Workers Compensation Commission

DETERMINATION OF APPEAL AGAINST A DECISION OF THE COMMISSION CONSTITUTED BY AN ARBITRATOR

CITATION:	**Pacific National Pty Ltd v Baldacchino [2018] NSWWCCPD 12**
APPELLANT:	Pacific National Pty Ltd
RESPONDENT:	Saviour (Sam) Baldacchino
INTERVENER:	State Insurance Regulatory Authority
INSURER:	Self-insured
FILE NUMBER:	A1-2148/17
ARBITRATOR:	Mr J Harris
DATE OF ARBITRATOR'S DECISION:	6 October 2017 and 9 October 2017 (Amended)
DATE OF APPEAL DECISION:	28 March 2018
SUBJECT MATTER OF DECISION:	Section 59A(6)(a) of the *Workers Compensation Act 1987*: whether a total knee replacement is exempted from the application of s 59A(1) as it is an 'artificial aid'; statutory interpretation – application of *Thomas v Ferguson Transformers Pty Ltd* [1979] 1 NSWLR 216; application of *Re Alcan Australia Limited; Ex parte Federation of Industrial Manufacturing and Engineering Employees* [1994] HCA 34; 181 CLR 96; 68 ALJR 626; 123 ALR 193 and associated authorities, maxims of *noscitur a sociis*, *ejusdem generis*
PRESIDENTIAL MEMBER:	Deputy President Michael Snell
HEARING:	On the papers
REPRESENTATION:	**Appellant:** Hall & Wilcox **Respondent:** Carroll & O'Dea Lawyers **Intervener:** Lea Armstrong, Crown Solicitor
ORDERS MADE ON APPEAL:	1. The Amended Certificate of Determination dated 9 October 2017 is confirmed.

INTRODUCTION

1. This appeal raises an issue regarding whether a total knee replacement is an 'artificial aid' within the meaning of s 59A(6)(a) of the *Workers Compensation Act 1987* (the 1987 Act), so that it falls within the exemption in s 59A(6) to the application of s 59A(1) of the 1987 Act. For reasons which follow, the appeal is unsuccessful.

BACKGROUND

2. The factual background is uncontroversial. Saviour (Sam) Baldacchino (the respondent) suffered an accepted injury to his left knee on 27 October 1999, in the course of his employment with Pacific National Pty Ltd (the appellant). The appellant was known as Freight Corp at the time of the injury. The respondent underwent an arthroscopic medial meniscectomy of the left knee on 1 December 1999. Consent Orders dated 12 April 2013 provided for lump sum compensation pursuant to s 66 of the 1987 Act in respect of 15% loss of use of the left leg at or above the knee. This was consistent with a Medical Assessment Certificate of Dr Davis dated 9 January 2013. Consent Orders dated 13 August 2013 provided for compensation in respect of pain and suffering pursuant to s 67 of the 1987 Act, in the sum of $14,000. The respondent took a voluntary redundancy in 2014; he has since performed a little security work, which is not relevant for current purposes.

3. The respondent came under the care of Dr Leong, orthopaedic surgeon, who diagnosed post traumatic arthritis, which he said resulted from the previous "work related meniscal tear".[1] Dr Leong sought approval from the appellant to proceed with left total knee replacement surgery.[2] The appellant rejected the respondent's claim in respect of this treatment, in a s 74 notice dated 8 December 2016. It placed in issue whether the respondent had suffered injury arising out of or in the course of his employment, and whether the ongoing expenses claimed were reasonably necessary as a result of the employment injury. It also referred to "[a]ny other issue which flows from the above".[3]

4. The current proceedings seek orders pursuant to s 60(5) of the 1987 Act, that the appellant is liable for payment of the cost of a left total knee replacement, as a result of the employment injury on 27 October 1999.

5. An arbitration hearing was held before Arbitrator Harris on 31 July 2017, at which the parties were represented by counsel. The Arbitrator delivered an extempore decision. The Commission issued a Certificate of Determination dated 2 August 2017, which provided as follows:

> "1. The total left knee replacement proposed by Dr Leong (Application, page 19) is reasonably necessary as a result of injury sustained on 27 October 1999.
>
> 2. The s 59A issue is stood over for further hearing at Sydney at 2 pm on 11 September 2017."

6. The above finding is not challenged on this appeal. A further arbitration hearing was held before Arbitrator Harris on 11 September 2017, at which the application of s 59A of the 1987 Act was addressed. The Arbitrator succinctly stated the issue:

> "The applicant is in his 67th year. He is not entitled to the costs of a total left knee replacement due to the operation of s 59A of the 1987 Act, unless the proposed

[1] Dr Leong's report dated 31 March 2016, Application to Resolve a Dispute (Application), p 17.
[2] Dr Leong's report dated 8 July 2016, Application, p 19.
[3] Application, p 44.

surgery falls within the meaning of either a provision of an 'artificial member' or an 'artificial aid' in s 59A(6) of the 1987 Act."[4]

7. The Amended Certificate of Determination dated 9 October 2017 provided as follows:

> "**Finding**
>
> 1. The applicant is entitled to the costs for the provision of a total left knee replacement pursuant to section 59A(6) of the *Workers Compensation Act* 1987.
>
> **Order**
>
> 2. The respondent pay, pursuant to section 60(5) of the *Workers Compensation Act* 1987, the costs for the provision of a total left knee replacement."

8. The appellant's challenge to the decision, on this appeal, is to the Arbitrator's conclusion that the total left knee replacement was an 'artificial aid' within the meaning of s 59A(6)(a).

9. On 17 January 2018, the Registrar advised the State Insurance Regulatory Authority (the intervener) of the appeal, and invited it to consider whether it wished to be heard, pursuant to s 106 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act). On 1 February 2018, the intervener advised the Registrar that it wished to be heard pursuant to s 106. On 2 February 2018, the Commission issued a further timetable, providing for submissions by the intervener, and submissions in response by the appellant and the respondent. The intervener lodged and served submissions on 16 February 2018. On 26 February 2018, the solicitors for the appellant advised that they did not propose lodging further submissions, as they were "satisfied that our position is appropriately articulated" in the submissions previously filed.[5] The appellant relied on the submissions attached to the Application – Appeal Against Decision of Arbitrator, and also its submissions in reply, lodged 29 January 2018.

10. The respondent lodged supplementary submissions on 5 March 2018 (consistent with a short extension which was granted). Those submissions adopted the submissions of the intervener. Additionally, the respondent's supplementary submissions addressed the decision of the President, Keating DCJ in *Australian Bushman's Campdraft and Rodeo Association Ltd v Gajkowski*,[6] in which his Honour considered the application of authorities dealing with the 1926 Act, to a corresponding provision in the 1987 Act. The leave which was granted to the parties, in the further timetable, was limited to "submissions in response" to those of the intervener. Other than in the adoption of the intervener's submissions, the respondent's supplementary submissions fall outside the grant of leave. I ignore those submissions which fall outside the grant of leave.[7]

ON THE PAPERS

11. Section 354(6) of the 1998 Act provides:

> "(6) If the Commission is satisfied that sufficient information has been supplied to it in connection with proceedings, the Commission may exercise functions under this Act without holding any conference or formal hearing."

12. Having regard to Practice Directions Nos 1 and 6; the documents that are before me, and the submissions by the appellant and the respondent that the appeal can proceed to be

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[4] *Baldacchino v Pacific National Pty Ltd* [2017] NSWWCC 239 (Decision), [4].
[5] Email from Messrs Hall & Wilcox dated 26 February 2018.
[6] [2017] NSWWCCPD 54.
[7] *Bale v Mills* [2011] NSWCA 226; 81 NSWLR 498; 282 ALR 336, [54]–[61], *Heffernan v Comcare* [2014] FCAFC 2, [39].

determined on the basis of these documents, I am satisfied that I have sufficient information to proceed 'on the papers' without holding any conference or formal hearing and that this is the appropriate course in the circumstances.

THRESHOLD MATTERS

13. There is no dispute between the parties that the threshold requirements as to quantum and time pursuant to ss 352(3) and 352(4) of the 1998 Act have been met.

THE ARBITRATOR'S REASONS

14. The Arbitrator recorded the background of the matter, referred to the medical evidence, and noted his previous finding in the Certificate of Determination dated 2 August 2017, that the "proposed surgery is reasonably necessary as a result of the injury sustained on 27 October 1999".[8] The Arbitrator referred to an agreement between the parties:

> "It was agreed by counsel on the second hearing day that a total knee replacement 'replaces the ends of the femur (thighbone) and tibia (shinbone) with plastic inserted between them and usually the patella (kneecap)'."[9]

15. The Arbitrator set out the relevant legislative provisions, and summarised the submissions of the parties.[10] He referred to a number of authorities on statutory interpretation. The Arbitrator observed that the words 'artificial members' and 'other artificial aids', used in s 59A(6)(a) of the 1987 Act and cl 27 of Sch 8 of the Workers Compensation Regulation 2016 (the 2016 Regulation), had been in ss 10 and 10A of the *Workers Compensation Act 1926* (the 1926 Act). The "relevant words in s 10 of the 1926 Act were inserted into s 59 of the 1987 Act". "Section 59A and related sections were inserted into the 1987 Act by the *Workers Compensation Legislation Amendment Act 2012* (2012 Amending Act)". Section 59A was further amended by the *Workers Compensation Amendment Act 2015* (2015 Amending Act), which introduced s 59A(6).[11]

16. The Arbitrator referred to the decision of the Court of Appeal in *Thomas v Ferguson Transformers Pty Ltd*,[12] which considered the meaning of the term 'artificial aids' in the definition of 'medical treatment' in s 10(2)(b) of the 1926 Act. He said there was a presumption that certain words, having received a judicial construction in one of the Superior Courts, when repeated in a subsequent statute are taken to have that meaning, referring to *Ex parte Campbell*,[13] *Re Alcan Australia Limited; Ex parte Federation of Industrial Manufacturing and Engineering Employees*,[14] and DC Pearce and RS Geddes, *Statutory Interpretation in Australia*.[15] He said the relevant words should have the same meaning in s 59 and s 59A(6)(a) of the 1987 Act, applying *Registrar of Titles (WA) v Franzon*.[16]

17. The Arbitrator referred to the appellant's submission that a knee replacement is 'hospital treatment' within the meaning of s 60(1)(b) of the 1987 Act, not 'medical or related treatment'. Section 59A(6) applies to 'medical or related treatment' only, not 'hospital treatment'. The Arbitrator said that the exemption in s 59A(6)(a) included the provision of artificial eyes; it was unlikely that such treatment would occur outside a hospital. He said it would be "an absurd result and clearly contrary to the legislature's intention", if the provision of an eye did

[8] Decision, [1]–[19].
[9] Decision, [21], referring to Transcript of Proceedings, *Baldacchino v Pacific National Pty Ltd* (WCC, [2017] NSWWCC 239, Arbitrator Harris, 11 September 2017) (T) 2.27–3.1.
[10] Decision, [24]–[44].
[11] Decision, [47]–[52].
[12] [1979] 1 NSWLR 216 (*Thomas*).
[13] (1870) LR 5 Ch App 703 (*Ex parte Campbell*).
[14] [1994] HCA 34; 181 CLR 96; 68 ALJR 626; 123 ALR 193 (*Re Alcan*).
[15] DC Pearce and RS Geddes, *Statutory Interpretation in Australia*, (Butterworths 8th ed, 2014) [3.44].
[16] [1975] HCA 41; 132 CLR 611 (*Franzon*).

not fall within the exemption if such treatment occurs in a hospital. He cited *Uelese v Minister for Immigration and Border Protection*[17] as authority that a construction should be avoided that "appears irrational and unjust".[18]

18. The Arbitrator concluded that "medical or related treatment" in s 59A(6) may include hospital treatment, if the treatment is for any of the "specific categories set out in s 59A(6)". He noted that 'secondary surgery' is one of the categories exempted in s 59A(6), yet surgery would "obviously fall within the meaning of 'hospital treatment'".[19]

19. The Arbitrator rejected the appellant's argument that an 'artificial aid' was "something that is external to the body". He said this was unsupported by authority, and there is nothing in the natural meaning of 'aid' that requires it to be external. Other items in the exemption, such as eyes or teeth, "are obviously not external body parts". The argument was inconsistent with the construction by Hutley JA of the phrase 'artificial aid' in *Thomas.*[20]

20. The Arbitrator referred to the Minister's second reading speech relating to the 2015 Amending Act. The Arbitrator identified a purpose to extend the recovery of "specific medical and related expenses beyond the expiry of the time periods specified in s 59A". He said "the 2015 amendments clearly have some beneficial purpose".[21]

21. The Arbitrator concluded that he was bound by, and should apply, the reasons of Hutley JA in *Thomas*. He said that the total knee replacement was designed for the respondent to overcome the effects of his disability, and "clearly is an artificial aid as defined by Hutley JA in *Thomas*". It fell within the meaning of 'other artificial aids' in s 59A(6). He said it was unnecessary that he consider whether it also fell within the definition of an 'artificial member' in s 59A(6).[22] He accepted the appellant's argument that cl 27 of Sch 8 of the 2016 Regulation did not assist the respondent.[23]

22. The Arbitrator rejected an argument by the appellant that the amendments introduced by the *Workers Compensation Amendment Act 2015* (2015 Amending Act) are read subject to cl 27 of Sch 8 of the 2016 Regulation. The Arbitrator said that this clause operated with respect to existing claims, and he accepted that the claim at issue was not an 'existing claim' as defined in Part 2 of Sch 8 of the 2016 Regulation. The Arbitrator said the 2016 Regulation did not demonstrate a clear legislative intention to override the effect of the Act,[24] referring to *ADCO Constructions Pty Ltd v Goudappel*.[25]

23. The Arbitrator summarised his findings as follows:

> "(a) The total left knee replacement is reasonably necessary as a result of injury sustained on 27 October 1999.
>
> (b) The proposed surgery falls within the meaning of 'other artificial aid' in s 59A(6) of the 1987 Act, adopting the meaning of those words from the reasons of Hutley JA in *Thomas* on the former s 10 of the 1926 Act.
>
> (c) In these circumstances I do not decide whether the proposed surgery falls within the meaning of the provision of an 'artificial member'.

[17] [2015] HCA 15; 256 CLR 203; 89 ALJR 498; 319 ALR 181.
[18] Decision, [53]–[62].
[19] Decision, [63].
[20] Decision, [66].
[21] Decision, [72].
[22] Decision, [78]–[79].
[23] Decision, [84]–[97].
[24] Decision, [98]–[110].
[25] [2014] HCA 18; 254 CLR 1; 88 ALJR 624; 308 ALR 213; 13 DDCR 90 (*Goudappel*).

(d) The proposed surgery is not based on an existing claim as defined in cl 27 of Sch 8 of the 2016 Regulations. For that reason, and also due to the fact that the applicant has reached retiring age, the claim is not exempt from the operation of s 59A by reason of cl 27.

(e) Section 59A(6) of the 1987 Act is not subject to the provisions of cl 27 of Sch 8 of the 2016 Regulations.

(f) The applicant is entitled to an order under s 60(5) that the respondent pays for the provision of a total knee replacement."[26]

GROUNDS OF APPEAL

24. The appellant states that it appeals the findings at (b) and (f) set out in the preceding paragraph.[27] It raises the following grounds of appeal:

(a) The Arbitrator made an error of law in finding that a total left knee replacement was an 'artificial aid' contemplated by s 59A(6)(a) of the 1987 Act (Ground No 1).

(b) The Arbitrator made an error of law in relying on *Thomas*, in finding that a total left knee replacement was an 'artificial aid' contemplated by s 59A(6)(a) of the 1987 Act (Ground No 2).

(c) The Arbitrator made an error of law in failing to construe s 59A(6)(a) of the 1987 Act by reference to its text, context and purpose and consequently erred in finding that a total left knee replacement was an 'artificial aid' contemplated by s 59A(6)(a) of the 1987 Act (Ground No 3).

LEGISLATION

25. The definition of 'medical treatment' in s 10(2) of the 1926 Act, in its form when considered in *Thomas*, provided:

> "'Medical treatment' includes–
>
> (a) treatment by a legally qualified medical practitioner, a registered dentist, a registered physiotherapist, or a masseur or remedial medical gymnast or speech therapist;
>
> (a1) therapeutic treatment afforded by direction of a legally qualified medical practitioner;
>
> (a2) treatment by way of rehabilitation afforded by an approved person or body or at an approved place;
>
> (b) the provision of skiagrams, crutches, and artificial members, eyes or teeth and other artificial aids and spectacle glasses;
>
> (c) any nursing, medicines, medical or surgical supplies or curative apparatus, supplied or provided for him otherwise than as a patient as a hospital; and
>
> (d) the cost to the worker of any fares, travelling expenses and maintenance necessarily and reasonably incurred by him in obtaining any treatment referred to in paragraph (a), (a1) or (a2) of this definition or in connection

[26] Decision, [111].
[27] Appellant's submissions, [10].

with the provision or supply of anything referred to in paragraph (b) or (c) of this definition,

but does not include ambulance service or hospital treatment."[28]

26. The definition relevant to 'medical or related treatment' in s 59 of the 1987 Act provides:

"**59 Definitions** (cf former s 10 (2))

In this Division:

ambulance service includes any conveyance of an injured worker to or from a medical practitioner or hospital.

hospital treatment means treatment (including treatment by way of rehabilitation) at any hospital or at any rehabilitation centre conducted by a hospital and includes:

(a) the maintenance of the worker as a patient at the hospital or rehabilitation centre,

(b) the provision or supply by the hospital, at the hospital or rehabilitation centre, of nursing attendance, medicines, medical or surgical supplies, or other curative apparatus, and

(c) any other ancillary service,

but does not include ambulance service.

medical or related treatment includes:

(a) treatment by a medical practitioner, a registered dentist, a dental prosthetist, a registered physiotherapist, a chiropractor, an osteopath, a masseur, a remedial medical gymnast or a speech therapist,

(b) therapeutic treatment given by direction of a medical practitioner,

(c) (Repealed)

(d) the provision of crutches, artificial members, eyes or teeth and other artificial aids or spectacles,

(e) any nursing, medicines, medical or surgical supplies or curative apparatus, supplied or provided for the worker otherwise than as hospital treatment,

(f) care (other than nursing care) of a worker in the worker's home directed by a medical practitioner having regard to the nature of the worker's incapacity,

(f1) domestic assistance services,

(g) the modification of a worker's home or vehicle directed by a medical practitioner having regard to the nature of the worker's incapacity, and

(h) treatment or other thing prescribed by the regulations as medical or related treatment,

[28] *Thomas*, 218A–C.

but does not include ambulance service, hospital treatment or workplace rehabilitation service.

public hospital means:

(a) a public hospital within the meaning of the *Health Services Act 1997* controlled by a local health district or the Crown,

(b) a statutory health corporation or affiliated health organisation within the meaning of the *Health Services Act 1997*,

(c) (Repealed)

(d) a hospital or other institution (whether in this State or in another State or a Territory of the Commonwealth) that:

(i) is prescribed by the regulations, or

(ii) belongs to a class of hospitals or institutions prescribed by the regulations,

for the purposes of this definition.

workplace rehabilitation service means any service provided as a workplace rehabilitation service by or on behalf of a provider of rehabilitation services approved under section 52 of the 1998 Act.

Note. For the meaning of references in this Division to health practitioners see section 21D of the *Interpretation Act 1987* and the *Health Practitioner Regulation National Law (NSW)*."

27. Section 59A of the 1987 Act, as originally introduced by the 2012 Amending Act, provided:

"**59A Limit on payment of compensation**

(1) Compensation is not payable to an injured worker under this Division in respect of any treatment, service or assistance given or provided more than 12 months after a claim for compensation in respect of the injury was first made, unless weekly payments of compensation are or have been paid or payable to the worker.

(2) If weekly payments of compensation are or have been paid or payable to the worker, compensation is not payable under this Division in respect of any treatment, service or assistance given or provided more than 12 months after the worker ceased to be entitled to weekly payments of compensation.

(3) If a worker becomes entitled to weekly payments of compensation after ceasing to be entitled to compensation under this Division, the worker is once again entitled to compensation under this Division but only in respect of any treatment, service or assistance given or provided during a period in respect of which weekly payments are payable to the worker.

(4) This section does not apply to a seriously injured worker (as defined in Division 2)."

28. Section 59A of the 1987 Act in its current form, applicable to the respondent's claim for knee replacement surgery, provides:

"**59A Limit on payment of compensation**

(1) Compensation is not payable to an injured worker under this Division in respect of any treatment, service or assistance given or provided after the expiry of the compensation period in respect of the injured worker.

(2) The compensation period in respect of an injured worker is:

(a) if the injury has resulted in a degree of permanent impairment assessed as provided by section 65 to be 10% or less, or the degree of permanent impairment has not been assessed as provided by that section, the period of 2 years commencing on:

(i) the day on which the claim for compensation in respect of the injury was first made (if weekly payments of compensation are not or have not been paid or payable to the worker), or

(ii) the day on which weekly payments of compensation cease to be payable to the worker (if weekly payments of compensation are or have been paid or payable to the worker), or

(b) if the injury has resulted in a degree of permanent impairment assessed as provided by section 65 to be more than 10% but not more than 20%, the period of 5 years commencing on:

(i) the day on which the claim for compensation in respect of the injury was first made (if weekly payments of compensation are not or have not been paid or payable to the worker), or

(ii) the day on which weekly payments of compensation cease to be payable to the worker (if weekly payments of compensation are or have been paid or payable to the worker).

(3) If weekly payments of compensation become payable to a worker after compensation under this Division ceases to be payable to the worker, compensation under this Division is once again payable to the worker but only in respect of any treatment, service or assistance given or provided during a period in respect of which weekly payments are payable to the worker.

(4) For the avoidance of doubt, weekly payments of compensation are payable to a worker for the purposes of this section only while the worker satisfies the requirement of incapacity for work and all other requirements of Division 2 that the worker must satisfy in order to be entitled to weekly payments of compensation.

(5) This section does not apply to a worker with high needs (as defined in Division 2).

(6) This section does not apply to compensation in respect of any of the following kinds of medical or related treatment:

(a) the provision of crutches, artificial members, eyes or teeth and other artificial aids or spectacles (including hearing aids and hearing aid batteries),

(b) the modification of a worker's home or vehicle,

(c) secondary surgery.

(7) Surgery is ***secondary surgery*** if:

(a) the surgery is directly consequential on earlier surgery and affects a part of the body affected by the earlier surgery, and

(b) the surgery is approved by the insurer within 2 years after the earlier surgery was approved (or is approved later than that pursuant to the determination of a dispute that arose within that 2 years).

(8) This section does not affect the requirements of section 60 (including, for example, the requirement for the prior approval of the insurer for secondary surgery)."

GROUND NO 1

The Arbitrator made an error of law in finding that a total left knee replacement was an 'artificial aid' contemplated by s 59A(6)(a) of the 1987 Act.

29. The appellant notes that the respondent did not rely on sub-clauses (b) or (c) of s 59A(6) of the 1987 Act. The respondent was only entitled to succeed if the medical or related treatment he claimed fitted within the criteria in sub-clause (a). The appellant refers to the agreement described at [14] above, describing the nature of a total knee replacement. The appellant submits it was an error to find that a total knee replacement was an 'artificial aid', "for the reasons articulated in grounds 2 and 3 below".[29]

30. The respondent observes, correctly, that ground no 1 "is not a distinct ground", and does not respond to it further.

31. This ground is not argued separately, and depends on "the reasons articulated in grounds nos 2 and 3". It is appropriate to deal with the other grounds.

GROUND NO 2

The Arbitrator made an error of law in relying on Thomas, in finding that a total left knee replacement was an 'artificial aid' contemplated by s 59A(6)(a) of the 1987 Act.

The appellant's submissions

32. The appellant submits:

(a) The decision in *Thomas* was "made thirty-eight years ago". The process of reasoning in *Thomas* "is no longer applicable to the modern legislation". It is put that the legislation now includes "express provision … for the modification of a worker's home or vehicle".

(b) It is plain that the intention of the Parliament as to the ambit of s 59A(6)(a) is quite different from the intention of the Parliament in respect of the same phrase contained in s 10(2) of the 1926 Act, as explained by the Court of Appeal in 1979.

(c) The decision in *Thomas* "is, at best, of little assistance and is, at worst, quite misleading in understanding the ambit of the phrase 'artificial aid' in [subs] 59A(6)(a) as introduced in 2015".[30]

[29] Appellant's submissions, [30]–[32].
[30] Appellant's submissions, [33]–[35].

(d) The Explanatory Note to the Workers Compensation Amendment Bill 2015 relevantly provided:

> "The object of this Bill is to amend the *Workers Compensation Act 1987* (***the principal Act***) as follows:
>
> (a) the limitation on the payment of compensation for medical and related treatment and services (which currently applies to medical and related treatment and services provided more than 12 months after a worker's claim for compensation was made or weekly payments cease to be payable to the worker) will be changed as follows:
>
> (i) the limitation will no longer apply to compensation in respect of crutches, artificial aids, home or vehicle modifications or secondary surgery,
>
> …"

The Arbitrator erred in finding that a purpose of the 2015 Amending Act was "to widen the potential benefits available for workers to recover the costs of specific medical related expenses beyond the expiry of the time periods specified in s 59A". The appellant submits:

> "… the [A]rbitrator's reading of the second reading speech is too broad, and focuses insufficiently on the passages of both the second reading speech and explanatory memorandum that expressly deal with the contents of s 59A(6)(a)."[31]

33. The appellant lodged submissions in reply dated 24 January 2017 [sic, 2018]. The appellant in these submits:

(a) The effect of the decision in *Thomas* was to hold that modification of a car is 'medical treatment'. This "surprising outcome is itself sufficient to raise doubt" as to the applicability of the decision to the modern legislation.[32]

(b) The *Workers Compensation Legislation Amendment Act 2012*[33] "gave substantive effect to a Parliamentary intention to effect economies by limiting entitlements to less severely injured workers". The issue is not whether the definition of an 'artificial aid', as interpreted by Hutley JA, survived the re-enactment of the 1926 Act by the 1987 Act, but rather "whether it survives the parliamentary intention manifested in the 2012 amendments".[34]

(c) The appellant submits the "Parliamentary intention underlying the 2012 amendments" is expressed in the opening words of s 59A(1), "Compensation is not payable …". Section 59A(6) was introduced by the *2015 Amending Act* it "was intended as a limited amelioration of one of the effects of s 59A(1). The phrase 'artificial aid' should be construed by reference to the 2012 amendments it is ameliorating".[35] The 2012 amendments "were patently not beneficial"; reference is made to *Goudappel.*

[31] Appellant's submissions, [18].
[32] Appellant in reply, [5], [6].
[33] (2012 Amending Act).
[34] Appellant in reply, [10], [11]–[22].
[35] Appellant in reply, [23], [24].

(d) The appellant submits that the presumption in *Ex parte Campbell* has been doubted in a number of High Court authorities,[36] and was referred to as a "legal fiction" in *Fish v Solution 6 Holdings Limited*.[37]

The respondent's submissions

34. The respondent submits:

(a) The "broad characterisation" of the phrase 'artificial aids' in *Thomas* "would plainly encompass knee replacement technology, which, if inserted, would enable the effects of the worker's disability to be overcome".[38]

(b) The words in s 10(2)(b) of the 1926 Act, at issue in *Thomas*, are strikingly similar to those employed in the definition of 'medical or related treatment' in cl (d) of s 59 of the 1987 Act. The only changes are to delete 'skiagrams', and substitute 'spectacles' for 'spectacle glasses'. This is not a change in legislative context which would warrant a fresh interpretation of the phrase 'artificial aid', as if the application of *Thomas* was restricted to the 1926 Act.[39]

(c) There is no reason why the addition of a further category of 'medical or related treatment' (modification of a worker's home or vehicle at cl (g) of s 59 of the 1987 Act) should affect the "wide and general reach" of the definition of 'artificial aid' applied in *Thomas*.[40] The respondent submits that the "appellant's argument does not develop beyond cursory reference to superficial differences in the format of the 1926 Act and its amended form in and after 1987".[41]

(d) The appellant has not identified "any underlying legislative purpose" for why the term 'artificial aid' would cease to have the meaning ascribed to it in *Thomas*, or how the intention of Parliament in relation to the 1926 Act differed from that in relation to the 1987 Act.[42]

The intervener's submissions

35. The intervener submits:

(a) The intervener states that it "supports the decision of the Arbitrator, that a total knee replacement falls within the meaning of 'other artificial aids' for the purposes of s 59A(6)(a)" of the 1987 Act. It falls within the concept as "a matter of ordinary English"; it is consistent with the formulation of Hutley JA in *Thomas*:

> "The replacement of the ends of the femur and tibia (and, if necessary, the patella) is something 'which has been specially constructed to enable the effects of the disability … to be overcome'."[43]

[36] Reference is made to *Salvation Army (Vic) Property Trust v Fern Tree Gully Corporation* [1952] HCA 4; 85 CLR 159 (*Salvation Army*), *R v Reynhoudt* [1962] HCA 23; 107 CLR 381 and *Flaherty v Girgis* [1987] HCA 17; 162 CLR 574; 71 ALR 1; 61 ALJR 255 (*Flaherty*).
[37] [2006] HCA 22; 225 CLR 180; 227 ALR 241; 80 ALJR 959 (*Fish*) per Kirby J, [125].
[38] Respondent's submissions, [7]–[9].
[39] Respondent's submissions, [11]–[16].
[40] Respondent's submissions, [18].
[41] Respondent's submissions, [21].
[42] Respondent's submissions, [21].
[43] Intervener's submissions, [2]–[3].

(b) The meaning of 'artificial aid' applied in *Thomas* is consistent with the words used, as "a matter of ordinary English". It is consistent with characterising a total knee replacement as falling within the definition.[44]

(c) There is "every reason" to presume that the Parliament intended, when re-enacting the words from s 10(2)(b) of the 1926 Act, in s 59, and then s 59A(6), of the 1987 Act, that it intended to embrace the existing judicial interpretation.[45]

Consideration

The decision in Thomas

36. *Thomas* was a case involving a claim under s 10 of the 1926 Act, by a worker suffering from spastic paraplegia. It involved matters such as house renovations, the installation and heating of a swimming pool, special driving lessons, modifications to a motor vehicle and household assistance.

37. Hutley JA (Hope JA agreeing) dealt with the worker's claim for the cost of modifications to her car, so it could be driven by a person who could not use her legs, saying:

> "These modifications were claimed to be artificial aids. An artificial aid, in my opinion, is anything which has been specially constructed to enable the effects of the disability (the result of injury) to be overcome. The other articles in the subclause, crutches, artificial members, eyes or teeth, are illustrations of this. Because of her injury, she has lost all capacity for natural progression. The modifications to the car have given her some capacity to transport herself. It was suggested that, on this basis, the car was an artificial aid, and every person whose capacity to walk was diminished could have a car supplied at the expense of the insurer. It is not necessary to decide whether this conclusion follows. The essential quality of an artificial aid is that it is an aid specially tailored to the needs of a person, which flowed from the injury. The artificial aid is specific to an injured person. These modifications have this quality. As an artificial aid is useless unless the person for whom it is provided can use it, the provision of an artificial aid includes the provision of instruction in its use."[46]

38. *Thomas* has been frequently applied subsequently. As the Arbitrator observed,[47] it was applied by the Court of Appeal, on other issues, in *Bresmac v Starr*[48] and *Our Lady of Loreto Nursing Home v Olsen*.[49] It was applied on multiple occasions in the former Compensation Court of New South Wales, on various issues.[50] It was applied in the Commission.[51] On many of the occasions on which *Thomas* has been applied over the years, it has been on the issue of the construction of the phrase 'curative apparatus'.

The words in the definition

39. The words employed in the relevant definitions, in cl (b) of s 10(2) of the 1926 Act, cl (d) dealing with 'medical or related treatment' in s 59 of the 1987 Act, and s 59A(6)(a) of the 1987 Act (inserted by the 2015 Amending Act), are very similar.

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[44] Intervener's submissions, [3].
[45] Intervener's submissions, [5].
[46] *Thomas*, 220F–221A.
[47] Decision, [55].
[48] (1992) 29 NSWLR 318; 8 NSWCCR 601.
[49] [2000] NSWCA 12; 19 NSWCCR 465.
[50] See, for example, *McWilliams v Rachel Forster Hospital* [2002] NSWCC 22; 23 NSWCCR 197, *Sinanian v WorkCover Authority (NSW)* (1999) 19 NSWCCR 83, *Woollahra Council v Beck* [1996] NSWCC 43; 14 NSWCCR 179 (*Beck*), *Bartolo v Western Sydney Area Health Service* [1997] NSWCC 1; 14 NSWCCR 233, *Harbison v Harbison* (2000) 19 NSWCCR 548, *Sankey v NSW Fire Brigade* (1998) 17 NSWCCR 100.
[51] *Newcastle Regional Public Tenants Council Incorporated v Grant* [2005] NSWWCCPD 2.

40. The appellant's submissions are imprecise, regarding why the insertion of cl (g) into the relevant definition in s 59, and the subsequent inclusion of subcl (b) in s 59A(6), requires a construction of the term 'artificial aid' different to that applied by Hutley JA in *Thomas*. It refers to the fact that "the modern legislation … contains an express provision at section 59A(6)(b) for the modification of a worker's home or vehicle".[52] It then submits:

> "It is plain that the intention of Parliament as to the ambit of section 59A(6)(a) of the 1987 Act, in particular the ambit of the phrase 'artificial aids' is quite different from the intention of Parliament in respect of the same phrase contained in s 10(2) of the 1926 Act as explained by the Court of Appeal in 1979."[53]

41. After the arbitration hearing, the Arbitrator drew the decision in *Thomas* to the parties' attention, and gave leave for the lodgment of written supplementary submissions dealing with that authority. The respondent did not lodge any further submissions before the Arbitrator. The appellant's supplementary submissions are summarised in the Arbitrator's decision.[54] Some of those submissions are not relevant to issues raised on this appeal. The Arbitrator noted a submission by the appellant that knee replacement surgery did not fall within the definition of an 'artificial aid', as that phrase was interpreted in *Thomas*. He noted a submission that the term 'artificial aid' was something external to the body, not something "internal as a result of a surgical procedure". This was submitted to be consistent with *Thomas*, in which the "claimed artificial aid had no connection with surgery".

42. The appellant did not, at the arbitration hearing or in its supplementary submissions dealing with *Thomas*, submit that the construction of the phrase 'artificial aids' was affected by the insertion of cl (g) into s 59, or subcl (b) into s 59A(6). It did not submit that the construction in *Thomas* no longer had application. The issue is purely one of statutory construction, no party has asserted prejudice or objected to the appellant pursuing the argument on this appeal.[55]

43. It is true that the construction of the phrase 'artificial aids' in *Thomas* related to a claim for modifications to a motor vehicle. It is unclear why the subsequent insertion of cl (g) would lead to a conclusion that the "ambit of the phrase" is now quite different to when *Thomas* was decided. The respondent submits that the appellant has not explained how or why the intention of Parliament, in using a substantially identical term in the 1987 Act, differs from its intention in using the term in the 1926 Act. The appellant, it is submitted, has referred to no underlying legislative purpose to explain why the meaning of the term required revision, and ceased to mean what it had meant in *Thomas*.[56]

44. The intervener submits:

> "… the introduction of a special provision for modification of a worker's home or car provides no reason to read the words 'artificial aid' any more narrowly. Modifications of a worker's home or vehicle are significantly broader than the existing concept of 'artificial aids'. There would be a real prospect of incoherence if the Commission chose to read more narrowly the concept of 'artificial aids' merely because Parliament had, in a different respect, enlarged the scope of treatments being contemplated."[57]

45. The fact that *Thomas* was decided "thirty-eight years ago" does not mean that it no longer has application. The consideration of the phrase by Hutley JA was of a general nature, and is set out at [37] above. His Honour's reasoning, on the meaning of 'artificial aids', was in the context of a claim for modification of a motor vehicle and instruction in its use. His Honour's

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[52] Appellant's submissions, [34].
[53] Appellant's submissions, [35].
[54] Decision, [41]–[44].
[55] *Water Board v Moustakas* [1988] HCA 12; 180 CLR 491, [13], *Hearne v Hearne* [2015] FAMCAFC 178, [81].
[56] Respondent's submissions, [21]–[22].
[57] Intervener's submissions, [5].

reasoning did not depend on that context. His Honour's conclusion was that an 'artificial aid' is "anything which has been specially constructed to enable the effects of the disability (the result of injury) to be overcome". In reaching this conclusion, his Honour had apparent regard to the words themselves, and to the list in the definition, saying the "other articles in the subclause, crutches, artificial members, eyes or teeth, are illustrations of this".

46. In *Beck*, in an obiter passage, Neilson J considered that the words 'artificial aids' in s 59, after the insertion of cl (g) in that definition, had the continued effect that modification of a motor vehicle could be compensable as an 'artificial aid', on the basis of the decision in *Thomas*.[58]

47. I accept the submissions of the respondent and the intervener on this issue. The plain words, in those parts of the statutory definitions which deal with 'artificial aids', have changed very little since the decision in *Thomas*, and not in a way which would suggest the meaning of 'artificial aids' has altered. No developed submission is made by the appellant, that the insertion of cl (g) into the relevant definition in s 59 of the 1987 Act (and the corresponding inclusion of s 59A(6)(b) in the 1987 Act), requires that the term 'artificial aids' be read more restrictively than it was in *Thomas*. Other than the insertion of cl (g), the appellant has not sought to identify any specific change in the words, which would warrant an interpretation different to that in *Thomas*. I accept the submission by the respondent and the intervener, that the interpretation in *Thomas* is consistent with the words of the text. The Arbitrator's reliance on the decision in *Thomas* is supported by the application of *Ex parte Campbell*, further discussed below.

The reliance on Ex parte Campbell

48. The intervener, supporting the Arbitrator's decision, submits there is "every reason to presume, as the Arbitrator did, that Parliament intended to embrace the existing judicial interpretation of 'artificial aids' when re-enacting it". The intervener refers to the Arbitrator's reasons at [56]–[58] and the authorities cited there.[59] The respondent adopts the intervener's submissions on this issue.

49. The Arbitrator referred to *Ex parte Campbell*, in which James LJ said:

> "Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them."[60]

50. The appellant, in its submissions in reply, said that *Ex parte Campbell* has been doubted, referring inter alia to *Salvation Army*, *Flaherty* and *Electrolux Home Products Pty Ltd v Australian Workers' Union*.[61] In *Salvation Army* Dixon, Williams and Webb JJ said of this proposition:

> "But this principle affords at most a valuable presumption as to the meaning of the language employed. It should not lead the Court to perpetuate the construction of a statutory provision which it considers to be erroneous …"[62]

[58] *Beck*, 181E.
[59] Intervener's submissions, [5].
[60] *Ex parte Campbell*, 706.
[61] [2004] HCA 40; 221 CLR 309; 209 ALR 116; 78 ALJR 1231 (*Electrolux*).
[62] *Salvation Army*, [10].

51. In *Flaherty*, Mason ACJ, and Wilson and Dawson JJ, after referring to authorities including *Salvation Army*, said "… the suggested rule nowadays is little use as a guide and it will not be permitted to prevail over an interpretation otherwise appearing to be correct."[63]

52. The Arbitrator cited *Re Alcan*,[64] which postdates *Flaherty*, in which a unanimous bench of seven said:

> "There is abundant authority for the proposition that where the Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already 'judicially attributed to [them]'."[65]

53. Their Honours noted that "the validity of that proposition has been questioned", referring to *Salvation Army*, but said "the presumption is considerably strengthened in the present case by the legislative history of the Act".[66]

54. In *Electrolux*, McHugh J attached significance to a definition being repeated in legislation, two years after the High Court decision in *Re Alcan*. His Honour said that in "the specialised and politically sensitive field" of industrial relations, "it would be astonishing if the Department, its officers and those advising on the drafting of the Act would have been unaware of *Re Alcan*".[67] The presumption was recently considered in the High Court in *Fortress Credit Corporation (Australia) II Pty Limited v Fletcher*, the Court saying that the decision in *Re Alcan* "… noted that the validity of the proposition has been questioned but accepted it as a permissible approach to interpretation".[68] The principle was a factor considered, as part of the legislative history, in the construction reached by their Honours in *Fletcher*.[69]

55. The passage from *Fish* to which the appellant refers, in which Kirby J said "[s]uch assumptions are now commonly treated as legal fictions",[70] is of limited assistance. His Honour's was a minority judgment in *Fish*, and predates the High Court's consideration of the presumption in *Fletcher*.

56. In *WorkCover Authority of New South Wales (Inspector Belley) v Freight Rail Corporation* Haylen J, applying the presumption, observed:

> "While there might be some validity in the attacks on the presumption based upon the artificiality of presuming Parliament knows and understands the various rulings that courts have made in construing legislation before Parliament re-enacts it, there is not quite the same strength to that argument where Parliament deals with statutes administered by specialist tribunals or where there is a legislative history of frequent review and amendment."[71]

57. It can be validly observed that, since the decision in *Thomas*, workers compensation legislation in NSW has been administered by a specialist Commission and court, and then a specialist tribunal, and the legislation has been subject to "frequent review and amendment".

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[63] *Flaherty*, [34].
[64] Decision, [57].
[65] *Re Alcan*, [20].
[66] *Re Alcan*, [20].
[67] *Electrolux*, [81].
[68] [2015] HCA 10; 254 CLR 489 (*Fletcher*), [15].
[69] *Fletcher*, [25]–[27].
[70] *Fish*, [125].
[71] [2002] NSWIRComm 281; 117 IR 99, [62].

58. The principle was recently applied by the Court of Appeal in *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Industrial Relations Secretary on behalf of the Department of Justice*, where it was said:

> "The fact that legislative provisions are re-enacted following judicial consideration (in this case, with only very minor changes) gives rise to a presumption that Parliament has approved of that judicial consideration."[72]

59. The above authorities are consistent with the ongoing operation of the re-enactment presumption as an aid to construction, to be considered in context, including the legislative history of the relevant provision. The principle should not be used to perpetuate a construction which is erroneous. It is necessary that the principle in *Ex parte Campbell* be applied consistently with the later authorities.

60. Clause (b) of s 10(2) of the 1926 Act, which includes 'artificial aids', was part of the definition of 'medical treatment', when it was construed in *Thomas*. That clause, with "only very minor changes", was repeated in the definition of 'medical or related treatment' in s 59 of the 1987 Act, where it remains.

61. In general terms, prior to relevant commencement of the 2012 Amending Act, an employer was liable to pay for a worker's 'medical or related treatment' which was reasonably necessary as a result of compensable injury: ss 59 and 60 of the 1987 Act. Section 59A was inserted by the 2012 Amending Act. Subject to some exceptions, s 59A restricted the period during which such compensation was recoverable.[73] In those circumstances caught by its operation, s 59A as originally enacted, provided that compensation was not payable "under this Division" (Pt 3 of Div 3, which provides for "Compensation for Medical, Hospital and Rehabilitation Expenses etc"). Section 59A in its original form did not distinguish between the various kinds of entitlement described in the definitions in s 59.

62. Section 59A was amended by the 2015 Amending Act. The amendments include the insertion of s 59A(6), which exempts certain "kinds of medical or related treatment" from the application of s 59A. Section 59A(6) provides that s 59A does not apply to:

> "… compensation in respect of any of the following kinds of medical or related treatment:
>
> (a) the provision of crutches, artificial members, eyes or teeth and other artificial aids or spectacles (including hearing aids and hearing aid batteries),
>
> (b) the modification of a worker's home or vehicle,
>
> (c) secondary surgery."

63. The opening words of s 59A(6) repeat the phrase 'medical or related treatment' from the definition heading in s 59. The words used in subcll (a) and (b) of s 59A(6), are reflective of the words of subcll (d) and (g) of the definitions in s 59:

> "(d) the provision of crutches, artificial members, eyes or teeth and other artificial aids or spectacles,"
>
> "(g) the modification of a worker's home or vehicle directed by a medical practitioner having regard to the nature of the worker's incapacity,"

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[72] [2015] NSWCA 386, (per Emmett JA, Ward JA agreeing), [66]. See also to similar effect *Williams v Pisano* [2015] NSWCA 177; 90 NSWLR 342 (per Emmett JA), [99], and *JPMorgan Chase Bank National Association v Fletcher* [2014] NSWCA 31; 85 NSWLR 644 (per Macfarlan JA, Gleeson JA agreeing), [164].

[73] See *Flying Solo Properties Pty Ltd t/as Artee Signs v Collet* [2015] NSWWCCPD 14.

64. The Arbitrator relied[74] on the following passage from *Franzon*:

> "It is a sound rule of construction to give the same meaning to the same words appearing in different parts of a statute unless there is reason to do otherwise."[75]

65. Clause (d) of the definition of 'medical or related treatment' in s 59, and s 59A(6)(a), both appear in the same Division (Pt 3 of Div 3) of the 1987 Act, dealing with "Compensation for Medical, Hospital and Rehabilitation Expenses etc". One essentially repeats the wording of the other. There is no reason why those words should not be given the same meaning in each instance. Section 59A(8) provides that s 59A "does not affect the requirements of section 60". Thus, although s 59A(6) may quarantine a certain kind of 'medical or related treatment' from the disentitling operation of s 59A, it is still necessary that the cost of the treatment be recoverable pursuant to ss 59 and 60. It is appropriate that the term 'artificial aids' has the same meaning in the definition in s 59, and in s 59A(6)(a). This is consistent with those provisions operating coherently together, giving "effect to harmonious goals".[76]

66. The relevant words appeared in the definition of 'medical treatment' in s 10(2) of the 1926 Act. They appeared, in very similar form, in the definition of 'medical or related treatment' in s 59 of the 1987 Act. They appeared in substantially identical form (but with the addition of the words "including hearing aids and hearing aid batteries") in s 59A(6)(a) of the 1987 Act, a provision which placed that particular kind of 'medical or related treatment' outside the otherwise disentitling provisions of s 59A. The purpose of s 59A(6)(a) is discussed at [70]–[73] below. The repeated use of substantially identical words in these provisions, with only very minor changes, is consistent with an intention that they have the same meaning as when the phrase 'artificial aids' was construed in *Thomas*. *Thomas* is a longstanding authority dealing with the meaning of the words. Consistent with *Re Alcan* and related authorities referred to above, the presumption relied on by the Arbitrator, citing *Ex parte Campbell*, is a "permissible approach" to interpretation of the words. It does not have the effect of perpetuating an erroneous construction. The Arbitrator did not err in relying on the principle, in support of his application of the decision in *Thomas*.

Is the provision beneficial?

67. The appellant's submission, regarding whether the Arbitrator's reading of the second reading speech was "too broad", is not developed beyond what is summarised at [32] above. The appellant, in reply, seeks to rely on the 2012 Amending Act, in support of an argument that the definition should be read more narrowly than in *Thomas*. It submits Parliament's intention underlying the 2012 amendments is expressed in the opening words of s 59A(1), "Compensation is not payable …" It submits the 2012 amendments "were patently not beneficial", and the 2015 Amending Act should relevantly be "construed by reference to the 2012 amendments it is ameliorating". The appellant refers to *Goudappel*.[77]

68. The plurality in *Goudappel* said:

> "It can be accepted, as was put by counsel for Mr Goudappel, that the WCA's remedial character reflects a beneficial purpose which requires a beneficial construction, if open, in favour of the injured worker. But to accept the beneficial purpose of the WCA as a whole *does not mean that every provision or amendment to a provision has a beneficial purpose or is to be construed beneficially. The purpose of the provision must be identified.* The evident purpose of cl 5 was to expand the regulation-making power so as to allow regulations to be made which could affect pre-existing rights. The purpose of cl 11, made pursuant to cl 5(4), was clear enough. It applied the new s 66 to

[74] Decision, [58].
[75] *Franzon*, [11].
[76] *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355; 153 ALR 490; 72 ALJR 841 (*Project Blue Sky*), [70].
[77] Appellant in reply, [23], [24].

> entitlements to permanent impairment compensation which had not been the subject of a claim made before 19 June 2012 that specifically sought compensation under the old s 66. Its purpose was patently not beneficial."[78] (emphasis added and footnote omitted)

69. The Arbitrator referred[79] to *Military Rehabilitation and Compensation Commission v May*,[80] in which the plurality said the "question of construction is determined by reference to the text, context and purpose of the Act."[81] The Arbitrator quoted the following well known passage[82] from the plurality in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*:

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."[83] (footnotes omitted)

70. The Arbitrator considered the historical context of s 59A(6)(a) of the 1987 Act,[84] and the purpose of the 2015 Amending Act which enacted s 59A(6).

71. The Arbitrator referred[85] to *Goudappel* at [29] (the passage quoted at [68] above), and to a passage to similar effect in *Cram Fluid Power Pty Ltd v Green*.[86] The Arbitrator dealt with the second reading speech relating to the 2015 Amending Act. The Minister said that in "2012 the scheme was in crisis, with a $4.1 billion deficit". The Minister referred to improvements in the scheme's financial position, "[t]hanks to reforms introduced by this Government". He said:

> "The Government is now in a position to return some of these funds to further support injured workers, to get them back to work and to reward employers with an above average safety record with lower premiums."
>
> And:
>
> "Compensation for certain kinds of medical or related treatment, including artificial aids such as hearing aids and artificial members, will not have a time limit."[87]

72. The Arbitrator said:

> "A clear purpose of the 2015 amendments was to widen the potential benefits available for workers to recover the costs of specific medical and related expenses beyond the expiry of the time periods specified in s 59A. The 2015 amendments clearly have some beneficial purpose although I do not accept the applicant's submission that sub-section (6) should be read 'widely'. However, there is no reason to read these amendments in the same vein as the 2012 amendments which clearly disclosed a 'cost-savings objective'."[88]

73. The passage from *Goudappel* quoted above requires that the purpose of the relevant provision or amendment be identified. It is apparent, from the text of the amendment, and its

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[78] *Goudappel*, [29].
[79] Decision, [45].
[80] [2016] HCA 19; 257 CLR 468 (*May*).
[81] *May*, [10].
[82] Decision, [46].
[83] [2009] HCA 41; 239 CLR 27, [47].
[84] Decision, [47]–[52].
[85] Decision, [68].
[86] [2015] NSWCA 250; 13 DDCR 281, [122].
[87] New South Wales Legislative Assembly, *Parliamentary Debates* (Hansard), 5 August 2015, 70, 72.
[88] Decision, [72].

legislative history, that s 59A(6) quarantined specified kinds of medical or related treatment, including those described in s 59A(6)(a), from the otherwise disentitling effect of s 59A. The Arbitrator correctly recognised that it had "some beneficial purpose". For reasons discussed above, there is no reason why the words in s 59A(6)(a) should not have the same meaning as those in cl (d) of the definition of 'medical or related treatment', in s 59 of the 1987 Act. There is no reason why they should be read more narrowly than the corresponding phrase in the definition in s 59. Section 59 provides that the definition in that section of 'medical or related treatment' applies for the purpose of Div 3 of Pt 3. Section 59A(6)(a) falls within Div 3 of Pt 3. For reasons given above, the Arbitrator did not err in applying the construction from *Thomas* to the meaning of the phrase 'artificial aids' in s 59A(6)(a).

74. The Arbitrator's conclusion in this regard was not dependent on construing s 59A(6) beneficially. The respondent, at the arbitration hearing, submitted that s 59A(6) was a "remedial provision", and "ought to be given the widest meaning possible", specifically in relation to the definition of artificial member or aid.[89] The Arbitrator described his comments (at [67]–[72] of the decision) as being in light of this submission. The Arbitrator rejected the submission that s 59A(6) should be read "widely".[90] The Arbitrator did not err in his approach to whether the provision should be construed beneficially. The Arbitrator did not construe the provision on that basis, so any such error could not have affected the result in any event.

75. Ground No 2 is rejected.

GROUND NO 3

The Arbitrator made an error of law in failing to construe s 59A(6)(a) of the 1987 Act by reference to its text, context and purpose and consequently erred in finding that a total left knee replacement was an 'artificial aid' contemplated by s 59A(6)(a) of the 1987 Act.

The appellant's submissions

76. The appellant submits that the issue of whether the total knee replacement was of the same 'kind' as the other medical or related treatments enumerated in s 59A(6)(a) should have been answered by a process of statutory construction. The Arbitrator "averted to the correct authorities and principles" but failed to apply them. The phrase re-introduced, by the 2015 Amending Act, was in a provision "relevantly and significantly different from s 10(2) of the 1926 Act".

77. The appellant nominates two canons of construction, which it submits should have been applied. The first is *noscitur a sociis*, "legislation is not understood by reading it word for word", but by "reading whole phrases or sections". The phrases "artificial members" and "other artificial aids" should be understood "in the context of the phrases in which they appear",[91] citing *Avondale Motors (Parts) Pty Ltd v Federal Commissioner of Taxation*.[92]

78. The second canon referred to is *ejusdem generis*; the maxim "presumes that a general word is read down to have the meaning of specific words in a list. To successfully argue *ejusdem generis* it is necessary to characterise the genus of the list." The genus of the list in s 59A(6)(a) is submitted to be "aids that are external, visible and externally accessible to an injured worker's body". The appellant submits that "s 59A(6)(b) confirms that the genus in s 59A(6)(a) should not be read more widely".[93]

79. The appellant submits:

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[89] T 31.11–7.
[90] Decision, [72].
[91] Appellant's submissions, [37].
[92] [1971] HCA 17; 124 CLR 97; 45 ALJR 280 (*Avondale Motors*), [13].
[93] Appellant's submissions, [38].

> "Applying the canons of construction *noscitur a sociis* and *ejusdem generis* leads to the conclusion that reading ss 59A(6)(a) as a whole and reading down the general words in the sub-section to embrace only those things falling within the genus, knee replacement surgery is not an artificial aid and is not capable of falling within the exception to section 59A(1) of the 1987 Act."[94]

80. The appellant refers to *Sorrenson v Opal Promotions Pty Ltd*,[95] a decision of O'Meally J, in which his Honour said that the phrase 'artificial aids' should be construed *ejusdem generis* with crutches, artificial members, eyes or teeth. His Honour concluded that an exercise bike and chairs could not be considered 'artificial aids'. This decision contains no reference to the decision in *Thomas*; and there is no indication that his Honour was referred to it.

The appellant's submissions in reply

81. The appellant submits that the respondent seeks to resist the appellant's argument on statutory interpretation, by relying on *Thomas*, a case which the appellant submits "has no application". The appellant repeats its reliance on the canons of *noscitur a sociis* and *ejusdem generis*.[96] It states that whether a total knee replacement was an 'artificial member' was not the subject of decision, or of the present appeal.[97] It says that the respondent was not claiming for modification of his vehicle under s 59A(6)(b) of the 1987 Act (in response to an argument by the respondent based on *Thomas*).[98]

The respondent's submissions

82. The respondent submits that Hutley JA interpreted the term 'artificial aid' in the context of s 10 of the 1926 Act as a whole. "His interpretation was manifestly in harmony with the objects of the legislation to compensate workers in respect of the effects of workplace injuries."[99] His Honour had regard to the "illustrative value"[100] of the "other articles in the subclause, crutches, artificial members, eyes or teeth …"[101] In adopting the approach of Hutley JA, the Arbitrator "defined the term in the context of the legislation as a whole, and the accompanying articles in the sub-section in which it appeared". The terms accompanying 'artificial aid' in s 10(2)(b) of the 1926 Act "are with limited variation, essentially the same as the definition of *medical and related expenses* in section 59 of the 1987 Act, and section 59A(6) of the 1987 Act". The respondent submits it is "incorrect" to suggest the term was not interpreted in its relevant context in *Thomas* or the current arbitral decision.[102]

83. The respondent submits that the appellant's submission, that the *ejusdem generis* rule restricts the term 'artificial aids' to aids that are "'external, visible, and externally accessible to an injured worker's body', is made without providing any explanation of the legislative purpose in restricting compensable artificial aids in this way".[103] There is no reference to the objects of the legislation, or to any section of the Acts themselves, which would indicate an intention to exclude artificial aids that were internal.

84. The respondent submits that Hutley JA drew no distinction between aids that were external and internal. His Honour placed "no limit on types of aids that were compensable under the Act".[104] There are items in s 59A(6) on which the appellant relies, in support of its *ejusdem*

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[94] Appellant's submissions, [39].
[95] (1989) 5 NSWCCR 254.
[96] Appellant in reply, [26]–[30].
[97] Appellant in reply, [31].
[98] Appellant in reply, [33].
[99] Respondent's submissions, [26].
[100] Respondent's submissions, [27].
[101] *Thomas*, 220F–G.
[102] Respondent's submissions, [27]–[28].
[103] Respondent's submissions, [29].
[104] Respondent's submissions, [30].

generis argument, which are not exclusively external. Eyes and teeth are internal to the body. Section 59A(6) refers to hearing aids. A cochlear implant has an internal implant, yet would "obviously be compensable". "One can conceive of a variety of artificial aids which are inserted within the body and would enable the effects of injury to be overcome – pacemakers, artificial hearts, and nerve stimulators, to name a few."[105]

85. *Thomas* involved modification of a motor vehicle, "arguably more remote in its relationship to the injury than an aid attaching to the body". If modifications to a motor vehicle, assisting the worker to overcome her disability and to transport herself, fall within the ambit of an artificial aid, it is difficult to conceive that an aid that would assist a worker in walking would not be one "the legislature intended to compensate under the scheme". The distinction between external and internal aids is submitted to be "artificial and lacking any substantive rationale".[106]

The intervener's submissions

86. The intervener submits that, when "considering an argument that words should be read *ejusdem generis* with other concepts in a statute, the Court should 'begin with the presumption or assumption that words, even when general, mean what they say'",[107] citing *Cody v J H Nelson Pty Ltd*.[108] The intervener submits the introduction of "special provision for modification of a worker's home or vehicle provides no reason to read the words 'artificial aid' any more narrowly". The submission continues:

> "There would be a real prospect of incoherence if the Commission chose to read more narrowly the concept of 'artificial aids' merely because Parliament had, in a different respect, enlarged the scope of treatments being contemplated. Rather, there is every reason to presume, as the Arbitrator did, that Parliament intended to embrace the existing judicial interpretation of 'artificial aids' when re-enacting it, and to give that expression the same semantic scope both in section 59 and section 59A: see the Arbitrator's decision at [56]–[58] and the cases cited there."[109]

87. The intervener refers to the maxims on which the appellant relies, *ejusdem generis* and *noscitur a sociis*. It submits that when invoking them, regard must be had to the "whole context, including other provisions of the statute, and its scope and purpose",[110] citing *Deputy Commissioner of Taxation v Clark*.[111]

88. The intervener submits that "[t]he maxims must be applied with caution", citing *Pepper v Attorney-General for the State of Queensland [No 2]*.[112] It submits regard should be had to the presumption that a statute should be read coherently on the basis that it gives effect to harmonious goals, referring to *Project Blue Sky*.[113]

89. The intervener submits:

> "If it were necessary to replace a toe, a foot, or a whole leg below the knee, it cannot be doubted that this would be an artificial member. If it were necessary to replace part of a leg that could not be characterised as a whole 'member', that must be an artificial aid of a similar kind. The total knee replacement involves exactly that step, except that it happens below the flesh. There is no reason in the text or purpose of the section to

[105] Respondent's submissions, [31].
[106] Respondent's submissions, [33]–[34].
[107] Intervener's submissions, [4].
[108] [1947] HCA 17; 74 CLR 629 (*Cody*), 647–8.
[109] Intervener's submissions, [5].
[110] Intervener's submissions, [6].
[111] [2003] NSWCA 91; 57 NSWLR 113 (*Clark*).
[112] [2008] QCA 207; 2 Qd R 353 (*Pepper*) (per Muir JA, de Jersey CJ and Fraser JA agreeing), [23].
[113] *Project Blue Sky*, [70].

> read 'other artificial aids' so narrowly as to exclude this treatment – indeed, to do so would only tend to reduce the coherence of the provision."[114]

90. The intervener submits that if, contrary to the above submissions, the Commission adopts a narrow reading of the term 'artificial aid' consistent with the appellant's submissions, it is necessary to consider the term 'artificial members' in s 59A(6)(a) of the 1987 Act. The appellant, at the arbitration hearing, relied on a dictionary definition of 'member', "any part or organ of the body, esp limb".[115] The intervener submits that a "knee is clearly open to being characterised as a 'part or organ of the body'". It continues:

> "… an interpretation should be adopted that provides the section with a coherent operation that gives effect to its statutory purpose … it would be incoherent if section 59A(6) applied to replacement of, say, a thigh or a foot or a toe, but did not apply to the replacement of a knee.
>
> If the Commission considers it necessary to decide the point, the Commission should hold that the proposed knee replacement involves the provision of an 'artificial member'."[116]

Consideration

91. The appellant's submissions refer to the words in s 59A(6)(a) being "re-introduced" into the 1987 Act, by the 2015 Amending Act.[117] Whilst the 2015 Amending Act inserted s 59A(6)(a), the words (in substantially identical form) were present throughout, in the definitions in s 10(2) of the 1926 Act, then s 59 of the 1987 Act. Ground No 3 refers to a failure by the Arbitrator to construe s 59A(6)(a) of the 1987 Act by reference to its text, context and purpose. Notwithstanding this, the appellant's submissions on this ground deal essentially with the canons of construction which it submits should have been applied.

92. The appellant submits:

> "Applied to s 59A(6)(a) a *noscitur a sociis* reading would understand the phrases 'artificial members' and 'other artificial aids' as being understood in the context of the phrases in which they appear."[118]

93. The appellant, in support of this proposition, refers to *Avondale Motors*. Gibbs J (as his Honour then was) in *Avondale Motors* said:

> "The meaning of the phrase 'same as', like that of any other ambiguous expression, depends on the context in which it appears. In my opinion in the context of the section the words 'same as' import identity and not merely similarity and this is so even though the legislature might have expressed the same meaning by a different form of words."[119]

94. The appellant refers to reading words *ejusdem generis*. It submits:

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[114] Intervener's submissions, [7].
[115] Decision, [80]. The *Australian Oxford Dictionary Online* relevantly defines 'member' as "*archaic* A part of the body, especially a limb". The *Macquarie Dictionary Online* relevantly defines 'member' as "a part of an animal body which protrudes from the trunk, as a leg, arm or wing".
[116] Intervener's submissions, [9]–[10].
[117] Appellant's submissions, [36].
[118] Appellant's submissions, [37].
[119] *Avondale Motors*, [13].

> "The genus of the list comprised in s 59A(6)(a) is aids that are external, visible, and externally accessible to an injured worker's body. The existence of s 59A(6)(b) confirms that the genus in s 59A(6)(a) should not be read more widely."[120]

95. The respondent's submissions attack this characterisation. The respondent submits the articles in s 59A(6)(a) are "not exclusively external to the body". Eyes and teeth are internal to the body. A cochlear implant has "an internal component", yet would be compensable as it falls within the meaning of 'hearing aids'. Artificial body parts, organs and limbs, would be compensable as 'artificial members', yet are "internally located".

96. The intervener refers to authorities relating to the maxims on which the appellant relies. In *Cody* Dixon J said:

> "The three canons of construction are relied upon: Lord *Bacon's verba generalia restringuntur ad habilitatem rei vel personae*, to which in the passage just quoted there is a reference; Lord *Hale's noscitur a sociis*, and that which allows the court to give to general expressions following an enumeration of more particular things or matters an application no larger than to things and matters *ejusdem generis.* But standing as a caution against a too ready use of these counsels there is yet another Latin canon, *generalia verba sunt generaliter intelligenda*, which is as much as to say words although general should be understood in their primary and natural signification unless there are sufficient indications of some other meaning. This last maxim or brocard is not to be understood in opposition to the three first mentioned. They relate to the context and subject matter in which indications of a narrower meaning may be seen."

And:

> "I think that we should begin with the presumption or assumption that words, even when general, mean what they say."[121]

97. The intervener refers also to *Clark* where Spigelman CJ (Handley and Hodgson JJA agreeing) said:

> "The process of reading down general words in a statute is a frequently recurring issue in statutory interpretation. (See, for example, the authorities I referred to in *R v Young* [1999] NSWCCA 166; (1999) 46 NSWLR 681 at [23]–[29].) Application of the ejusdem generis rule is a specific example of this process. The application of this rule, in substance, gives the immediate verbal context determinative weight in the process of construing general words. In my opinion, this is rarely justified. Whether or not general words ought be read down is to be determined by the whole of the relevant context, including other provisions of the statute and the scope and purpose of the statute."[122]

98. The Chief Justice in *Clark* also quoted the following passage[123] from *Mattinson v Multiplo Incubators Pty Ltd*,[124] in which Mahoney JA said:

> "There are frequently … several competing formulations of the genus. Which one is to be selected as the intended genus will, as it has been said, require that there first be ascertained what is the purpose of the statutory provision or the legislative intention as disclosed by it … and the exercise might then partake of the circuitous. The legislative intention to be derived from the words used is not ascertained by applying the ejusdem generis rule; whether and in what manner the rule is to be applied is to be determined after the legislative intention has first been assessed. … If, in order to determine

[120] Appellant's submissions, [38].
[121] *Cody*, 647–8.
[122] *Clark*, [127].
[123] *Clark*, [130].
[124] [1977] 1 NSWLR 368 (*Mattinson*)

> whether there is any, or what, genus, or whether the particular words exhaust that genus, it is necessary first to determine what was the relevant intention of that part of the legislation, the construction of the words may normally be best determined simply by reference to that intention, without the necessity of resorting to an artificial rule of construction."[125]

99. In *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* Gibbs CJ said:

> "The words of any statutory provision must be first read in the context provided by the statute as a whole but 'if, when so read, the meaning of the section is literally clear and unambiguous, nothing remains but to give effect to the unqualified words'".[126] (citations omitted)

100. In *Chief Commissioner of State Revenue v Tasty Chicks Pty Ltd* Meagher JA (Barrett JA and Sackville AJA agreeing) said of the *ejusdem generis* rule:

> "The rule provides a grammatical justification for reading general words down so as to limit their operation. For its application it requires that there be an enumeration of things of a particular kind or class so that the general words might then be read as applying only to things of the same kind or class as those enumerated …"[127] (citations omitted)

101. It is necessary, as a starting point, to consider the words of the text. If the meaning is "literally clear and unambiguous", effect is given to the clear words. The intervener submits that a "total knee replacement falls within the concept of an 'artificial aid'", as "a matter of ordinary English".[128] The respondent submits that Hutley JA in *Thomas* interpreted the term 'artificial aid' "in the context of the legislation as a whole, and the accompanying articles in the sub-section in which it appeared".[129]

102. The Court of Appeal in *Thomas* gave the general words their full natural meaning:

> "An artificial aid, in my opinion, is anything which has been specially constructed to enable the effects of the disability (the result of injury) to be overcome. The other articles in the subclause, crutches, artificial members, eyes or teeth, are illustrations of this."[130]

103. Rather than reading down the general words, 'artificial aids', to make their meaning consistent with the specific items in the list, Hutley JA described the specific items as illustrative of the meaning he ascribed to the general words. His Honour gave the general words their full literal meaning, consistent with the clear words of the provision. I accept the submissions of the intervener and the respondent, that the plain words of the text are consistent with a total knee replacement falling within the definition of an 'artificial aid'.

104. In any event, if the term were being construed by reference to the genus of the other items in s 59A(6)(a), I do not accept that this would result in it being limited in the way for which the appellant contends. The appellant argues that the genus of the list in s 59A(6)(a) is restricted as described at [94] above.

105. The words of the provision do not suggest that its meaning is restricted in this way. It is unclear why s 59A(6)(b), which provides for "modification of a worker's home or vehicle", leads to the conclusion that s 59A(6)(a) should be so restricted. In *Clark*, Spigelman CJ,

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[125] *Mattinson*, 375D–G.
[126] [1985] HCA 48; (1985) 157 CLR 309, [4].
[127] [2012] NSWCA 181, [54].
[128] Intervener's submissions, [3].
[129] Respondent's submissions, [28].
[130] *Thomas*, 220F–G.

referring to *Cody*, said "[i]t is essential for the application of the ejusdem generis rule that some common characteristic capable of being described as a genus is able to be identified".[131] The passage from *Mattinson*, quoted above at [98], indicates that "whether there is any, or what, genus" is determined by "the relevant intention of that part of the legislation". The intention is not ascertained by applying the *ejusdem generis* rule. The submissions of the intervener and the respondent are correct; there is nothing in the text or purpose of the section which suggests that it should be read so narrowly. The items in the list, in s 59A(6)(a), are not consistent with the genus which the appellant argues should be applied.

106. Artificial teeth may take the form of removable dentures, or may be implanted. Either would clearly fall within the ambit of s 59A(6)(a). In either event, they are designed to be used within the mouth and would, as the respondent submits, be "internal".[132] An artificial eye, whilst in part externally visible, is used within the eye socket. It could not be appropriately described as an aid that was "external". The definition in s 59A(6)(a) includes the words "including hearing aids and hearing aid batteries". Hearing aids are likely to be partially external and partially internal. They could not be simply described as "external". Aids such as artificial teeth, or some hearing aids, would not necessarily be visible. The genus which the appellant seeks to identify (aids that are external, visible and externally accessible to an injured worker's body) is not consistent with the other items in the list in s 59A(6)(a).

107. The respondent's submission is correct, there is no reference in the appellant's submissions to the objects of the legislation, or to any section of the Acts themselves, which would indicate an intention to exclude artificial aids that were internal.

108. I reject the submission that the meaning of "artificial aids" in s 59A(6)(a) is restricted, on the basis set out at [94] above.

109. The Arbitrator's construction of s 59A(6)(a) is also, in my view, supported by the intervener's submission quoted at [89] above. The respondent adopted this submission. On the plain words used in the subclause, if a worker required an artificial foot, or leg below the knee, the prosthesis would be an 'artificial member' within the meaning of s 59A(6)(a). The replacement of "part of a leg, that could not be characterised as a whole 'member', that must be an artificial aid of a similar kind." The intervener submits "a total knee replacement involves exactly that step, except that it happens below the flesh." I accept the intervener's submission that there is no reason, in the text or purpose of the sections, to exclude such treatment from the meaning of 'artificial aids'.

110. Ground No 3 is rejected. It follows, from the failure of Grounds Nos 2 and 3, that Ground No 1 also is rejected. The appeal fails.

ANOTHER MATTER

111. The intervener submits that, if 'artificial aid' is given the narrow reading proposed by the appellant, the Commission should consider the scope of the expression 'artificial member' in s 59A(6)(a) of the 1987 Act. The intervener submits that "the proposed knee replacement involves the provision of an 'artificial member'."

112. The appeal has failed. The term 'artificial aid' has not been given the "narrow reading" for which the appellant argued. The matter was not ultimately conducted before the Arbitrator on the basis that the knee replacement was an 'artificial member', and the Arbitrator did not make findings on that basis. Other than a brief submission by the intervener, the parties did not make submissions going to such an argument on the appeal. It is not desirable that I deal with that alternative argument, in the current circumstances.

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[131] *Clark*, [126].
[132] Respondent's submissions, [31].

DECISION

113. The Amended Certificate of determination dated 9 October 2017 is confirmed.

Michael Snell
Deputy President

28 March 2018