WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number: 256/20
Applicant: Lawrence Joseph Dunne
Respondent: Surfside Buslines Pty Ltd
Date of Determination: 27 March 2020
Citation: [2020] NSWWCC 94

The Commission determines:

1. The applicant's employment with the respondent is connected with the State of New South Wales at the date of his psychological injury on 10 March 2019 pursuant to section 9AA(3)(b) of the *Workers Compensation Act 1987*.

2. No other order.

A brief statement is attached setting out the Commission's reasons for the determination.

Grahame Edwards
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF GRAHAME EDWARDS, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

Pleadings

1. On 16 January 2020, Mr Lawrence Joseph Dunne (the applicant) filed an Application to Resolve a Dispute (the Application) in the Commission claiming weekly payments of compensation from 18 October 2019 pursuant to ss 36 and 37 of the *Workers Compensation Act 1987* (the 1987 Act), and medical expenses pursuant to s 60 of the 1987 Act as a result of psychological injury caused by exposure to traumatic events or incidents in the course of employment as a bus driver with Surfside Buslines Pty Ltd (the respondent) with the injury deemed to have happened on 10 March 2019.

2. Mr Dunne particularised the "Injury Details" in the Application as follows:

"**Type of injury**	Disease
Date of injury	10/3/2019 deemed
Date of compensation claimed:	11/4/2019
Place of injury:	Various locations within Tweed Heads, New South Wales
Injury description/ **Cause of injury**	The applicant was exposed to numerous traumatic incidences over the course of employment with Surf Side Bus Lines. These incidences involved violent, unruly and intoxicated passengers"

3. On 7 February 2020, the respondent filed its Reply to the Application to Resolve a Dispute (the Reply).

Background

4. On 10 March 2019, Mr Dunne submitted an "incident report form" to the respondent particularising an event or incident in the course of employment at the Robina Town Centre Queensland as follows[1]:

> "Two girls whom [sic] tried to enter bus were refused due to previous incident but refused to get off bus with one standing on front door holding it open with the other girl holding emergency door button on outside of bus preventing me from moving. After calling base & requesting security to attend the girls carried on with their verbal abuse of me. Another passenger on bus then came & told girls to get of [sic] & let bus go so he could get to work but girls continued with their abuse. Then one of the girls pulled a lazser light (torch) from her pocket & shone it directly at my face & eyes. At that point I left the driver's seat & told girl to hand over lazer which she refused. I then attempted to grab lazer from girls [sic] pocket of her jacket pulling jacket from girl & obtaining lazer. Returning to my seat other girl then reached in to [sic] my cash box area where I had put lazer & removed it & left bus with more abuse and insults."

5. On 19 March 2019, Mr Dunne lodge an application for workers compensation with WorkCover Queensland (Qld WorkCover) in regard to his injury suffered on 10 March 2019.

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[1] Application – p 43

6. On 10 April 2019, Mr Dunne submitted a "Worker's injury claim form" (the NSW claim form) to the New South Wales State Insurance Regulatory Authority[2].

7. Under the heading in the NSW claim form: "What happened and how you were injured?", Mr Dunn particularised the injury as follows:

> "Cumulative total of many incidents during the course of employment with Surfside Buslines from 2001 until 10 March 2019. On 10 March 2019 an incident occurred as per the Incident Report Form attached involving an incident with fare evaders at Robina Town Centre and involving a laser light being shined into my eyes."

8. On 23 April 2019, Qld WorkCover wrote to Mr Dunne advising while it considered him to be a worker under the *Workers Compensation and Rehabilitation Act 2003* (the 2003 Qld Act), he did not suffer a personal injury arising out of or in the course of employment within the meaning of s 32(1)(b) of the 2003 Qld Act[3].

9. On 24 April 2019, the respondent's NSW workers compensation insurer, Insurance & Care NSW (Icare), accepted provisional liability for Mr Dunne's injury.

10. On 20 May 2019, Mr Dunne's solicitors wrote to Icare, referring to acceptance of provisional liability, asking Icare to accept full liability for the claim because employment is connected with New South Wales within the meaning of s 9AA of the 1987 Act[4].

11. On 30 May 2019, Mr Dunne lodged an appeal against the decision of Qld WorkCover with the Queensland Workers Compensation Regulator (the Qld Regulator), Queensland Office of Industrial Relations.

12. On the same date, Mr Dunne's solicitor wrote to Qld WorkerCover requesting it determine liability of injury as a result of "multiple traumatic events that the Worker has been exposed to during the course of employment and determine liability within the meaning of section 32 of the Act"[5].

13. Also, on the same date, Mr Dunne's solicitors wrote to the Queensland Office of Industrial Relations advising: "curiously, WorkCover QLD have accepted that Mr. Dunne is a Queensland worker"[6], which Mr Dunne says is inconsistent with the decision of *Ferguson v WorkCover Queensland* (*Ferguson*)[7].

14. On 9 August 2019, the Qld Regulator issued "Reasons for decision"[8], setting aside the decision of Qld WorkCover and substituting a new decision that Mr Dunne suffered a personal injury of a psychological/psychiatric nature arising out of or in the course of employment with the respondent on 10 March 2019; and that employment was the major significant contributing factor to the injury within the meaning of s 32A of the 2003 Qld Act; and that he had an entitlement to compensation under the Queensland workers compensation legislation.

15. The Qld Regulator in her reasons for decision referred to "worker" as not being an issue for review because it was not disputed Mr Dunne was a "worker" within the meaning of the 2003 Qld Act[9].

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[2] supra – pp 10-16
[3] Reply – p 3
[4] supra – p 38
[5] supra – p 40
[6] supra – p 41
[7] [2013] QSC 78
[8] Reply – pp 6-14
[9] supra – p 8

16. On 19 September 2019, an entity styled “Tranalt Australia Group Pty Ltd” (the appellant) lodged a notice of appeal[10] with the Queensland Industrial Relations Commission against the Qld Regulator’s Reasons for decision that Mr Dunne suffered a personal injury within the meaning of s 32A of the 2003 Qld Act.

17. The appellant did not dispute Mr Dunne was a “worker” within the meaning of the 2003 Qld Act in its Notice of Appeal. The ground of the appeal is whether Mr Dunne is disentitled to workers compensation because of his alleged serious and wilful misconduct in relation to the incident with the two female passengers[11] taking him outside the course of his employment disentitling him to workers compensation for his injury.

18. On 9 October 2018, the respondent issued a notice[12] pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) declining liability on the basis the employment is not connected with New South Wales within the meaning of s 9AA of the 1987 Act.

19. On 10 October 2019, Mr Dunne’s solicitors wrote to Qld WorkCover advising that based upon the decision in *Ferguson*: “this is a New South Wales claim”[13], and the NSW workers compensation insurer has “erroneously denied liability for the claim under the New South Wales Act”.

20. On 24 October 2019, Icare issued a notice of review pursuant to s 287A of the 1998 Act maintaining its declinature of liability that the employment is not connected with the State of New South Wales[14].

21. On 13 January 2020, Mr Dunne’s solicitors lodged a “Notice of Claim for Damages” with Qld WorkCover[15]

ISSUES FOR DETERMINATION

22. The parties agree that the following issue remains in dispute:

    (a) Is the applicant’s employment connected with this State within the meaning of s 9AA of the 1987 Act?

PROCEDURE BEFORE THE COMMISSION

23. The parties attended a conciliation conference/arbitration hearing at Tweed Heads on 10 March 2020. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

24. Mr Baran of counsel, instructed by Mr Clarke, solicitor, represented the interests of the applicant who was in attendance at the conciliation conference/arbitration hearing.

25. Mr Beran of counsel represented the respondent in the interests of the insurance scheme agent.

[10] Application to Admit Late Documents filed by the applicant dated 26 February 2020 – pp 8-11
[11] supra – p 10
[12] Application – pp 75-83
[13] Reply – p 43
[14] Application – pp 80-83
[15] supra – p 44

26. The arbitration hearing was sound recorded.

EVIDENCE

Documentary evidence

27. The following documents were in evidence before the Commission and taken into account in making this determination:

    (a) Application and attached documents;

    (b) Reply and attached documents;

    (c) Application to Admit Late Documents filed by the applicant dated 26 February 2020, and

    (d) Application to Admit Late Documents filed by the respondent dated 2 March 2020.

Oral evidence

28. No application was made by either party to adduce oral evidence. No application was made by the respondent to cross examine the applicant.

Submissions

29. Both parties provided a list of cases upon which they rely.

30. Mr Baran provided written submissions and a case list in support of his oral submissions.

31. While the case lists and the applicant's written submissions were not admitted into evidence, those documents will be placed with the papers in the Commission's file.

Applicant

32. Mr Baran submits the acceptance by Qld WorkCover whether Mr Dunne is a worker or otherwise within the meaning of the 2003 Qld Act is irrelevant to the jurisdiction of the Commission.

33. Mr Baran submits s 9AA of the 1987 Act contemplates a state of affairs where employment is connected with New South Wales, and that sub-section (3) provides a series of cascading tests[16]; and the fact that the applicant suffered injury outside of New South Wales does not prevent him from obtaining compensation benefits under the New South Wales legislation.

34. Mr Baran submits the observations, although not exhaustive, of Deputy President Roche in *Martin v RJ Hibbens Pty Ltd*[17] (*Martin*) are relevant to construing the term "usually works".

35. Mr Baran submits if the Commission is not satisfied that the "usually works" test provides the answer, then the Commission moves onto test two: "usually based", and if that test is not satisfied, then moves onto test three: "employer's principal place of business".

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[16] *Klemke v Grenfell Commodities Pty Limited* [2011] NSWWCCPD 27 (*Klemke*)
[17] [2010] NSWWCCPD 83 at [60]

36. Mr Baran submits the applicant has satisfied the tests: “usually works” and “usually based” because the history of employment establishes he drove a variety of different bus routes, some in New South Wales and others in Queensland; and that he commenced and finished work at the Tweed Heads depot.

37. Mr Baran submits the term “usually works” means the place where the worker habitually or customarily works or where he or she works in a regular manner; it does not mean where the worker works for the majority of the time; it is not merely a mathematical exercise[18].

38. Mr Baran, in support of this submission that the first two tests of “usually works” and “usually based” are satisfied, referred to Mr Dunne’s work history set out in paragraphs one to seven and nine of his statement dated 11 January 2020[19].

39. Mr Baran, in support of his submission that Mr Dunne is “usually based” in New South Wales, referred to the respondent’s “file note”[20] disclosing Mr Dunne’s name; his position; employee number and the department/location where he is based as “Tweed Heads Depot”.

40. Mr Baran, in support of this submission that the Commission would be satisfied Mr Dunne could be directed as to the bus routes he was to drive either in New South Wales or Queensland, referred to the statement of a co-worker, whose unchallenged evidence is that she drove buses in both States[21].

41. Mr Baran submits the Commission can inform itself on any manner and in such manner as it considers appropriate[22]; including the drawing of an inference that the respondent could at any time direct the applicant to drive bus routes in New South Wales, and that he was not merely confined to driving bus routes in Queensland.

42. Mr Baran submits the third test: “employer’s principal of business”, is satisfied because the Tweed Heads depot is the respondent’s principal place of business because the contractual agreement or arrangement with Mr Dunne to work for the respondent took place in New South Wales; Mr Dunne started and finished each rostered shift of work at the Tweed Heads depot; he was paid in New South Wales; he lives in New South Wales and the buses were driven to and from the Tweed Heads depot.

43. Mr Baran submits the respondent’s case list does not provide any assistance to the determination of employment that is connected with New South Wales because the respondent has not adduced any evidence to rebut Mr Dunne’s case of satisfying the cascading tests provided by sub-section 3 of s 9AA of the 1987 Act.

44. In respect of sub-section 3(c) of s 9AA, Mr Baran submits the principal place of business is New South Wales, and while ASIC searches are relevant, they are not determinative as to the principal place of business[23].

45. In respect of the Qld Regulator’s Reasons for decision, Mr Baran submits the questions of “worker” and “jurisdiction” were not raised as issues in dispute between the parties; and that the Regulator proceeded on the assumption Mr Dunne was a “worker” within the meaning of the Queensland workers compensation legislation; determining the disputed issue of injury only.

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[18] *Martin* at [60]
[19] Application – pp 2-3
[20] supra – p 33
[21] statement of Helen Margaret McLaughlan dated 25 February 2020 – Application to Admit Late Documents field by the applicant dated 26 February 2020 – p 21-22 at [9] and [10]
[22] s 354(2) of the 1998 Act
[23] *Martin*

46. Mr Baran submits there is no issue estoppel because the questions of “jurisdiction” and “worker” were not considered and determined by the Qld Regulator.

Respondent’s submissions

47. Mr Beran submits the respondent does not cavil with the applicant’s written summary of the cases set out in the respondent’s case list.

48. Mr Beran conceded on behalf of the respondent that Mr Dunne is entitled to compensation benefits as provided by the 1987 Act if he establishes on the balance of probabilities that the employment is connected to this State.

49. Mr Beran submits there is no issue that the applicant commenced and completed his rostered shifts at the Tweed Heads depot each work day to drive buses on routes in Queensland in accordance with a contract with Queensland Translink (division of the Department of Transport and Main Roads[24]), but there is no evidence upon which the Commission could find the respondent at any time directed Mr Dunne to drive buses on routes in New South Wales.

50. Mr Beran submits there is no evidence that the applicant was paid wages in New South Wales.

51. Mr Beran submits the applicant habitually or customarily worked in Queensland; driving buses on routes in that State for many years, and that he only drove the bus in New South Wales for 10 minutes at the commencement of his shift and 10 minutes at the end of the shift, totalling 20 minutes per shift on a standard 12 hour shift.

52. Mr Beran, in support of this submission, referred to paragraph 7 of Mr Dunne’s statement[25], and emails from the respondent and Transit Australia Group, and particulars of bus route 765[26].

53. Mr Beran submits the applicant was paid for the work he did in Queensland, referring to payroll advices issued by the respondent[27].

54. Mr Beran submits the applicant’s meal breaks were taken at Robina and Broadbeach in Queensland[28].

55. Mr Beran submits *Ferguson* is distinguishable on its facts, which involved a delivery driver delivering plumbing supplies and products in both Queensland and New South Wales because deliveries were commonly made in New South Wales by the injured worker and that it was usual for him to do so; starting and finishing work at the Tweed Heads warehouse of his employer where he received instructions on what deliveries to make that day whereas Mr Dunne’s only connection with New South Wales was for 10 minutes at the start of his shift and 10 minutes at the end of his shift, merely taking and returning the bus to the depot.

56. Mr Beran submits the applicant habitually or customarily worked in Queensland, and his employment is connected with that State[29].

57. Mr Beran submits the applicant is not usually based in New South Wales; the Tweed Heads depot is merely the place where he starts and finishes his shifts.

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[24] Reply – p 129
[25] Application – p 3
[26] Reply – pp 16, 18, 20 and 29
[27] supra – pp 55-99
[28] supra – p 20
[29] s 113 of the 2003 Qld Act

58. Mr Beran, in support of his submissions in regard to the first two tests, referred to the hypothetical example given by Applegarth J in *Ferguson* at [39] of a taxi driver collecting and returning the cab to the employer's yard just inside NSW, spending 12 hours providing taxi services on the Gold Coast with 10 minutes out of each 12 hour shift in New South Wales; and in such case the worker might not be "usually based" in New South Wales for the purpose of his employment as a taxi driver.

59. Mr Beran submits the respondent's principal place of business is Queensland evidenced by the ASIC records showing the registered office of the respondent is in Brisbane and its principal place of business is at Robina[30].

Applicant's submissions in reply

60. Mr Baran submits the respondent's records show the directions he was given at the Tweed Heads depot with respect to his duties, where those duties were to be performed, and how they were to be performed[31].

61. Mr Baran submits the Commission should exercise caution with respect to Mr Hoppner's email dated 7 February 2020[32] because there is no statement from him, but in any event part of Mr Hoppner's email supports the applicant's case.

62. Mr Baran submits s 354 of the 1998 Act entitles the Commission to draw inferences, referring to the respondent's rostered bus route records, that it could direct him as to when, where and how he performed those duties based on the history of employment, which commenced in 2000.

Discussion

63. The relevant parts of s 9 AA of the 1987 Act are:

> "(1) Compensation under this Act is only payable in respect of employment that is connected with this State.
>
> (2) That fact that a worker is outside this State when the injury happens does not prevent compensation being payable under this Act in respect of employment that is connected with this State.
>
> (3) A worker's employment is connected with:
>
> (a) The State in which the worker usually works in that employment, or
>
> (b) If no State or no one State is identified in paragraph (a), the State in which the worker is usually based for the purposes of that employment, or
>
> (c) If no State or no one State is identified by paragraph (a) or (b), the State in which the employer's principal place of business in Australia is located.
>
> …
>
> (6) In deciding whether a worker usually works in a State, regard must be had to the worker's work history with the employer and the intention of the worker and employer. However, regard must not be had to any temporary arrangement under which the worker works in State for a period of not longer than 6 months
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> …"

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[30] Reply – p 100
[31] supra – pp 20-21
[32] supra – p 45

64. Section 9AA was enacted into the 1987 Act by the *Workers Compensation Legislation Amendment Act 2002* on 4 December 2002. It applies to all applications from 1 January 2006. The Parliamentary Secretary stated in the second reading speech in the NSW Legislative Council on 4 December 2002, that the purpose of the amendment was to eliminate the need for employers to obtain workers compensation coverage for a worker in more than one jurisdiction. The principles were intended to ensure that workers:

> "working temporarily in another jurisdiction will only have access to the workers compensation entitlements – and common law benefits – available in their home State of 'State of Connection' and to provide certainty for workers about their workers compensation entitlements and ensure that each worker is connected to one jurisdiction or another".

65. This removes the need for employers to have two workers compensation polices for "employees working temporarily for up to six months" in another State.

66. Other States and the Territories introduced similar legislation to s 9AA.

67. Section 113 of the Qld 2003 Act provides that compensation under the Act is only payable "in relation to employment that is connected with this State". Sub-sections 3 and 6 mirrors the same provisions of those sub-sections in s 9AA of the 1987 Act.

68. It is accepted that the relevant terms of s 9AA(3) provide cascading tests[33] for determining the State with which a worker's employment is connected. First, a worker's employment is connected with the State "in which the worker usually works in that employment" (the "usually works" test). If that test provides an answer to the question, there is no need to proceed further. If not, one applies the test in s 9AA(3)(b) and looks for the State "in which the worker is usually based for the purposes of that employment" (the "usually based" test). If that test provides the answer, there is no need to proceed further. If not, one applies the test in s 9AA(3)(c) and looks for the State "in which the employer's principal place of business in Australia is located" (the "principal place of business" test).

69. Deputy President Roche in *Martin* said that in determining whether a worker usually works in a State under s 9AA(3)(a), regard must be had to the worker's "work history" with the employer and the intention of the worker and employer. However, regard must not be had to any "temporary arrangement" under which the worker works in a State for a period of not longer than six months (s 9AA(s))[34].

70. Deputy President Roche in *Martin* reviewed the authorities, which are summarised in Mr Baran's written submissions and which the respondent does not "cavil with", applicable in the determination of the provisions of s 9AA of the 1987 Act to distil the following principles set out at [60] as follows:

> "(a) regard should always be had to the terms of the contract of employment;
>
> (b) 'usually works' means the place where the worker habitually or customarily works, or where he or she works in a regular manner (*Hanns* at [26]). It does not mean the place where the worker works for the majority of time (*Knight* at [76]) and is not simply a mathematical exercise (*Falls* at [43]), though the time worked in a particular location will naturally be relevant. It will also be relevant to look at where the worker is contracted to work (*Falls*). Regard must be had to the worker's work history with the employer and the parties' intentions, but 'temporary

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[33] *Martin* at [30] and *Klemke*

[34] supra at [71]

arrangements' for not longer than six months within a longer or indefinite period of employment are to be ignored. Whether an arrangement is a 'temporary arrangement' will depend on the parties' intentions, which will be ascertained by looking at the worker's work history and terms of the contract. A short-term contract of less than six months that is not part of a longer or indefinite period of employment will not usually be a 'temporary arrangement' (*Knight*);

(c) 'usually based' can include a camp site or accommodation provided by an employer (*Knight* at [83]). Where a worker is usually based may coincide with the place where the worker usually works, but that need not necessarily be so. In considering where a worker is 'usually based', regard may be had to the following factors, though no one factor will be decisive: the work location in the contract of employment, the location the worker routinely attends during the term of employment to receive directions or collect materials or equipment, the location where the worker reports in relation to the work, the location from where the worker's wages are paid, and

(d) any employer's 'principal place of business' is the most important or main place where it conducts the main part or majority of its business (*Knight* at [66]). It will not necessarily be the same as its principal place of business registered with ASIC."

71. Applegarth J in *Ferguson* agreed with the observations and statements of Deputy President Roche in *Martin*[35]*,* but in respect of where a worker is usually based said:

> "I add that the place in which the worker's employer is based may not be the same place in which the worker is based for the purposes of that employment. The place in which the employer chooses to base certain operations for the purpose of administering the contract of employment, for example, for administering payroll, may have little to do with the place at which the employee is based for the purposes of that employment. The location at which the worker routinely attends during the term of employment to receive directions or collect materials or equipment may be highly relevant."

72. His Honour also said at [39]:

> "…, the place at which the applicant started and finished work each day has an obvious relevance. So too is the place to which he returned to collect products, and the place at which the vehicle he used for the purposes of his employment was based. The place at which he planned his daily runs and the place at which he received directions about the work he was to undertake by way of delivering products are also relevant in determining where he was 'usually based'. The place at which he worked whilst awaiting delivery jobs is also relevant in determining where he was 'usually based'. Whilst regard must be had to these and other facts, none may be decisive in determining where the applicant was 'usually based'."

usually works test

73. In my view, in accordance with the principles of *Martin* and approved of by Applegarth J in *Ferguson*, in deciding the State in which Mr Dunne usually worked regard must be had to his work history.

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[35] *Ferguson* at [36]

74. Mr Dunne commenced work as a full time or permanent bus driver with the respondent in 2000 or 2001. He has always worked out of the respondent's bus depot at Ourimbah Road Tweed Heads. Mr Dunne said the respondent has two other bus depots on the Gold Coast, one at Molendinar and the other at Coomera, both in Queensland. Mr Dunne said he never did any training at the Coomera depot but undertook three days of training at the Molendinar depot, which was over a 19 year period. Mr Dunne said he did not do any bus runs in New South Wales in his later years of employment with the respondent but in the earlier years of employment, he did bus runs in this State from Tweed Heads to Pottsville and Kingscliff.

75. I agree with Mr Baran's submission that the respondent's file note[36] confirms Mr Dunne worked out of the Tweed Heads depot.

76. While there is no direct evidence that Mr Dunne's bus routes were at the direction of the respondent, there is, in my view, some weight in Mr Baran's submission that Mr Dunne could have been directed at any time to undertake bus routes in New South Wales based on his past work history, and also the evidence of Ms McLaughlan[37].

77. Ms McLaughlan worked as a bus driver for the respondent, working from the Tweed Heads depot only, starting and finishing each work day at that depot. Ms McLaughlan's unchallenged evidence is that she undertook bus routes in both Queensland and New South Wales, although the majority of the bus runs were in this State.

78. It is, in my view, a reasonably hypothesis that directions were given to the drivers based at the Tweed Heads depot as to the bus routes they were to undertake as part of their employment duties including driving buses in New South Wales and Queensland based upon the evidence of Mr Dunne, Ms McLaughlan and the respondent's records relating to "Duty 2035", "Duty 2034", "Duty 2424, and "Duty 2622"[38]. While these duty records refer to bus routes in Queensland, all shifts commenced and finished at the Tweed Heads depot. Similar duty sheets would be in place for the rostering of drivers to drive bus routes in this State operating out of the Tweed Heads depot.

79. The contractual arrangement between the respondent and Queensland Translink, while relevant for the provision of buses and drivers to operate bus routes in Queensland, is irrelevant to the direction and control of the respondent to direct drivers at its Tweed Heads depot. In other words, it would be for the respondent as part of its operation at the Tweed Heads depot to direct its employees as to the buses to be driven on routes either in this State or Queensland. The evidence established that the respondent provided bus services out of its Tweed Heads depot both in this State and Queensland. The decision to allocate and direct employees as to the buses to be driven on routes in this State and Queensland laid with the respondent.

80. The evidence also establishes the respondent conducted bus routes in this State and Queensland operating out of the Tweed Heads depot, and that drivers commenced and finished their shifts at that depot irrespective of the bus route allocated to them.

81. With respect to Mr Beran's submission that Mr Dunne habitually or customarily worked in Queensland supported by his evidence that in "later years" he did not do any runs in New South Wales; the submission does not take into account Mr Dunne's work history with the respondent over 19 years driving buses in this State and Queensland.

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[36] Application – p 33
[37] statement of Helen McLaughlan dated 25 February 2020 – Application to Admit Late Documents filed by the applicant – dated 10 March 2020 – pp 21-22
[38] Reply – pp 20-27

82. The evidence, in my view, does not answer the first test upon which I could identify "usually works in that employment connected to the State" as provided by s 9AA(3)(a) of the 1987 Act because he worked in this State and Queensland over his 19 year period of employment.

83. I accept Mr Baran's submission that the respondent could have at any time directed Mr Dunne to drive bus routes either in New South Wales or Queensland as evidenced by his employment history.

84. In accordance with the cascading tests, I need to consider the next test: "the State in which the worker is usually based for the purposes of that employment".

Usually based test

85. The term "usually based" was considered by Commissioner Herron in *Tamboritha Consultants Pty Ltd v Knight*[39] (*Knight*), cited with approval by Roche DP in *Martin* and Applegarth J in *Ferguson*, referring to the Shorter Oxford Dictionary definition of "base" as "town, camp, harbour, airfield, etc., from which (esp. military) operations are conducted and where stores and supporting facilities are concentrated; a centre of operations, a headquarters".

86. I agree with the statement of Applegarth J in *Ferguson* at [36]:

> "The test is where the worker is usually based 'for the purposes of that employment', and this may not be the same place in which a majority of the worker's time is spent each day."

87. His Honour cited with approval the statement of Deputy President Roche in *Martin* [40] that where "a worker is usually based may coincide with the place where the worker usually works, but that need not necessarily be so"; adding that:

> "the place in which the employer chooses to base certain operations for the purpose of administering the contract of employment, for example, administering payroll, may have little to do with the place at which the employee is based for the purposes of that employment. The location at which the worker routinely attends during the term of employment to receive direction or collect materials or equipment may be highly relevant."

88. Mr Dunne, during the entirety of his 19 year period of employment with the respondent, drove buses on routes in this State and Queensland, commencing and finishing each shift at the Tweed Heads depot.

89. The duty rosters or sheets as to bus driving duties referred to by Mr Beran shows the Tweed Heads depot as the base of operation of the respondent for routes in this State and also Queensland, confirmed by the ASIC records as the principal place of business for those bus operations[41].

90. While pay slips and other administrative matters were organised from the Robina office, the issue for determination is where Mr Dunne was based for the purpose of his employment; it is not necessary to determine where he was physically located for most his work time because the place in which he is "based" for the purpose of employment is different to the various places to which he might be required to go in the course of his employment[42].

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[39] [2008] WADC 78 at [30]
[40] *Martin* at [31]
[41] Reply – p 101
[42] *Ferguson* at [60] and *Hanns v Greyhound Pioneer Australia Ltd* [2006] ACTSC5

91. Tweed Heads was the place where Mr Dunne turned up for work, where he received directions by the respondent as to his bus driving duties and other matters ancillary to his employment, and where he collected and returned buses allocated to him. It was the centre out of which he operated, and the fact he spent most of his shift driving bus routes in Queensland does not alter this fact as to his base of operation. The Tweed Heads depot was his base; it was his usual base.

92. I am satisfied on the balance of probabilities the evidence establishes that Mr Dunne was usually based at the Tweed Heads depot; this is the place where he started and commenced all his bus runs throughout his 19 year period of employment; from where he operated or drove the respondent's buses and where he received directions as to his duties and bus routes be undertaken.

Finding

93. For the reasons I have given, I find the employment is connected with the State of New South Wales within the meaning of s 9AA(3)(b) of the 1987 Act.

94. As I have found Mr Dunne's employment is connected with this State, it is not necessary for me to consider the "principal place of business" test other than to comment that some of the ACSIC records refer to various locales for the "principal place of business" including the Tweed Heads depot[43].

Other matters

95. It is not necessary of me to consider or make any determination when and where Mr Dunne suffered his personal injury arising out of or in the course of employment as a result of events or incidents as particularised in the application with a deemed date of injury; incapacity for work and whether medical and related treatment expenses are reasonably necessary as a result of injury because the respondent, through its counsel, concedes Mr Dunne is entitled to compensation benefits in accordance with the provisions of the 1987 Act if the employment concerned is connected with the State of New South Wales.

[43] Reply – pp 100-101