meaning of the exceptions. The article explains how the published decisions were identified by the authors. It then explains what the case law illustrates about actions that are capable of being 'reasonable management action.' We focus in particular on how multiple causes of psychological injury are weighed, given that there is rarely a single cause of a psychological injury, and what decision makers have said when assessing reasonableness.

I INTRODUCTION

In all nine Australian workers' compensation systems, where a worker suffers a psychological injury at work that is caused by what we will name 'reasonable management action,' the worker is not entitled to workers'

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compensation.[1] In claiming the exception, employers may acknowledge that the worker has suffered a psychological injury, even accept that the injury was suffered during the course of employment and that the employment was a substantial or significant cause of the injury. However, on the basis that the employer was acting reasonably in performing the management actions that caused the injury, the employer can argue that they are not liable to pay compensation.

The availability of workers' compensation for psychological conditions was limited by amendments commencing in the 1990s that introduced the 'reasonable management action' exceptions.[2] Employers' and insurers' concerns about the escalating cost of insurance and payments for stress claims were key drivers for the introduction of an exception to the entitlement for compensation for a psychological injury suffered at work.[3] Guthrie has noted that 'early cases led to a perception in legislators, insurers, employers and some judges that stress-related claims were easy to bring and difficult to defend.'[4] There were concerns that too many claims for stress related illnesses were being granted to workers, and an 'unreasonable' stress response by a worker to standard managerial practice could result in a workers' compensation payment.[5] The exceptions were introduced to protect employers from liability for adverse consequences of managing employees.[6]

This article reports from a study of 'reasonable management action' in workers' compensation claims for psychological injury, with specific focus upon consideration of the relevant exception in Tasmania.[7] Where a worker suffers from an injury that is a disease (an ailment, disorder, defect, or morbid condition of sudden or gradual development), and their

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[1] *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 5A ('*Commonwealth Act'*); *Workers Compensation Act 1951* (ACT) s 4(2) ('*ACT Act'*); *Workers Compensation Act 1987* (NSW) s 11A(1) ('*NSW Act'*); *Return to Work Act 2015* (NT) s 3A(2) ('*NT Act')*; *Workers Compensation and Rehabilitation Act 2003* (Qld) s 32(5) ('*Queensland Act'*); *Return to Work Act 2014* (SA) s 7(4) ('*SA* Act'); *Workers Rehabilitation and Compensation Act 1988* (Tas) s 25(1A) ('*Tasmanian Act'*); *Accident Compensation Act 1985* (Vic) s 82(2A) ('*Victorian Act'*); *Workers' Compensation and Injury Management Act 1981* (WA) s 5 (definition of 'injury') ('*WA Act'*).

[2] Robert Guthrie, 'Stress Claims and Management Prerogatives' (1996) 4(2) *International Journal of Employment Studies* 95.

[3] Ibid 98–9.

[4] Robert Guthrie, 'The Australian legal framework for stress claims' (2007) 14(4) *Journal of Law and Medicine* 528, 536.

[5] See Tasmania, *Parliamentary Debates,* House of Assembly, Friday 23 June 1995, 10 (Ray Groom, Minister for Development and Resources) <https://www.parliament.tas.gov.au/> Second Reading Speech of the *Workers Rehabilitation and Compensation Reform Bill 1995*.

[6] *Comcare v Martin* (2016) 258 CLR 467, [46] (French CJ, Bell, Gageler, Keane and Nettle JJ), citing Australia, House of Representatives, *Safety, Rehabilitation and Compensation and Other Legislative Amendment Bill 2006*, Explanatory Memorandum iv, v.

[7] The set of justifications contained in the *Tasmanian Act* (n 1) s 25(1A)(a)–(e) comprise what we name the 'reasonable management action' exception. We note that this is not a phrase that appears in the Tasmanian Act.

employment is 'the major or most significant factor' contributing to the disease, they may claim workers' compensation.[8] Where a worker suffers from a recurrence, aggravation, acceleration, exacerbation or deterioration of an injury, and their employment is 'the major or most significant contributing factor,' they may claim workers' compensation.[9] However, where a psychological injury is caused by management behaviours that fall within legislative exceptions, no compensation is payable by the employer.[10] Our project sought to identify case law applying the Tasmanian exception provision, s 25(1A) of the *Workers Rehabilitation and Compensation Act 1988* (Tas) ('the Act'). Although the number of reported cases identified in the Tasmanian study was small, the decisions nonetheless provide some useful guidance for employers, injured workers and their advocates.

First, the relevant Tasmanian legislative provisions are explored in detail and contextualised within Australian workers' compensation systems. Secondly, the method by which the sample of cases were identified and analysed is described. Discussion then turns to the findings from the case analysis and the conclusions that we draw from them.

II THE 'REASONABLE MANAGEMENT ACTION' EXCEPTION IN TASMANIA

In this part we introduce the Tasmanian legislative provisions containing workers' entitlement to compensation for psychological injury and the s25(1A) exceptions to that general entitlement. Our focus is upon psychological injury, as the Tasmanian provision is specifically limited to disorders or illnesses of the mind.

A *Compensation for psychological injury at work*

Workers' compensation schemes are compulsory, largely 'no fault'[11] statutory schemes that have been established to provide workers with quick and certain payments when they are injured at work, and to enable insurance premiums to be pooled to provide adequate funding for injured workers.[12] In Tasmania, the ability to recover compensation for psychological injuries suffered at work is found in the *Workers Rehabilitation and Compensation Act 1988* (Tas). The existence of a workplace injury is defined, and then the exception to liability to pay

[8] *Tasmanian Act* (n 1) ss 3(1), 3(2A), 25(1)(b).
[9] Ibid.
[10] Ibid s 25(1A).
[11] A worker found to have suffered injury due to their own serious and wilful misconduct will not be entitled to compensation: Ibid s 25(2)(a)(i).
[12] Michael Peters, 'The impact of the changes to the New South Wales workers compensation law: A betrayal of the compensation bargain?' (2014) 22(2) *Tort Law Review* 75, 76.

workers’ compensation appears in a separate provision.[13] Section 3(1) defines ‘injury’ and ‘disease’ for the purposes of the Act:

> *injury* includes –
>
> (a) a disease; and
>
> (b) the recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease where the employment was the major or most significant contributing factor to that recurrence, aggravation, acceleration, exacerbation or deterioration –
>
> but does not, except for the purposes of section 97(1)(b) and (c), include an asbestos-related disease within the meaning of the *Asbestos-Related Diseases (Occupational Exposure) Compensation Act 2011*
>
> *disease* means any ailment, disorder, defect, or morbid condition, whether of sudden or gradual development

Section 25(1)(b) provides that:

> If in any employment – a worker suffers an injury, which is a disease and to which his employment contributed to a substantial degree, within the meaning of section 3(2A) – his employer is…liable to pay compensation in accordance with this Act.

Section 3(2A) says that:

> For the purposes of this Act, employment contributed to a disease to a substantial degree only if it is the major or most significant factor.

Therefore, where a worker suffers from a psychological condition and their employment was the major or most significant factor contributing to that condition (including the aggravation of a previously existing condition), then the worker has an entitlement to claim compensation. Guthrie has noted that the Tasmanian legislation sets a particularly high bar for workers to establish, that their injury arose both out of *and* in the course of their employment, which must be the ‘major or most significant’ cause of their injury.[14]

In the context of psychological injury, two specific exceptions apply to the employee’s entitlement to compensation. Employers are not liable to pay compensation in any case where the worker, at the time of entering employment, wilfully and falsely represented themselves as not having previously suffered from the psychological condition (that is later

[13] The *Tasmanian Act* was based upon the then *Workers Rehabilitation and Compensation Act* 1986 (SA), s 30(2)(a). A similar legislative structure is found in *NSW Act* (n 1) s 11A(1); *SA Act* (n 1) s 7(2)(b)(ii), 7(3)(b)(ii); *Victorian Act* (n 1) s 82(2A). This contrasts with legislative frameworks where the exception is built into the meaning of “injury”: *Commonwealth Act* (n 1) s 5A(1); *ACT Act* (n 1) s 4(2); *NT Act* (n 1) s 3A(2); *Queensland Act* (n 1) s 32(5); *WA Act* (n 1) s 5.

[14] Guthrie (n 4) 529, 533.

aggravated).[15] The second exception is for psychological injuries caused by 'reasonable management action' (explained in II.B).

Workers may suffer a psychological injury by an accident or by gradual onset of a psychological disease. Where a worker has suffered a psychological injury by their involvement in or witnessing of a workplace incident such as a bank robbery, assault, explosion, traffic accident or similar the 'reasonable management exception' is not relevant. Therefore, this article concerns psychological diseases that develop gradually or psychological injuries/diseases that are aggravated in the workplace.

B *The 'reasonable management action' exception*

Where an injury was caused substantially by behaviour meeting the relevant exceptions, the injury is excluded and an employer will not be liable. Broadly similar exceptions exist in all Australian state, territory and Commonwealth jurisdictions, and we name the exceptions collectively 'reasonable management action.'[16] The core common features are:

- the action was an administrative/management action (including non-action);
- the action related to the worker's employment/specified activities;
- the action caused the injury or disease;
- the action was reasonable; and
- the action was taken in a reasonable manner.

The reasonable management action exception is a significant barrier to the recovery of compensation for psychological injury suffered in connection with employment. It restricts and complicates claims in an otherwise beneficial 'no fault' compensation system.[17] The weighing of the competing purposes of protecting workers and employers has been the subject of deliberation by courts and tribunals.[18] An overly broad interpretation of the exception could leave many injured employees unable to pursue workers' compensation. An overly narrow interpretation could defeat the purpose of enabling employers to manage their businesses

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[15] See, eg, *Tasmanian Act* (n 1) ss 25(2)(c), 81AA(2)(c); *NSW Act* (n 1) ss 14(2), 14(3); *Workers Compensation Act 1958* (Vic) s 6; *WA Act* (n 1) s 22.

[16] *ACT Act* (n 1) s 4(2); *NSW Act* (n 1) s 11A(1); *NT Act* (n 1) s 3A(2); *Queensland Act* (n 1) s 32(5); *SA Act* (n 1) s 7(4); *Tasmanian Act* (n 1) s 25(1A); *Victorian Act* (n 1) s 82(2A), 82(10); *WA Act* (n 1) s 5(1) (definition of 'injury'), 5(4); *Commonwealth Act* (n 1) s 5A; Safe Work Australia, *Comparison of workers' compensation arrangements in Australia and New Zealand* (July 2015), 74–80.

[17] *Abrahams v St Virgil's College* [1998] TASSC 53, [7] ('*Abrahams*').

[18] See, eg, *Comcare v Martin* (n 6); *Lim v Comcare* [2016] FCA 709; *Commonwealth Bank of Australia v Reeve* (2012) 199 FCR 463; *State of Victoria v Leck* [2009] VSC 92; *Parker v Q-Comp* (2007) 185 QGIG 269; *Abrahams* (n 17); *WorkCover Corporation of South Australia v Summers* (1995) 65 SASR 243.

without unreasonable risk of workers' compensation claims arising from management action.[19] Ultimately a balance needs to be found between the intentions of the legislation to benefit workers and the clear intention of the exception to benefit employers.[20] In 2014 Chief Justice Blow of the Tasmanian Supreme Court observed that:

> As a general rule, because workers compensation legislation is beneficial legislation, ambiguities therein ought to be resolved in favour of the class of persons intended to be benefited by the legislation, namely workers[21]… However excepting provisions in beneficial legislation do not always require beneficial interpretation. Whether a beneficial interpretation is appropriate "depends on the particular statutory provision and an analysis of its language and purpose".[22]

The High Court made clear in *Comcare v Martin* that the purpose of protecting employers is the purpose through which the exception in the Commonwealth Act should be interpreted.[23] The exceptions were introduced to limit workers compensation claims and were therefore intended to act as a barrier to workers' compensation for psychological injury claims. Chief Commissioner Webster noted in *M v Allianz Australia Services Pty Ltd (No 2)*[24] that the intended benefit of the Tasmanian exception was directed to the employer, and that the provision should accordingly be given its widest construction in accordance with that beneficial purpose.[25]

There are some inter-relationships between this exception in workers' compensation law and industrial relations laws that regulate management behaviours, requiring managers to act reasonably.[26] We do not seek to explore the interaction between workers' compensation and industrial laws in detail here, but we acknowledge the influence of each over the other. We also acknowledge that many workers will simultaneously be in dispute with employers in unfair dismissal, adverse actions, promotions appeal or similar industrial law proceedings as well as a workers' compensation

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[19] Guthrie (n 2) 98.
[20] *Friends' School Inc v Edmiston* [2014] TASSC 68, [8], citing *McDermott v Owners of SS Tintoretto* [1911] AC 35, 46 ('*McDermott'*); *Wilson v Wilson's Tile Works Pty Ltd* (1960) 104 CLR 328, 335 ('*Wilson*'); *Bird v Commonwealth* (1988) 165 CLR 1, 9 ('*Bird*'); Emma Reilly, "The mental injury exception to workers' compensation claims" (2010) 101 *Precedent* 31; Kevin Purse, 'Winding Back Workers' Compensation Entitlements in Australia' (2011) 24(3) *Australian Journal of Labour Law* 238, 245–6.
[21] *Friends' School Inc v Edmiston* (n 20) [8], citing *McDermott* (n 20); *Wilson* (n 20); *Bird* (n 20).
[22] *Friends' School Inc v Edmiston* (n 20) [8], citing *Rose v Secretary, Department of Social Security* (1990) 21 FCR 241, 244.
[23] *Comcare v Martin* (n 6) [46] (French CJ, Bell, Gageler, Keane and Nettle JJ), citing Australia, House of Representatives Safety, Rehabilitation and Compensation and Other Legislative Amendment Bill 2006, Explanatory Memorandum iv, v.
[24] [2019] TASWRCT 35.
[25] Ibid [31].
[26] Guthrie (n 2).

claim for psychological injury. The Commonwealth Fair Work legislation contains a qualification that 'reasonable management action carried out in a reasonable manner' is not bullying under the Fair Work system, adopting the wording of workers' compensation laws.[27] It must be acknowledged that the exception in the workers' compensation jurisdiction introduces an assessment of the 'reasonableness' of managerial action that is otherwise unusual in that context, which raises questions about whether the decision makers and advocates are best placed to make assessments of what behaviours are 'reasonable.' Managerial action, and its reasonableness, is the specialist expertise of professionals operating in the industrial relations context (eg unions and Fair Work tribunals) rather than workers' compensation tribunals.

In Tasmania, the relevant exception provision is found in s 25(1A) of the Act:

> Compensation is not payable under this Act in respect of a disease which is an illness of the mind or a disorder of the mind and which arises substantially from–
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> (a) reasonable action taken in a reasonable manner by an employer to transfer, demote, discipline or counsel a worker or to bring about the cessation of a worker's employment; or
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> (b) a decision of an employer, based on reasonable grounds, not to award or provide a promotion, transfer or benefit in connection with a worker's employment; or
>
> (c) reasonable administrative action taken in a reasonable manner by an employer in connection with a worker's employment; or
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> (d) the failure of an employer to take action of a type referred to in paragraph (a), (b) or (c) in relation to a worker in connection with the worker's employment if there are reasonable grounds for not taking that action; or
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> (e) reasonable action taken by an employer under this Act in a reasonable manner affecting a worker.

In Tasmania, an employer who relies upon s 25(1A) as a defence to a claim bears the onus of proving that the elements of the provision are satisfied.[28] The onus of proving the reasonable management action exception upon

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[27] *Fair Work Act 2009* (Cth) s 789FD(2); *Application by Purcell* [2016] FWC 2308, [95]; *Application by SB* [2014] FWC 2104, [47]–[53].

[28] *Bradshaw v Tasmania Networks Pty Ltd* [2020] TASFC 2, [12] citing *Bradshaw v Tasmania Networks Pty Ltd* [2020] TASSC 41; *Skill Group Limited v Anning* [2015] TASSC 18; *Lamont v MRT Supermarkets Pty Ltd* [2016] TASSC 16; *M v Allianz Australia Services Pty Ltd (No 2)* (n 24) [14]; *C v Department of Education* [2011] TASWRCT 15, [49].

which they rely is also borne by the employer in NSW,[29] NT,[30] and Victoria.[31] Where the exception provision is located within the statutory definition of 'injury'[32] the fact that the injury suffered by the worker falls within that definition must be established before they can succeed on their claim. Generally, in those jurisdictions the worker must disprove the exception of 'reasonable management action' claimed by the employer.[33]

The Tasmanian exclusion provision requires that the psychological injury 'arises substantially from' the 'reasonable management action,' which is a lower bar for employers than most other Australian jurisdictions. The wording of most exclusion provisions requires that the 'reasonable management action' be the only or main cause of the worker's injury. The words used are 'completely or mostly caused by',[34] 'wholly or predominantly caused by',[35] 'caused wholly or primarily by',[36] 'arise wholly or predominantly from',[37] 'caused wholly or predominantly by'[38] and 'wholly or predominantly arises from.'[39] These provisions clearly require that the exception only applies where the 'reasonable management action' was the main cause of the injury. In NSW in the context of multiple causes, the excepted 'wholly or predominant' cause must be 'stronger than and prevailing over other causes' or 'mainly or principally caused.'[40] By

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[29] *Hamad v Q Catering Ltd* [2017] NSWWCCPD 6, [45]; *Department of Education and Training v Sinclair* [2005] NSWCA 465, [18]; *Commissioner of Police v Minahan* [2003] NSWCA 239, [25].

[30] *Rivard v Northern Territory* (1999) 150 FLR 33 noted and agreed between the parties in *Corbett v Northern Territory of Australia* [2015] NTSC 45, [4]–[5].

[31] *Department of Education & Anor v Unsworth* [2010] VSCA 77, [57]; *Mills v City of Whitehorse (WorkCover)* [2016] VMC 4, [77].

[32] See above II.A identifying the Commonwealth, ACT, NT, Queensland and WA Acts as including the exception within the definition of injury.

[33] *Fuller v Simon Blackwood (Workers' Compensation Regulator)* [2016] ICQ 12, [12]; *Roberts v Workers' Compensation Regulator* [2016] QIRC 30, [327]; *Henderson v Workers' Compensation Regulator* [2015] QIRC 216, [11], citing *State of Queensland (Queensland Health) v Q-COMP and Beverley Coyne* (2003) 172 QGIG 1447 (Hall P); *Q-COMP v Hetherington* [2004] 176 QGIG 493 (Hall P); *Church v Simon Blackwood (Workers' Compensation Regulator)* [2015] ICQ 031; *Cannon v Department for Health and Ageing* [2015] SAWCT 5, [2] applying s 30A(b) of the *Workers Rehabilitation and Compensation Act 1986;* Robert Guthrie, 'Negotiation, Power in Conciliation, and Review of Compensation Claims' (2002) 24(3) *Law and Policy* 229, 244; *Catholic Education Office of WA v Granitto* [2012] WASCA 266, [40] citing the Arbitrator's reference to *O'Leary v Edith Cowan University* CM 108-02 (Compensation Magistrate Packington) [14].

[34] *ACT Act* (n 1) s 4(2).

[35] *NSW Act* (n 1) s 11A(1).

[36] *NT Act* (n 1) s 3A(2).

[37] *SA Act* (n 1) ss 7(2)(b)(ii), 7(3)(b)(ii).

[38] *Victorian Act* (n 1) s 82(2A).

[39] *WA Act* (n 1) s 5.

[40] *Hamad v Q Catering Ltd* (n 30) [45]–[46] citing *Ponnan v George Weston Foods Ltd* (2007) NSWWCCPD 92; Christine Tsekouras, *Halsbury's Laws of Australia* (LexisNexis, 2014) [450-4105], citing *Jackson v Work Directions Australia Pty Ltd* (1998) 17 NSWCC 70; *Ponnan v George Weston Foods*; *Temelkov v Kemblawarra Portugese Sports and Social Club Ltd* [2008] NSW WCC PD 96; *Smith v Roads and Traffic Authority (NSW)* [2008]

contrast, in the Commonwealth and Queensland systems, the exception can apply where it is not the primary cause of the injury.[41] The Tasmanian provision requires that the 'reasonable management action' is a substantial cause of the psychological condition, not that it was the action that caused the most substantial psychological injury.[42] It would be rare that a psychological injury is definitively attributed to only one cause. Multiple aggravating factors are usual, and it is enough if the excepted cause is one of them, provided that it was a substantial cause.[43] In the context of multiple causes, the court will weigh the causes and determined which were substantial.[44] The legislature did not confine the meaning in s 25(1A) to the 'major or most significant' cause, but rather 'substantially caused' requires that the contribution is real and of substance as distinct from insubstantial or nominal.[45]

The list of excepted actions in s 25(1A) is described in broad terms, but is exhaustive of the actions that could bar a worker's compensation claim.[46] Paragraph (a) enables employers to 'transfer, demote, discipline or counsel a worker or to bring about the cessation of a worker's employment' in a reasonable way. Paragraph (b) enables an employer to reasonably decline a worker's request for a promotion, transfer or benefit. Paragraph (c) enables 'reasonable administrative action taken in a reasonable manner.' Paragraph 25(1A)(d) applies the exception to an employer's failure to take any of the actions referred to in paragraphs (a), (b) or (c). Paragraph (e) protects employers who take reasonable actions under the workers' compensation legislation. The inclusions in s 25(1A) are broad, and a wide range of actions or inactions could potentially fall within the exception.

The paragraph (c) 'administrative action' exception is particularly difficult to define clearly. Acknowledging that it was difficult to know what parliament intended when it used the term 'administrative action' in the paragraph, Justice Underwood concluded that:

NSWWCCPD 130; *McCarthy v Department of Corrective Services* [2010] NSWWCCPD 27.

[41] Discussed in Joan Squelch and Robert Guthrie, 'The Australian Legal Framework for Workplace Bullying' (2010) 32(1) *Comparative Labor Law and Policy* 15, 28. See *Hart v Comcare* (2005) 145 FCR 29; *Commonwealth Bank of Australia v Reeve* (n 18); *Drenth v Comcare* (2012) 128 ALD 1, cited in *Pettiford v Comcare* [2014] AATA 95; *Lim v Comcare* [2016] FCA 709; *Simon Blackwood (Workers' Compensation Regulator) v Mahaffey* [2016] ICQ 10.

[42] *M v Allianz Australia Services Pty Ltd (No 2)* (n 24) [23].

[43] Ibid [30].

[44] *C v Department of Education* (n 28) [67].

[45] *M v Allianz Australia Services Pty Ltd (No 2)* (n 24) [32], citing with approval Chief Commissioner Carey's comments in *M v Healthscope (Tasmania) Pty Ltd* [2007] TASWRCT 29, [40].

[46] The same phrasing is used in *SA Act* (n 1) s 7(4). The legislative approach to the description of the excepted actions varies in other Australian jurisdictions.

> Perhaps it is best to let the definition emerge in the traditional common law way, the decision in each case being confined to its own facts.[47]

Although from a legal perspective this kind of case by case interpretation enables courts to make just decisions, from a practical perspective, it leaves some uncertainty about what kinds of administrative action could place the employer at risk of liability or the worker at risk of not being eligible for workers compensation. Any lack of clarity is problematic for all parties involved in workers compensation claims. Some Tasmanian decisions have shed light on what kinds of actions by employers fall within the definition of ‘administrative action’, drawing from case law in other jurisdictions.[48] In the Commonwealth legislation, the overall exception is described as ‘reasonable administrative action’ and a non-exhaustive list of actions falling within the definition is provided.[49] Commonwealth ‘administrative actions’ relate specifically to an employee, and are distinguishable from more general workplace actions that are a general feature of the workplace.[50] Where an employer takes action in relation to a class of employees, it will not constitute ‘administrative action’ specific to an individual within that class.[51] ‘Administrative action’ is very contextual in meaning, and requires consideration of the particular facts of the actions taken, the worker’s tasks and the functioning of the workplace.[52] A worker who receives instructions about how to perform their work is subject to ‘administrative action’, whereas the actual performance of work in accordance with those instructions is not.[53] ‘Administrative actions’ might include the allocation of workload, requirement to perform supervision duties, to attend and supervise additional activities, or to discipline others in accordance with workplace policy.[54] It is permissible for decision makers to look at the workplace as a whole and not simply the worker’s situation in isolation to determine what actions are ‘administrative’.[55] Part IV.A elaborates upon the case law findings about administrative action in Tasmania.

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[47] *Abrahams* (n 17) [9].
[48] *Burrage v Rural Press Limited* [2013] TASSC 43 (Wood J), citing *WorkCover Corporation of South Australia v Summers* (n 18); *Commonwealth Bank of Australia v Reeve* (n 18), all cited in *The State of Tasmania (DPIPWE) v B* [2015] TASWRCT 15, [19].
[49] *Commonwealth Act* (n 1) s 5A(2).
[50] *Pettiford v Comcare* (n 41) [48], citing *Commonwealth Bank of Australia v Reeve* (n 18); *Drenth v Comcare* (n 41).
[51] *Commonwealth Bank of Australia v Reeve* (n 18) [74], cited in David Richards, *Halsbury’s Laws of Australia* (LexisNexis, 2012) [450-1505]; *Reid v Workers’ Compensation Regulator* [2016] QIRC 47, [195].
[52] *Pataki v University of Tasmania* [2000] TASSC 144, [11] (Cox CJ), quoting the Commissioner who cited *Abrahams* (n 17); *Workcover Corporation of South Australia v Summers* (n 18). See also *M v Westpac Banking Corporation* [2011] TASWRCT 1, [11] citing *Summers* (n 18).
[53] *Department of Education v F* [2004] TASWRCT 43, cited in Guthrie (n 4) 542.
[54] *Department of Education v F* (n 53) [7].
[55] *Pataki v University of Tasmania* (n 52) [11] (Cox CJ), quoting the Commissioner.

Section 25(1A) refers to action in relation to 'a worker', which raises the question of whether it is necessary for the injured worker to be the person to whom reasonable management action was directed in order for the exception to apply. There is some authority in Queensland suggesting that managerial action 'mediating between workers or otherwise adjusting their relationships' rather than directed at the injured worker's own performance could fall within the exception.[56] However, it would not be intended that a worker injured by behaviour of another worker who has been the subject of managerial action would be denied compensation.[57] The Western Australian and Northern Territory legislation explicitly restricts the exception to injured workers subjected to the managerial action.[58] The Tasmanian provision is less explicit than WA and NT, but has been interpreted in a limiting way, requiring that the injured worker be the worker subjected to the employer's action. In *Friends' School Inc v Edmiston*, a teacher claimed that her psychological injury arose from the experience of witnessing and supporting a colleague through performance management.[59] Chief Justice Blow explored the Hansard debates during the introduction of s 25(1A) in 1995 and concluded that:

> …the mischief towards which the subsection was directed concerned the situation where a worker who has been the subject of reasonable action develops a stress-related medical disorder as a result, and claims compensation in respect of it.[60]

His Honour preferred a confined rather than expansive interpretation of the meaning of 'a worker' to be limited to the worker who developed the injury, because that was all that parliament intended.

> In my view s 25(1A) is ambiguous. It does not make clear whether or not it precludes the payment of compensation to a worker other than the worker who has been the subject of the reasonable action with which it is concerned. Having regard to the mischief towards which the subsection was directed, and the consequences that would flow if an interpretation favourable to employers were adopted, it is clear that it must be interpreted as precluding the payment of compensation only to a worker who has been the subject of the reasonable action to which it refers.[61]

Therefore, the worker was not excluded from claiming compensation, because the reasonable management action was taken towards her colleague rather than herself.

In summary, in Tasmania the exception of reasonable management action only applies where the reasonable management action was a significant

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[56] *Parker v Q-Comp* [2007] 185(13) *QGIG* 269, 272.
[57] *Parker v The President of the Industrial Court of Queensland & Q-Comp* [2009] QCA 120, [41].
[58] *WA Act* (n 1) s 5(4); *NT Act* (n 1) s 3(1) (definition of 'management action').
[59] *Friends' School Inc v Edmiston* (n 20).
[60] Ibid [10].
[61] Ibid [13].

cause of the injury. The employer must prove that the injury falls within the exception. ‘Reasonable management action’ is defined broadly, albeit exhaustively. The nature of an action (that is, whether it falls within the meaning of a paragraph of s 25(1A)) will be determined with reference to the broad workplace context. The exception only excludes claims by an injured worker who was themselves the subject of the reasonable management action.

III CASE IDENTIFICATION AND DATA ANALYSIS METHOD

Now that we have introduced the Tasmanian ‘reasonable management action’ exception, and the way that it has been interpreted, we explain the method we adopted to identify the case data that we use in Part IV.

A *Case identification*

We describe our case identification approach in our broad study in order to contextualise the way that the Tasmanian cases discussed in this article were identified and analysed. In phase one of our study we identified and reviewed relevant legislation pertaining to psychological injury for each state and territory in Australia, as well as the Commonwealth, to determine a) the extent to which the legislative provisions differed for each state and territory, and b) the terminology and key terms used in the legislation we could use to identify cases relevant to our enquiry. We then conducted key word searches of the Australasian Legal Information Institute (AustLII) database for each state and territory to develop a dataset of tribunal and court decisions for each jurisdiction related to claims about psychological injury and ‘reasonable management action’. The keywords for the Tasmanian search were ‘psychological’ and ‘disease’ and ‘employment’ and ‘reasonable’. The original case searches were conducted between May 2016 and November 2016 for published cases until November 2016. This produced an initial data set of 74 Tasmanian cases.

We then reviewed all cases in the initial data set to identify those which considered the question of whether ‘reasonable management action’ was taken and exclude those which did not. Those cases in which ‘reasonable management action’ was in issue were then reviewed in more detail to determine the types of claim being made (e.g. bullying, performance appraisal, alleged misconduct etc) and the findings of the tribunal or court for each case. Details were recorded in a spreadsheet. This method of case identification produced only 2 cases in Tasmania, as compared to 167 cases in Queensland. To identify additional cases relevant to our research questions that were not identified by the original search but that fitted our search criteria, we sourced cases directly from the Workers’ Rehabilitation and Compensation Tribunal in Tasmania from 2004 (from when decisions were published electronically) to identify published Tribunal decisions that concerned ‘reasonable management action’ for psychological injuries that

were considered in light of an application under s 81A of the Tasmanian Act. Section 81A enables an employer to make an interim application to the Workers' Rehabilitation and Compensation Tribunal to cease paying compensation on the basis that they have a 'reasonably arguable case' against the worker's claim.[62]

In June 2020 the search was replicated in AustLII to identify published cases between December 2016 and June 2020 and update the dataset. This revealed 17 relevant s 81A decisions but only one case involving a final hearing of the substantive issues.

The final data set includes 39 Tasmanian cases involving claims related to 'reasonable management action' but only seven that finally determined the question of whether the s 25(1A) exception applied.

B *Nature of the Tasmanian case data set*

Thirty-two of our cases involved applications under s 81A. The overwhelming majority of s 81A applications are finalised with a finding (by consent or determination) that the employer has a reasonably arguable case against the worker's claim.[63] None of the s 81A cases involved a final determination of the question of 'reasonable management action.' We identified only one case from our sample where a final determination of the claim was made following a s 81A outcome. In *M v Allianz Australia Services Pty Ltd (No 2)*[64] the employer successfully made a s81A application to cease making workers' compensation payments, and the matter later went to a full hearing of the substantive claim.[65]

Some very cautious indications may be suggested from comments in s 81A applications about actions that were accepted to be *capable* of amounting to reasonable management action. With qualification, the s 81A cases have been included in our analysis here. Because so many cases end after a s 81A hearing, Tasmania has relatively little published judicial guidance about what will be sufficient to establish the exception under s 25(1A). It would therefore be problematic to leave the s 81A indicators out of the analysis completely. The original set of interim decisions have been

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[62] For further discussion about this preliminary procedure and its implications for workers' compensation claimants, see Olivia Rundle, Megan Woods, and Laura Michaelson, 'Processes for disputing liability to pay workers' compensation for psychological injury' (2018) 7(2) *Journal of Civil Litigation and Practice* 105.

[63] Workers' Rehabilitation and Compensation Tribunal of Tasmania, *Annual Report 2014-2015* (Report, 2015) <http://www.workerscomp.tas.gov.au/annualreports> 7–8. In 2014-5 55% of applications were resolved with consensual agreement that the employer had a reasonably arguable case, and 39% ended with a determination that the employer had a reasonably arguable case. In only 1% of applications was there a positive finding that the employer did not have a reasonably arguable case.

[64] [2019] TASWRCT 35.

[65] Ibid [1].

analysed elsewhere in our consideration of the access to justice implications of the section 81A interlocutory procedure.[66]

Our discussion also includes decisions where a determination was made about whether the reasonable management action actually met the requirements of s 25(1A) (s 42 final decisions of the Workers' Rehabilitation and Compensation Tribunal). Our case identification method identified 7 cases falling into this category.

We acknowledge that there are some inherent and unavoidable limitations to our case data set. There are two ways that the data set does not accurately represent workers' compensation claims for psychological injury: availability of decisions and consensual dispute resolution.

First, not all tribunal and court decisions are available to us to include them in our research. We only have access to tribunal and court decisions that have been published electronically, and not all decisions are reported in written form. Our sample only represents some of the decisions that were made by Commissioners in the Workers' Rehabilitation and Compensation Tribunal. However, the decision to report a case is an indication that it is intended to act as a guide for negotiation and future determination of disputes. Therefore, our sample and our synthesis of those decisions serve as a legitimate guide for practitioners, managers, insurers and injured workers. We cannot, however, make assertions about the representativeness of our sample or the percentage of actual decisions in our identified data set.

The second limitation of our data set is that it is not representative of the outcomes of all disputes about 'reasonable management action' exceptions. In keeping with the approach of most courts and tribunals in Australia, the Workers' Compensation and Rehabilitation Tribunal of Tasmania encourages disputants to reach consensual agreement and resolve matters outside a formal arbitral hearing. To assist this process, the Tribunal conducts formal conciliation of matters as a compulsory step before a hearing before a Commissioner will be scheduled.[67] Parties will first engage in a preliminary conference[68] by telephone to (among other things) identify disputed issues, determine what parties need to do to resolve the claim, discuss the claim and attempt to find concessions, and discuss any other matter relevant to resolving the dispute efficiently.[69] A conciliation

[66] Rundle, Woods & Michaelson (n 62).
[67] Section 81A disputes are not required to be conciliated, as the hearing of those applications is made on the papers and conducted by telephone within one week of the application being made: *Tasmanian Act* (n 1) s 42B(1).
[68] *Tasmanian Act* (n 1) s 42C(2)(a).
[69] See Workers' Rehabilitation & Compensation Tribunal, Disputes other than of initial claim for Compensation http://www.workerscomp.tas.gov.au/procedures (30 March 2017).

conference is a face to face meeting. The parties are required to participate in conciliation.[70]

> The purpose of the conciliation conference is to provide an opportunity for open and "without prejudice" discussion based on all the available information to facilitate a resolution of the claim.[71]

Only a minority of claims are referred to the next stage of arbitration by the Tribunal. Most disputes are resolved by consent in conciliation. This means that there is no decision to be published or reported, and the outcome remains a private matter between the worker, employer and insurer. None of the conciliated outcomes are reflected in our data set. However, conciliating parties will make reference to reported cases such as those analysed in our data set when deciding what an appropriate agreed outcome will be in their disputes.

C *Case analysis method*

Our cases were analysed initially through a spreadsheet table of case characteristics, then in detail using the traditional legal method of manually highlighting relevant parts of the decisions and writing notes about each case. Our manual analysis focused upon both interpretation of s 25(1A) and its application to the individual circumstances of the cases. Once the review of individual cases was concluded, we conducted a cross-case analysis to identify how the decision-makers interpreted and applied the provisions. When reporting our findings, through quotes or summaries, we returned to the full text of each case to ensure that we were properly accounting for context.

It must be emphasised that the case by case approach is essential in this area of law, as the whole of the circumstances that surround management action will be taken into account when assessing whether or not those actions were reasonable. It is for this reason that we cannot give certain guidance to managers or injured workers about what kinds of actions are and are not reasonable in all circumstances. We can, however, explain what kinds of management actions have been treated as reasonable or unreasonable by tribunals and courts in a range of circumstances. We have tried to highlight significant contextual factors where we can, to maximise the practical usefulness of this analysis.

D *Overview findings*

Of the 39 Tasmanian cases analysed for our study, 32 involved an application under s 81A. Of those, 21 resulted in a preliminary finding that the employer had a reasonably arguable case,[72] one preliminary finding of

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[70] *Tasmanian Act* (n 1) ss 42B(1), 42E(4).
[71] Ibid s 42F.
[72] *St Helens Oysters Pty Ltd v C* [2007] TASWRCT 27 (12 July 2007); *Department of Education v B* [2008] TASWRCT 29 (11 November 2008); *Vodafone Pty Ltd v S* [2008]

no reasonably arguable case was overturned on appeal,[73] and in the remaining nine the worker successfully argued, or the tribunal concluded on the available evidence, that there was no reasonably arguable case for reasonable management action.[74]

There were only seven cases identified where reasonable management action was considered at a substantive hearing of the case by the Tribunal. In five the exception was established as a basis to exclude liability,[75] in one the tribunal's positive approach to the reasonable management exception was overturned by the Supreme Court on appeal,[76] and in one case reasonable management action was not established to be the substantial cause.[77] Within the small sample of cases, the exception had good rates of success as a defence to workers' compensation claims.

IV CASE LAW FINDINGS

In this part, we present our findings from the Tasmanian data set. First, we look at what kinds of behaviour amount to reasonable management action. We then explore how within the context of psychological conditions the causal connection between the reasonable management action and the

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TASWRCT 32 (27 November 2008); *B & E Ltd v B* [2010] TASWRCT 32 (25 October 2010); *Department of Justice v D* [2012] TASWRCT 10 (30 March 2012); *Cement Australia v H* [2013] TASWRCT 11 (28 February 2013); *The State of Tasmania (DPIPWE) v B* (n 48); *The State of Tasmania (DHHS) v T* [2015] TASWRCT 19 (12 May 2015); *The Trustee for Triple Three Unit Trust v L* [2016] TASWRCT 12 (19 April 2016); *State of Tasmania (Department of Education) v L* [2017] TASWRCT 15; *ALH Group Ld t/as Riverside Hotel v R* [2017] TASWRCT 21; *Westpac Banking Corporation v G* [2017] TASWRCT 22; *Baptcare Ltd v S* [2018] TASWRCT 16; *Exeter Golf Club Inc v R* [2018] TASWRCT 21; *Max Solutions v S* [2018] TASWRCT 27; *The State of Tasmania (TasTAFE) v C* [2018] TASWRCT 30; *Hydro Tasmania v A* [2018] TASWRCT 35; *Falbury Pty Ltd v K* [2019] TASWRCT 1; *J Boags & Son Brewing Pty Ltd v A* [2019] TASWRCT 7; *The State of Tasmania (Department of Health) v V* [2019] TASWRCT 6; *Moorilla Estate Pty Ltd v G*. [2019] TASWRCT 42; *The State of Tasmania (Department of Health) v G*. [2020] TASWRCT 7.

[73] *St Helens Oysters Pty Ltd v Coatsworth* (n 72); [2007] TASSC 90 (13 November 2007).

[74] *Department of Police & Emergency Management* [2006] TASWRCT 47 (8 December 2006); *Department of Education v J* [2010] TASWRCT 34 (20 December 2010); *Red Lion Security Pty Ltd v R* [2012] TASWRCT 41 (2 November 2012; *Learning Partners Pty Ltd v H* [2015] TASWRCT 3 (13 January 2015); *Vodafone Hutchinson Australia Pty Ltd v G* [2016] TASWRCT 6 (12 February 2016); *State of Tasmania (DHHS) v F* [2017] TASWRCT 30; *Toll Holdings v M* [2017) TASWRCT 2 upheld on appeal in *Toll Transport Pty Ltd v Medwin* [2018] TASSC 15; *State of Tasmania (Department of Communities Tasmania) v D* [2019] TASWRCT 22 ('*Toll Holdings*'); *Talbot Holdings (Tas) Pty Ltd T/As Kingston Pool and Wellness Centre v P* [2019] TASWRCT 30; *The State of Tasmania (TasTAFE) v A* [2019] TASWRCT 32.

[75] *Abrahams* (n 17); *S v Hobart Obgyn Pty Ltd* [2010] TASWRCT 2 (18 February 2010); *M v Westpac Banking Corporation* [2011] TASWRCT 1 (25 January 2011); *Friends' School Inc v Edmiston* (n 20); *M v Allianz Australia Service Pty Ltd (No 2)* (n 24).

[76] *Pataki v University of Tasmania* (n 52).

[77] *C v Department of Education* (n 28).

injury can be difficult to establish. Finally, we consider the ways that the question of reasonableness has been approached.

A *Actions capable of being 'reasonable management action'*

Section 81A decisions in our data set have given some indication of matters that would be *capable* of amounting to 'reasonable management action.' In *The State of Tasmania (DPIPWE) v B* the sending of an email cautioning an employee to comply with the employer's ICT policy could arguably be classified as either an action related to the workings or functioning of the workplace or an action with respect of the worker – employer relationship.[78] In *Vodafone Pty Ltd v S,* Commissioner Carey indicated that changed staffing levels and increased performance expectations were not administrative action within the meaning of s 25(1A)(c) but changed training opportunities and reduced autonomy about scheduled breaks were capable of falling within the meaning, if they caused a worker's illness.[79] In *B & E Ltd v B,* the alleged management action that was accepted to be capable of amounting to an exception included monitoring, supervision and management of a worker's performance within the context of a changed performance regime that aimed to increased overall productivity.[80] All of these actions related to the worker's performance, and the monitoring and sanctioning of that performance by management. The limitations of s 81A decisions, discussed above, must be emphasised.

More certain indications of behaviour that falls within the meaning of reasonable management action can be found from cases where a finding was actually made about that point. Section 25(1A) (a) and (b) describe specific management actions that are not difficult to define: transfer, demotion, discipline, counselling, ceasing a worker's employment, not promoting, transferring or providing a benefit in connection with employment.[81] Where there has been dispute, decision makers have consulted the dictionary for the meaning of terms such as 'discipline' or 'counsel.'[82] Questions by an employer about the hours a worker has been working, or whether they have completed a particular task, may not meet

[78] *The State of Tasmania (DPIPWE) v B* (n 48) [20].
[79] *Vodafone Pty Ltd v S* (n 72) [13].
[80] *B & E Ltd v B* (n 72).
[81] There is case law defining these terms in other jurisdictions. See Guthrie (n 4) 541, citing *Re Choo v Comcare* (1995) 39 ALD 399; *Re Quarry v Comcare* (1997) 47 ALD 113; *Arthur v Comcare* [2004] AATA 241. Tsekouras (n 40) [450-4115], citing *Manly Pacific International Hotel v Doyle* (1999) 19 NSWCCR 181; *White v Commissioner of Police* (2006) 3 DDCR 446; *Bottle v Wieland Consumables Pty Ltd* (1999) 19 NSWCCR 135; *Irwin v Director-General of School Education* (unreported, NSWCC, Geraghty J, No 14068/97, 18 June 1998); *Dunn v Department of Education and Training* (2000) 19 NSWCCR 475; *Kushwaha v Queanbeyan City Council* (2002) 23 NSWCCR 339; *AMP Bank Ltd v Ayoub* [2010] NSWWCCPD 37; *Chisholm v Thakral Finance Pty Ltd* [2011] NSWWCCPD 39.
[82] *ALH Group Ld t/as Riverside Hotel v R* (n 72) [27]–[28].

the definition of discipline, but fall within the meaning of counselling.[83] These categories apply to management actions that guide or advise workers in employment related matters.

Of all of the provisions of s 25(1A), paragraph (c) regarding 'administrative action' has given rise to the most scrutiny when applied to the facts. In *Abrahams v St Virgil's* College the sending of a letter informing an employee that they needed to attend a meeting in regard to specified matters relating to performance was concluded to be administrative action (or counselling).[84] The letter set out the anticipated topics for discussion, including the worker's absence from staff meetings, non-performance of co-curricular duties and actions in relation to a work experience programme that he was supposed to manage.[85]

In *M v Allianz Australia Services Pty Ltd (No 2)*[86] the worker's manager called her to advise that she was required to attend a meeting the following day concerning restructuring plans and the implications for her future employment. The meeting would be held off the work site and both the manager and a representative from human resources would be present. A proposal was presented to the worker at the meeting (with both redeployment or redundancy foreshadowed). The Commissioner accepted that the meeting and the telephone call to give notice of it constituted administrative action.[87] The psychological condition was suffered following and as a result of the telephone call.[88]

In *M v Westpac Banking Corporation* weekly team meetings that were held in accordance with a structured performance management programme, to discuss team and individual performance, were concluded to fall within the definition of administrative action, as they were 'workings or functionings of the workplace.'[89] A comment by a supervisor in a team meeting that a worker's response to a question was inappropriate and that she needed to focus on improving her performance:

> …given the intent of the question and the nature of the considered response required, …in the circumstances…was a reasonable comment and rebuke of the worker.[90]

The Commissioner acknowledged that the rebuke in front of other workers was embarrassing for the worker, but it was necessary (and reasonable) for the supervisor to 'highlight to the worker and to the group the need to

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[83] *Hydro Tasmania v A* (n 72) [23]–[24].
[84] *Abrahams* (n 17) (appeal from the Tribunal's decision was dismissed).
[85] Ibid 4.
[86] (n 24).
[87] Ibid [40].
[88] A telephone call to inform a worker that a complaint had been made against her was treated as administrative action in *State of Tasmania (Department of Education) v L* (n 72).
[89] *M v Westpac Banking Corporation* (n 75) [12].
[90] Ibid [18].

properly comply with the employer's expectations of these team meetings.'[91] The structure of the team meetings was clearly understood by all employees and was consistent from week to week.

Reasonable management action findings highlight the link between the action and management's desire to guide and/or sanction the worker's performance. The examples explored here illustrate the way that the exception is intended to operate. Employers, through their managers, need to be able to appropriately guide and sanction workers' behaviour in order to set and maintain expectations related to performance and workplace behaviour, even where that guidance or sanction may cause discomfort, embarrassment or psychological distress to a worker. Workers need clarity about what behaviours by their managers are and are not appropriate. The following management actions are, or are likely to be considered reasonable management behaviours even if they cause psychological injury (provided that they are done reasonably – see IV.C below):

- Transfer, demotion, discipline, counselling, ceasing a worker's employment, not promoting, transferring or providing a benefit in connection with employment (as stated in s 25(1A)(a)&(b));
- Sending a letter to an employee requiring them to attend a meeting to discuss specific issues about their performance;[92]
- Telephoning a worker to inform and invite them to a meeting to be held the following day to discuss their employment;[93]
- Weekly team meetings as part of a structured performance management programme;[94]
- Rebuking a worker for not engaging appropriately during a weekly performance management team meeting, for the purpose of enforcing expectations of those meetings;[95]
- Sending an email cautioning an employee to follow organisational policies (re ICT use);[96]
- Changed training opportunities;[97]
- Reduced autonomy about scheduled breaks;[98]

[91] Ibid [18].
[92] *Abrahams* (n 17).
[93] *M v Allianz Australia Services Pty Ltd (No 2)* (n 24).
[94] *M v Westpac Banking Corporation* (n 75).
[95] Ibid.
[96] *The State of Tasmania (DPIPWE) v B* (n 48).
[97] *Vodafone Pty Ltd v S* (n 72).
[98] Ibid.

- Performance management to monitor achievement of increased productivity expectations.[99]

The following management actions may not fall within the exception to liability:

- Changed staffing levels;[100]
- Increased performance expectations.[101]

B *Establishing “substantial cause” in the context of multiple causes*

Even where the employer establishes that they took reasonable management action, they must also establish that ‘prima facie, the worker’s illness substantially arose from this … action.’[102] Most psychological conditions are attributable to more than one cause and it can be extremely difficult to establish which causes are most significant. Not all causes will always be work related, and within work related causes, only some may be ‘reasonable management action’ causes. It is not, however, necessary to establish that the excepted cause was the only ‘substantial’ cause of the injury, or to measure it against other substantial causes.[103]

The cases demonstrate that the assessment of multiple causes of psychological injury requires careful and detailed consideration. Employers may meet a barrier to the ‘reasonable management action’ exception unless they can establish that the excepted action was a significant cause of the worker’s injury. Where there is a clear other causative stressor, the employer will need to argue that the ‘reasonable management action’ stressor was still significant in causing the injury. Decision makers will dissect multiple causes and determine which were ‘reasonable management actions’ and which were not, then consider which were significant.

The question of whether there is a reasonably arguable case of a substantial causative link being established will be relevant on a s 81A application. However, the question on such an interlocutory application will only be whether the ‘reasonable management action’ cause is *capable* of being found to be substantial within the applicable causes. Where it is clearly *incapable* of being a substantial cause in the circumstances, that could be grounds for refusal of the s 81A application. In *Department of Police & Emergency Management* the employer failed to establish that there was a reasonably arguable case of a substantial causative link between the ‘reasonable management action’ and the injury.[104] The employer’s medical

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[99] *B & E Ltd v B* (n 72).
[100] *Vodafone Pty Ltd v S* (n 72).
[101] Ibid.
[102] *Department of Police and Emergency Management* [2006] TASWRCT 47 [16].
[103] *M v Allianz Australia Services Pty Ltd (No 2)* (n 24) [29].
[104] *Department of Police and Emergency Management* (n 102) [16].

expert report stated that the worker's psychiatric illness had developed 'as a result of earlier exposure to violent death', not a meeting and its outcome (which had been accepted to be reasonable management action).[105] Therefore, there was no reasonably arguable case raised by the employer against the claim. In *Cement Australia v H* Commissioner Chandler noted that the available evidence established that the substantial causative factor was the death of the worker's brother, not the meeting where he was informed that he would be required to work at the site of his brother's death.[106] This, coupled with the lack of evidence of the reasonableness of the meeting, meant that the Commissioner did not make a reasonably arguable case determination on the basis of 'reasonable administrative action.'[107]

The timing of the suffering of the psychological injury or disease will sometimes reveal the substantive cause. In *M v Allianz Australia Services Pty Ltd (No 2)*[108] the worker was first incapacitated on the day of the telephone call advising her that there would be a meeting. Consequently, the Commissioner concluded that the only contact between the worker and her employer that day was the telephone call, so therefore the call was the substantial cause of her condition.[109]

Final determinations of 'reasonable management action' highlight the complexity of unravelling causes in order to identify the substantial cause. The identification of cause can be particularly difficult where a worker has a pre-existing psychological condition. Where a worker has a pre-existing mental condition, although this may explain why a workplace meeting caused the condition to manifest into a clinical psychological injury, the disease may still be found to have been caused or aggravated by employment.[110]

It is particularly difficult to establish the required causal link where there are multiple stressors. In *C v Department of Education* the worker had a history of mental illness, dating back to when a major fire destroyed the primary school classroom that she taught from. Her inability to cope with her work was related to her psychological condition. There were multiple identified causes of the worker's psychological condition, including performance management and disciplinary actions regarding her habitual lateness of work, her deteriorating relationship with her supervisor, the

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[104] *Department of Police and Emergency Management* (n 102). See also *Toll Holdings* (n 74).
[105] *Department of Police and Emergency Management* (n 102) [16].
[106] *Cement Australia v H* (n 72) [13].
[107] There was, however, a 'reasonably arguable case' determination on the basis that there was evidence supporting a defence of insufficient connection between the injury and employment: Ibid [13]–[14].
[108] (n 24).
[109] Ibid [105].
[110] *M v Westpac Banking Corporation* (n 75) [9].

Department's decision not to grant her a transfer to another school when she requested it, the inherently stressful nature of her work, and personal circumstances.[111] The Commissioner rejected a claim that a Code of Conduct investigation regarding her lateness caused her injury, although accepted that it did worsen her illness.[112] The inherently difficult nature of being a primary school teacher was accepted to be a stressor that affected the worker's condition.[113] The worker's personal stressors, being effectively a full time working sole parent with an overly dependent daughter, did contribute to her stress and lack of punctuality.[114] The refusal to grant a transfer was characterised as a 'last straw' factor, and therefore in the circumstances was not a substantial cause of the worker's illness.[115]

The Commissioner concluded that the deterioration in the relationship between the worker and her supervisor was a consequence of the supervisor's performance management role and actions, so should be treated as part of the performance management stressor rather than an additional cause.[116] This left the performance management stressor as the remaining factor to consider. With reference to *Abrahams v St Virgil's College*,[117] the Commissioner explained that the defence of s 25(1A)(c) 'reasonable administrative action taken in a reasonable manner by an employer in connection with a worker's employment' was not available to the employer:

> … insofar as the worker's illness is attributable to the nature of her work and her difficulties in coping with it. In the result, that provision can only have application in this case if I can be satisfied that the worker's illness arose substantially from the performance management process related to the worker's tardiness. I have identified above a range of other factors which I consider have all made a contribution to the onset of the worker's illness, some more so than others. In these circumstances I cannot be satisfied that the worker's illness substantially arose from that one contributing factor to which s 25(1A)(c) may apply.[118]

In other words, the requirement of 'arises substantially from' in s 25(1A) could not be established. Because there were a range of work related factors and the worker's difficulties in coping with work that contributed to her psychological injury, the reasonable management action cause was not clearly a significant cause of the worker's injury. There were many contributing causes that fell outside the reasonable management action definition and were still employment related. Therefore, the employer was

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[111] *C v Department of Education* (n 28) [51].
[112] Ibid [60].
[113] Ibid [62].
[114] Ibid [63].
[115] Ibid [66]–[67] citing *Harpur v State Rail Authority (NSW) & Anor* (2000) NSWCCR 256, 268.
[116] Ibid [56].
[117] (n 17).
[118] *C v Department of Education* (n 28) [69].

ordered to make weekly payments to the worker in accordance with the Act.[119]

C *Assessing reasonableness*

Once a decision maker is satisfied that the behaviour of an employer meets the definition of management action, the next question is to determine whether or not the action was reasonable and taken in a reasonable manner. Whether or not a management action is reasonable will be determined by taking into account all of the subjective facts, but applying an objective test of reasonableness.[120] The details of what actually happened must be interrogated.[121] The decision maker on a final determination hearing must determine whether the specific action taken was reasonable. The question is not whether the management action was faultless, or other more reasonable actions might have been taken.[122] Nor is it necessary for the action to be taken in a 'worker-friendly' manner nor with 'the utmost sensitivity and delicacy.'[123] 'Reasonableness' will be assessed with reference to procedural fairness principles such as consultation, notice and the extent to which the worker was supported around the employer's management action.[124] As noted in II.B above, evaluation of the reasonableness of managerial action is not otherwise conducted in workers' compensation jurisdictions, but is core to the Fair Work jurisdiction. A comparison of approaches between the jurisdictions falls outside the scope of this paper. Some of the Tasmanian cases we analysed highlighted issues around reasonableness.

In *Pataki v University of Tasmania*, a university lecturer was persuaded to relocate from Launceston to Hobart with representations that his workload would be similar to his current workload.[125] He alleged that the primary cause of his injury was that after he had committed to the relocation he was told that he would be teaching a heavier load. He renegotiated the new workload expectations to some extent, but remained dissatisfied about the amount of work he was being expected to do on a half time appointment. The questions were (a) whether the manager had misrepresented the workload and (b) whether this was 'reasonable administrative action taken in a reasonable manner.' Both questions needed to be answered. Chief

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[119] Ibid [69].
[120] *Pettiford v Comcare* (n 41) [50]; *Prizeman v Q-COMP* (2005) 180 QGIG 481; *WorkCover Queensland v Kehl* (2002) 70 QGIG 93; *Kean v Workers Rehabilitation and Compensation Corporation* (1998) 71 SASR 42, 63, cited in *M v Allianz Australia Services Pty Ltd (No 2)* (n 24) [41].
[121] *S v Hobart Obigyn Pty Ltd* (n 75) [20].
[122] *Davis v Blackwood* [2014] ICQ 009, [47]; *Worlley v State of Victoria (Workcover)* [2015] VMC 5, [44].
[123] *Headway Support Services v Wickham* [2009] TASSC 99, [13], cited in *M v Allianz Australia Services Pty Ltd (No 2)* (n 24) [42].
[124] John Wilson, 'Now, is that "Reasonable Management Action" or "Unreasonable Management Conduct"?' (2012) 225 *Ethos* 16.
[125] *Pataki v University of Tasmania* (n 52).

Justice Cox said in the Supreme Court of Tasmania on appeal, that even if the Tribunal decided that the manager had not been deceitful in misrepresenting the extent of the increased workload:

> …it was still required to consider whether his conduct in imposing a different workload was, having regard to the extent of the difference found by it, reasonable administrative action taken in a reasonable manner.[126]

Because the Commissioner failed to make a specific finding about whether imposing a workload different to the one promised was reasonable administrative action, and because the imposition of the unexpected workload was the most significant factor contributing to the injury, there was an appealable error.[127] The matter was remitted for rehearing.[128] This case demonstrates that assessing reasonableness is essential to properly apply the exception.

The telephone call advising the worker about a meeting to discuss restructure and its consequences for her position, by the worker's manager, was found to be reasonable in *M v Allianz Australia Service Pty Ltd (No 2)*.[129] The telephone call was undertaken in a reasonable manner, giving the worker around one day's notice, the identity of people who would attend, time and location, and sufficient but not too much detail about the topics to be discussed.[130]

The procedures through which a performance management process was conducted were considered in detail in *S v Hobart Obgyn Pty Ltd.*[131] The workplace was a small business of medical practitioners and the worker was the practice manager.[132] The worker did not have extensive prior experience in the medical practice environment, but believed that she was performing her work reasonably well until the management action that caused her psychological injury occurred. The directors of the practice developed concerns about the worker's performance and addressed the issue by one of the five directors meeting the worker and advising her that the directors had some concerns about a number of (unspecified) issues regarding the smooth running of the office and how well she was managing her role. He provided the worker with a form and asked her to fill it in and return to him. The form invited the worker to give her perspective of her performance against key performance indicators. The director:

> …stated that the directors would perform the same assessment in order that their perception on the various performance indicators could be compared

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[126] Ibid [13] (Cox CJ).
[127] Ibid [15].
[128] Ibid.
[129] *M v Allianz Australia Services Pty Ltd (No 2)* (n 24) [106].
[130] Ibid [107].
[131] *S v Hobart Obgyn Pty Ltd* (n 74).
[132] Ibid [4].

> to her own. … she was told that she would get a summary of the directors' assessment and that there would then be a meeting to discuss the issues.[133]

The director declined to outline details of the issues of concern. The worker was invited to bring a support person to the meeting, as there would be five directors and only one of her present.

The meeting was followed by an email from another director the following day (Thursday) that asked her to complete the self-assessment form by the Friday, informed her that she would be provided with a summary of the directors' assessments on the same form, and that the completed forms would provide the framework for discussions at the performance management meeting the following week.

The worker suffered her injury following the meeting, became insistent that she wanted the directors to disclose the details of their concerns to her before she completed the form, thought that her employment was in jeopardy, and believed when she attended work the following morning that other employees knew that she was being subjected to a performance management process. Despite the worker's response, the Commissioner observed:

> I can see nothing unreasonable about the employer's intent in having confirmed amongst the directors that there were various issues of concern to then proceed by way of this mutual KPI assessment, using this to crystallise what were the actual issues identified by this process and then to meet to discuss those issues or to plan how they could be addressed. This was the clear evidence of the intended process given by Drs Brodribb and Sherwood which I accept. I do not accept that it was necessary or even appropriate for a list of supposed or mentioned issues to be introduced at the initial stage. The directors had experience in using this process in assessing and reviewing performance. There was no evidence adduced that it was not, from a generally accepted human resource management viewpoint, an appropriate or reasonable process.[134]

The Commissioner also formed the opinion that the employer's refusal to bring the meeting forward to the Friday was not unreasonable in the circumstances. The practice was particularly busy on Fridays, and the intent was that the worker would have an opportunity to consider the employer's form before the meeting.[135] There were several email exchanges, wherein the worker expressed frustration and concern, and in which the directors maintained their insistence that the performance management process proceed as they had determined and informed the worker. The Commissioner also found that the employer's refusal to alter the process was reasonable in the circumstances.[136]

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[133] Ibid [23].
[134] Ibid [26].
[135] Ibid [29].
[136] Ibid [30].

In assessing the reasonableness of the management actions, the Commissioner also took into account the directors' knowledge of the worker's susceptibility to a psychological injury at the time that they initiated the performance management process.

> Although there was no specific submission by counsel on this point I consider that it is necessary for me to determine whether or not there was anything particular or specific about the worker's circumstances or mental health that ought to have been considered by the employer in instituting any administrative action they might take.[137]

Although the worker had experienced difficult working relationships with some of the other administrative staff over the months preceding the initial meeting, and may not have been coping well, the Commissioner did 'not accept that as at September 2008 the employer necessarily had any knowledge that the worker was distressed, stressed or in any way susceptible to injury (disease) due to difficulties that she was having within the workplace.'[138] No evidence was tendered that the worker made complaint about her treatment by others in the workplace or advised her employer that she was struggling or having difficulty coping.

The objective test of 'reasonableness' is applied within the subjective context of the specific case. Whether a management action was reasonable must be considered in great detail – it cannot be assumed that an employer's changed performance expectations were reasonable, even if the way that they were communicated was. The psychological health of a worker will be relevant in determining whether management behaviours are reasonable. This case was arguably borderline in that management could have responded differently to the worker's request for earlier notice of the nature of the concerns about her performance, and that the time between notice and the meeting was shortened, without undermining the integrity or framework of the performance management framework.

V Conclusion

The small number of Tasmanian cases that we identified through our case identification method help to demonstrate the way that s 25(1A) has been applied. The exception provisions have been applied in ways that capture a range of management actions in the course of guiding or sanctioning a worker's behaviour or performance. There must be a link to the worker's employment.

The purpose of the exception is to protect employers from liability for psychological injuries caused by reasonable management action.[139] Our study relies upon reported cases that proceeded to hearing and therefore

[137] Ibid [28].
[138] Ibid [28].
[139] Rundle, Woods & Michaelson (n 62).

excludes the majority of workers' compensation claims. However, we can draw some observations about the outcomes reached in the cases that were disputed to the hearing stage and reported. The preliminary determination of s 81A applications is a significant exit point for disputed worker's compensation claims, and the overwhelming majority of these applications are finalised on the basis that there is no liability to pay workers' compensation until further order.[140] For those matters that proceeded to a hearing of the substantive issues and therefore determined whether or not the exception applied, the employer succeeded in establishing the exception in five of the seven cases in our sample. The exception in workers' compensation claims for psychological injury is a powerful barrier to claiming.

One of the significant difficulties in psychological injury cases is in establishing what, if anything, were the most significant causes among a multitude. The need for the employer to establish that the injury 'arose substantially from' the reasonable management action was a barrier in *C v Department of Education.*[141] The Tribunal was not able to conclude that the management action was a substantial cause. Causation may be particularly difficult in cases where the workers has a pre-existing psychological condition that impairs their ability to perform their work competently.

The reasonableness of management behaviour is another important element of the reasonable management action defence. In *Pataki v University of Tasmania*[142] the Supreme Court highlighted the need for the Tribunal to make a specific finding about whether or not the management action was reasonable, and returned the case back for rehearing as the Commissioner had not done so. *S v Hobart Obgyn Pty Ltd*[143] shows how management may reasonably refuse to accede to a worker's request for changes to the way that their performance is managed, and if the procedure is reasonable, and causes injury, then the exception may apply.

Although we cannot make any generalisations from our findings, presenting them here should be of some assistance to human resources and legal practitioners whose work relates to workers' compensation claims. Examples can help illustrate the way that the law works in action, and demonstrate the application of legislative provisions.

The limitations of the available data that we encountered in this study can inform future research. Our study's goal was to elaborate upon the legal meaning of 'reasonable management action' in workers' compensation cases, by focusing on judicial and tribunal member determinations. These are the only decisions that have the authority of having been finalised

[140] Ibid
[141] (n 28).
[142] (n 52).
[143] (n 74).

through the process of a formal hearing. Our study revealed the difficulty in accessing tribunal decisions when there are insufficient resources for all of them to be published in writing. The informality and expedience of tribunals has benefit, but lack of public record of decisions made is a detriment. Furthermore, decisions about ‘reasonable management action’ are much more likely to be made by the people in dispute, with guidance from their lawyers, than by third parties. Those decisions are made in private within confidential processes. A fuller picture of the legal meaning of ‘reasonable management action’ will require creative research methods that will capture some of these data. There may also be scope for research drawing together the framing and evaluation of ‘reasonable management action’ across industrial relations claims, workers’ compensation, and empirical work in the psychological and management disciplines.