

# HIGH COURT OF AUSTRALIA

FRENCH CJ,  
BELL, GAGELER, KEANE AND NETTLE JJ

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COMCARE

APPELLANT

AND

PETA MARTIN

RESPONDENT

*Comcare v Martin*  
[2016] HCA 43  
9 November 2016  
S142/2016

## ORDER

1. *Appeal allowed.*
2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 30 November 2015, except insofar as order 2 sets aside order 5 of Griffiths J made on 8 January 2015, and in their place order that the appeal be otherwise dismissed.*
3. *The appellant pay the respondent's reasonable costs of the appeal to this Court and of the proceedings before Griffiths J and in the Full Court of the Federal Court of Australia.*

On appeal from the Federal Court of Australia

### **Representation**

T M Howe QC with A P Berger for the appellant (instructed by Lehmann Snell Lawyers)



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L King SC with L T Grey for the respondent (instructed by Maurice Blackburn Lawyers)

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## CATCHWORDS

### **Comcare v Martin**

Workers compensation – *Safety, Rehabilitation and Compensation Act 1988* (Cth), s 5A(1) – Meaning of injury – Where employee suffered aggravation of mental condition in reaction to perceived consequence of failure to obtain promotion – Whether aggravation suffered "as a result of" reasonable administrative action.

Words and phrases – "as a result of", "common sense' approach to causation", "disease", "injury".

*Safety, Rehabilitation and Compensation Act 1988* (Cth), ss 5A, 5B.



1 FRENCH CJ, BELL, GAGELER, KEANE AND NETTLE JJ. This appeal concerns the causal connection required to meet the exclusion from the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ("the Act") of an injury suffered by an employee "as a result of" reasonable administrative action. The causal connection was met in circumstances where an employee suffered an aggravation of a mental condition in reaction to a perceived consequence of her failure to obtain a promotion.

### The Act

2 The Act makes Comcare liable to pay compensation in respect of an "injury" suffered by an employee if that injury results in incapacity for work<sup>1</sup>. As the Act stood in 2012, after amendment by the *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007* (Cth) ("the Amending Act"), "injury" had the meaning given by s 5A and "disease" had the meaning given by s 5B.

3 Section 5A provided:

"(1) In this Act:

***injury*** means:

(a) a disease suffered by an employee ...

but does not include a disease ... suffered as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment.

(2) For the purposes of subsection (1) and without limiting that subsection, ***reasonable administrative action*** is taken to include the following:

...

(f) anything reasonable done in connection with the employee's failure to obtain a promotion, reclassification, transfer or benefit, or to retain a benefit, in connection with his or her employment."

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1 Section 14(1).

French CJ  
Bell J  
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4 Section 5B provided:

"(1) In this Act:

**disease** means:

- (a) an ailment suffered by an employee; or
- (b) an aggravation of such an ailment;

that was contributed to, to a significant degree, by the employee's employment by the Commonwealth or a licensee.

...

(3) In this Act:

**significant degree** means a degree that is substantially more than material."

The Act defined "ailment" to mean "any physical or mental ailment, disorder, defect or morbid condition (whether of sudden onset or gradual development)" and defined "aggravation" to include "acceleration or recurrence"<sup>2</sup>.

5 For the purposes of the Act, an employee was taken to have sustained an injury constituted by a disease or an aggravation of a disease on the day of the first to occur of: the employee first seeking medical treatment for the disease or the aggravation; or the disease or the aggravation resulting in incapacity for work<sup>3</sup>.

#### The facts

6 Ms Martin was employed by the Australian Broadcasting Corporation. She was initially appointed in 2010 to a position as producer of a local morning radio program in Renmark in South Australia. In that position, she was under the direct supervision of Mr Bruce Mellett, who presented the program.

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2 Section 4(1).

3 Section 7(4).

French CJ  
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Nettle J

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7 Ms Martin did not have a good working relationship with Mr Mellett. Mr Mellett evidently thought aspects of Ms Martin's work unsatisfactory. Ms Martin thought Mr Mellett bullying and harassing and thought their working environment "toxic". Mr Mellett denied Ms Martin's allegations of bullying and harassment and when she later made a formal complaint her allegations were found by management to be unsubstantiated.

8 Ms Martin attempted to remove herself from Mr Mellett's supervision. She applied for a number of positions outside Renmark, but was unsuccessful. Then, in 2011, still holding the substantive position of producer of the local morning radio program and still based in Renmark, Ms Martin was appointed to act temporarily in the higher position of cross media reporter. In that position, Ms Martin was supervised by Ms Carol Raabus, who was based in Hobart.

9 The position of cross media reporter in which Ms Martin was acting was advertised for permanent appointment in 2012. Ms Martin applied. Her main reason for applying was to avoid having to work again under Mr Mellett's direct supervision.

10 Ms Martin was interviewed for the permanent position of cross media reporter by a selection panel which was chaired by Ms Raabus and which included Mr Mellett. The selection panel decided not to appoint Ms Martin to the permanent position.

11 Ms Raabus informed Ms Martin in a telephone conversation that she had not been appointed. Their conversation then turned to Ms Martin returning to her substantive position as producer of the local morning radio program under the supervision of Mr Mellett. Ms Martin at that point, in her words, "broke down uncontrollably". She immediately went home. The next day, she sought medical treatment.

12 Ms Martin was diagnosed as suffering from an "adjustment disorder", which rendered her unfit for work. After Comcare refused her claim for compensation, Ms Martin appealed the merits of Comcare's decision to the Administrative Appeals Tribunal.

### The Tribunal

13 There was no dispute before the Tribunal that Ms Martin suffered a disease within the meaning of s 5B(1). The Tribunal identified her disease as an adjustment disorder, appropriately described as a mental condition, and therefore as an ailment within s 5B(1)(a).

French CJ  
Bell J  
Gageler J  
Keane J  
Nettle J

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14 The Tribunal found that Ms Martin was probably suffering from an adjustment disorder during the period in which she was acting in the position of cross media reporter. The Tribunal found that her mental condition deteriorated significantly when she was notified that she had not been appointed to the position of cross media reporter<sup>4</sup>. Ms Martin relied on the deterioration as constituting the injury which gave rise to her incapacity for work and which founded her claim to compensation.

15 On the findings it made, the Tribunal should have identified Ms Martin's disease as the significant deterioration of her adjustment disorder, and therefore as an aggravation of an ailment within s 5B(1)(b). But nothing turns on that minor misidentification.

16 What is important is that there was no dispute before the Tribunal that the deterioration of Ms Martin's adjustment disorder was contributed to, to a significant degree, by her employment. Just how her employment contributed to that deterioration was the subject of psychiatric evidence, albeit that the evidence was adduced in the context of another dispute.

17 That dispute was about whether the disease within the meaning of s 5B(1) which Ms Martin suffered was excluded from the definition of injury in s 5A(1). Comcare contended, and Ms Martin disputed, first that the deterioration of her mental condition was suffered "as a result of" the decision not to appoint her to the position of cross media reporter and second that the decision not to appoint her answered the description of reasonable administrative action taken in a reasonable manner.

18 In response to the first of those contentions of Comcare, Ms Martin contended as a matter of fact that "the worsening of her condition was caused by her realisation that she would be returning to the supervision of Mr Mellett, a prospect she dreaded, and any contribution caused by her disappointment with the loss of an opportunity for career advancement was immaterial"<sup>5</sup>. That fact, Ms Martin contended, was sufficient in law for the Tribunal to conclude that the deterioration of her mental condition was not suffered "as a result of", within the meaning of s 5A(1), the decision not to appoint her to the position of cross media reporter.

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4 *Martin v Comcare* (2014) 64 AAR 224 at 231 [37], 231-232 [42].

5 *Martin v Comcare* (2014) 64 AAR 224 at 233 [51].

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19 In the result, the Tribunal accepted Ms Martin's contention of fact but rejected her contention of law.

20 Making findings of fact, the Tribunal adopted the opinion of two psychiatrists who gave evidence before it. That opinion was that what caused Ms Martin to "decompensate" when notified by Ms Raabus that she had not been appointed to the position of cross media reporter was Ms Martin's "realisation" that the decision not to so appoint her meant that she would be returning to her substantive position under Mr Mellett's supervision, where the bullying and harassment which she felt that she had experienced would continue. Any contribution arising from her disappointment at the loss of the opportunity to advance her career through appointment to the permanent position of cross media reporter, the Tribunal accepted, was so minor as to be immaterial<sup>6</sup>.

21 The Tribunal stated<sup>7</sup>:

"A number of consequences flowed from Ms Martin's failure to obtain the promotion to the position of cross media producer. These included:

- Ms Martin would be required to return to her substantive position and work under the direct supervision of Mr Mellett; and
- Ms Martin would be denied a small pay increase and the opportunity to further develop her skills in cross media production."

22 The Tribunal continued<sup>8</sup>:

"The question posed by s 5A(1) is whether the claimed ailment was suffered as a result of the nominated action, in this case the failure to obtain the promotion. It matters not which of the anticipated consequences of the offending decision was most likely to have troubled Ms Martin. That her reaction to the offending decision was primarily attributable to her dread of returning to work under Mr Mellett and not her

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6 *Martin v Comcare* (2014) 64 AAR 224 at 234 [56], 234-235 [58].

7 *Martin v Comcare* (2014) 64 AAR 224 at 235 [60].

8 *Martin v Comcare* (2014) 64 AAR 224 at 235 [61].

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disappointment with lack of career advancement, is irrelevant. In her mind the former was a direct and foreseeable consequence of the decision."

23 The Tribunal was satisfied on that basis "that one of the operative causes of Ms Martin's adjustment disorder was her failure to obtain the position of cross media reporter" and concluded that "Ms Martin's condition was 'a result of' that action"<sup>9</sup>.

24 The Tribunal nevertheless went on to conclude that Mr Mellett's participation in the decision-making process resulted in the decision not to appoint Ms Martin to the position of cross media reporter not having been taken in a reasonable manner. The consequence was that the exclusion from the definition of injury in s 5A(1) had no application despite the causal connection between the identified administrative action and the suffering of the identified disease being met. The Tribunal decided accordingly that Ms Martin had suffered an injury within the meaning of s 5A(1) for which Comcare was liable to pay compensation.

### The Federal Court

25 Comcare appealed to the Federal Court. That appeal was limited to questions of law<sup>10</sup>. Comcare challenged the Tribunal's conclusion that the decision not to appoint Ms Martin to the position of cross media reporter was not taken in a reasonable manner. Ms Martin by notice of contention challenged the Tribunal's conclusion that she suffered her disease as a result of that decision.

26 The primary judge was Griffiths J<sup>11</sup>. Finding that the Tribunal's conclusion, that the decision not to appoint Ms Martin to the position of cross media reporter was not taken in a reasonable manner, was affected by error of law, his Honour allowed Comcare's appeal. Finding no legal error in the Tribunal's conclusion that Ms Martin suffered her disease as a result of that decision, his Honour dismissed Ms Martin's notice of contention. As a consequence of allowing the appeal, his Honour made orders setting aside the

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9 *Martin v Comcare* (2014) 64 AAR 224 at 235 [62].

10 Section 44 of the *Administrative Appeals Tribunal Act* 1975 (Cth).

11 *Comcare v Martin* (2015) 148 ALD 312.

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Gageler J  
Keane J  
Nettle J

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decision of the Tribunal and remitting the matter to the Tribunal to be heard and determined according to law.

27 Ms Martin appealed to the Full Court. Ms Martin challenged the conclusion of Griffiths J that the Tribunal erred in law in concluding that the decision not to appoint her to the position of cross media reporter was not taken in a reasonable manner, leading to his allowing of Comcare's appeal. Ms Martin also challenged the conclusion of Griffiths J that the Tribunal did not err in law in concluding that the disease she suffered was a result of that decision, leading to his dismissal of her notice of contention.

28 Ms Martin's notice of appeal to the Full Court framed her challenge to the dismissal of her notice of contention as follows:

"The primary judge erred in dismissing [Ms Martin's] notice of contention, when on the correct construction of s 5A(1) and the primary factual findings made by the Tribunal (congruent with the opinions of both psychiatrists who gave evidence), [Ms Martin's] adjustment disorder was not a result of the failure of [Ms Martin] to obtain the promotion for which she had applied, but a result of the fact that she was to be sent back to work under the supervision of Mr Mellett, whom she identified as the principal source of the bullying and harassment she believed she had earlier suffered in the course of her work."

29 The Full Court comprised Siopis, Flick and Murphy JJ. The Full Court was unanimous in rejecting Ms Martin's challenge to the allowing of Comcare's appeal from the decision of the Tribunal. The Full Court divided on the outcome of Ms Martin's challenge to the dismissal of her notice of contention. The majority, Siopis and Murphy JJ, upheld that challenge, leading them to allow the appeal. Flick J dissented.

30 The reasoning of the majority was set out in the reasons for judgment of Murphy J, with whom Siopis J agreed. His Honour construed the phrase "as a result of" in s 5A(1) as requiring the application of a "common sense" approach to causation<sup>12</sup>. The Tribunal, according to his Honour, misconstrued that phrase in a way that led it to fail to apply common sense to the facts as it found them: it

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**12** *Martin v Comcare* (2015) 238 FCR 373 at 396 [108]-[110].

French CJ  
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Keane J  
Nettle J

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confused consequence with causation, and considered itself permitted to treat as causative an event which was no more than chronologically precedent<sup>13</sup>.

31 Murphy J also found fault with the Tribunal's fact finding. First, he considered that there was no evidence which permitted the Tribunal to find that Ms Martin believed that returning to work in her substantive position under the supervision of Mr Mellett was a direct and foreseeable consequence of the decision not to appoint her to the position of cross media reporter<sup>14</sup>. Second, he considered that the Tribunal was wrong to approach the issue of causation on the assumption that Ms Martin being returned to her substantive position was an inevitable consequence of the failure to promote her. He suggested instead that it was "likely that there was an intervening administrative action (such as making the further decision that she was to revert to working under the supervision of Mr Mellett, informing her of that decision or maintaining the decision to return Ms Martin to Mr Mellett's supervision when Ms Raabus was made aware of Ms Martin's concerns regarding him)"<sup>15</sup>.

32 The Full Court made orders allowing the appeal, setting aside the orders made by Griffiths J, and remitting the matter to the Tribunal to be determined according to the law as explained in the reasoning of the majority.

#### The appeal to this Court

33 Comcare appeals, by special leave, to this Court. Comcare argues that Murphy J proceeded on an erroneous view of the causal connection required to meet the exclusion in s 5A(1). The Tribunal, Comcare argues, was correct in law to conclude on the facts it found that the causal connection was met.

34 Further, Comcare argues, Murphy J went beyond the role of the Federal Court in an appeal from the Tribunal to the extent that he found fault with the Tribunal's fact finding. The Tribunal's findings of fact were not challenged in the appeal. The findings of fact were, in any event, supported by evidence and on that basis incapable of being disturbed in an appeal limited to a question of law.

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13 *Martin v Comcare* (2015) 238 FCR 373 at 399-400 [120]-[125].

14 *Martin v Comcare* (2015) 238 FCR 373 at 399-400 [120(c)].

15 *Martin v Comcare* (2015) 238 FCR 373 at 400 [122].

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Gageler J  
Keane J  
Nettle J

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35 Even if Murphy J were correct in suggesting the likelihood of other administrative action intervening to result in Ms Martin reverting to work under the supervision of Mr Mellett, Comcare argues, that other administrative action is likely itself to have been reasonable administrative action within s 5A(1). That is because the other administrative action is likely to have fallen within the wide description in s 5A(2)(f) of "anything reasonable done in connection with [Ms Martin's] failure to obtain [the] promotion".

36 Ms Martin supports the reasoning of Murphy J. She argues that the possible application of s 5A(2)(f) to other administrative action was not explored in the evidence before the Tribunal and cannot be raised for the first time in this Court.

#### Isolating the issue of principle

37 Comcare's case before the Tribunal proceeded on the basis that the reasonable administrative action as a result of which Ms Martin suffered a worsening of her mental condition was the decision not to appoint her to the position of cross media reporter. That was the case which the Tribunal considered. The issue of causation that case raised was limited to whether, within the meaning of s 5A(1), the worsening of Ms Martin's condition was as a result of that administrative action. Comcare's belated invocation of s 5A(2)(f) as extending to other possible administrative action is a distraction.

38 Whether Ms Martin's return to her substantive position as producer of the morning program was or was not in fact an inevitable consequence of the administrative action constituted by the decision not to appoint her to the position of cross media reporter similarly distracts from the critical finding of the Tribunal on the issue of causation that was raised for its determination.

39 The critical finding of the Tribunal was that returning to her substantive position was a direct and foreseeable consequence of the decision in Ms Martin's mind. The deterioration of her mental condition, on the Tribunal's finding, was triggered by her contemplation of what she perceived to be a consequence of the decision.

40 The Full Court had no basis for questioning that finding, let alone for considering that finding not to have been open on the evidence. Not only was the finding consistent with the opinions of the two psychiatrists who gave evidence, it was the finding which Ms Martin asked the Tribunal to make. The finding was unchallenged on the appeal to the Federal Court and its correctness was assumed

French CJ  
Bell J  
Gageler J  
Keane J  
Nettle J

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in the framing of Ms Martin's ground of appeal to the Full Court challenging the dismissal of her notice of contention by Griffiths J.

41 That leaves a single issue of principle to be resolved on the facts found by the Tribunal. The issue is whether the Tribunal was correct in law to conclude that the deterioration of Ms Martin's mental condition triggered by her contemplation of a perceived consequence of the decision was a disease which she suffered as a result of that decision within the meaning of s 5A(1).

#### Resolving the issue of principle

42 Causation in a legal context is always purposive<sup>16</sup>. The application of a causal term in a statutory provision is always to be determined by reference to the statutory text construed and applied in its statutory context in a manner which best effects its statutory purpose<sup>17</sup>. It has been said more than once in this Court that it is doubtful whether there is any "common sense" approach to causation which can provide a useful, still less universal, legal norm<sup>18</sup>. Nevertheless, the majority in the Full Court construed the phrase "as a result of" in s 5A(1) as importing a "common sense" notion of causation. That construction, with respect, did not adequately interrogate the statutory text, context and purpose.

43 Within a statutory context which includes ss 5A and 5B, the exclusionary phrase "as a result of" in s 5A(1) is naturally read, not as imposing its own separate and free-standing test of causation, but rather as referring relevantly to the test of causation spelt out in s 5B(1).

44 The application of the definition of disease in s 5B(1) means that, to have suffered a disease falling within s 5A(1)(a), the employee must have suffered an ailment or aggravation of an ailment that was contributed to, to a significant degree, by the employee's employment. In excluding from the definition of an

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16 *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at 530 [137]; [2013] HCA 35.

17 *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at 639 [28]; [2005] HCA 69. See also *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at 582 [42]; [2005] HCA 26.

18 *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at 642 [45], citing *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at 596-597 [96]-[97].

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injury compensable under the Act a disease that is suffered by an employee "as a result of" reasonable administrative action taken in a reasonable manner in respect of the employee's employment, s 5A(1) is naturally read as referring to the contribution made to the suffering of the disease by an event in the course of the employee's employment which answers that description of reasonable administrative action.

45 When the exclusionary phrase is so read, it becomes apparent that an employee has suffered a disease "as a result of" administrative action if the administrative action is a cause in fact of the disease which the employee has suffered. The administrative action need not be the sole cause. There may be multiple causes, some of which might even be related to other aspects of the employee's employment. What is necessary is that the taking of the administrative action is an event without which the employee's ailment or aggravation would not have been a disease: it would not have been contributed to, to a significant degree, by the employee's employment.

46 That reading conforms to the purpose of the exclusion. The purpose was described in the explanatory memorandum to the Bill for the Amending Act as being to "ensure that the wide range of legitimate human resource management actions, when undertaken in a reasonable manner, do not give rise to eligibility for workers' compensation" and as including, in particular, to prevent claims "being used to obstruct legitimate management action by excluding claims where an injury (usually a psychological injury) has arisen as a result of" such action<sup>19</sup>. The taking of administrative action in respect of an employee's employment was in that way sought to be insulated from need for concern about the psychological effect of the decision on the employee. This purpose would be defeated if the operation of the exclusion were dependent upon the subjective psychological drivers of the employee's reaction.

47 Having regard to the text and structure of ss 5A and 5B, and consistently with the statutory purpose of the exclusion in s 5A(1), what is required to meet the causal connection connoted by the exclusionary phrase in s 5A(1) in its application to a disease within s 5A(1)(a) is therefore that the employee would not have suffered that disease, as defined by s 5B(1), if the administrative action had not been taken. That is to say, the causal connection is met if, without the taking of the administrative action, the employee would not have suffered the

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19 Australia, House of Representatives, Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2006, Explanatory Memorandum at iv, v.

*French* CJ  
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*Gageler* J  
*Keane* J  
*Nettle* J

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ailment or aggravation that was contributed to, to a significant degree, by the employee's employment.

48 The causal connection giving rise to the exclusion from the definition of injury is met where the disease suffered by the employee is a mental condition or an aggravation of a mental condition suffered by the employee in reaction to a failure to obtain promotion, including in reaction to a perceived consequence of that failure to obtain promotion. The nature of the perceived consequence – whether personal or professional, direct or indirect, real or imagined – is beside the point.

49 The reasoning of the Tribunal was correct in law on the findings of fact which it made.

#### Orders

50 The orders disposing of the appeal will have the effect of restoring the orders made by Griffiths J at first instance, except the order his Honour made in relation to costs. Those orders include that the matter be remitted to the Tribunal to be heard and determined according to law. Comcare accepts that Ms Martin will not be constrained on remitter by the prior findings of fact made by the Tribunal.

51 In relation to costs, the orders will reflect the undertaking given by Comcare as a condition of the grant of special leave to appeal.

52 The orders are:

- (1) Appeal allowed.
- (2) Set aside the orders of the Full Court of the Federal Court of Australia made on 30 November 2015, except insofar as order 2 sets aside order 5 of Griffiths J made on 8 January 2015, and in their place order that the appeal be otherwise dismissed.
- (3) The appellant pay the respondent's reasonable costs of the appeal to this Court and of the proceedings before Griffiths J and in the Full Court of the Federal Court of Australia.

