Bulletin

Edited by Michelle Riordan

Independent Review Office

RECENT CASES

These case reviews are not intended to substitute for the headnotes or ratios of the cases. You are strongly encouraged to read the full decisions. Some decisions are linked to AustLii, where available.

Decisions reported in this issue

1. Dawking v Secretary (Department of Education) [2022] NSWPIC 611
2. McKinnon v Port Marina Pty Ltd [2022] NSWPIC 654
3. Payne v Allianz Australia Insurance Limited [2022] NSWPIC 673
4. Watts v BKFY Pty Ltd [2022] NSWPIC 700

PIC – Member Decisions

Workers Compensation

Claim for weekly benefits and s 60 expenses - psychological injury resulting from the worker's refusal to be double vaccinated for COVID-19 – employment terminated for failure to comply with Public Health Order in respect of vaccination and the respondent's COVID Vaccination Guidelines - Held: the injury was not caused by reasonable action taken by the respondent with respect to discipline- s 11A defence rejected

Dawking v Secretary (Department of Education) [2022] NSWPIC 611 – Member Batchelor – 3/11/2022

The worker was employed by the respondent as a full-time special education teacher, but she was engaged as a "temporary" teacher at the time of her injury.

On 27/08/2021, the worker became aware of the Public Health Order 2021 (COVID-19 Vaccination of Workers), which established mandatory requirements for health staff and persons working in health settings to be vaccinated with a COVID-19 vaccine. This required the first dose by 30/09/2021 and a second dose by 30/11/2021.

That day, the respondent sent an email to all school-based staff advising that the Premier of NSW was expected to announce that, as with aged care and health sectors, mandatory double doses of vaccination would be required for all public school and preschool staff from 8/11/2021.

On 2 September 2021 the Respondent's Deputy Secretary, Chief People Officer sent an email to all school-based staff providing an update on mandatory vaccines, advising inter alia that: (a) from 8/11/2021, all NSW school and preschool staff would be required to have received two doses of COVID-19 vaccination; and (b) from 25/10/2021, all NSW school and preschool staff on site to support the staged return of student cohorts under Level 3 plus would be required to have received two doses of COVID-19 vaccination.

On 23/09/2021, the Minister for Health and Medical Research made the Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021 (the Public Health Order). The object of the Order was to require certain education and care workers to be vaccinated against COVID-19. In that Order the Minister directed that education and care workers must not carry out relevant work on or after 8 November 2021 unless the worker had: (a) 2 doses of a COVID-19 vaccine, or (b) been issued with a medical contraindication certificate. The Public Health Order defined "relevant work" as "work at a government school or non-government school".

On 24/09/2021, the worker received a letter from the respondent which advised that she must be double vaccinated by 8/11/2021, otherwise she would be considered guilty of misconduct and liable for disciplinary actions including possible termination of her employment. This advice is contained at [8.9] in the Respondent's "Covid-19 Vaccination Guidelines" (the Guidelines).

The worker alleged that as a result of the vaccination mandate and her decision not to be fully vaccinated, she started to suffer a number of symptoms, including helplessness and hopelessness, loss of interest in daily activities, loss of weight, sleep changes, anger and irritability, and other symptoms for which she consulted a psychologist on 12/10/2021. He diagnosed acute stress reactions/disorder in relation to the current Covid-19 restriction and mandatory vaccination commencing on 27/08/2021 and continuing and certified that she had no current capacity for any work from 9/11/2021.

On 18/10/2021, Georgina Harrison, Secretary of the Respondent, issued Determination No 1 of 2021 under the Teaching Service Act 1980, Covid-19 Vaccination Evidence, the purpose of which was set out in [1.1] thereof as follows:

> The purpose of this Determination is to establish the requirement that employees of the Department must be vaccinated with two doses of a COVID-19 vaccine and provide evidence of that vaccination unless they are unable to be vaccinated because of a medical contraindication, as a condition of their employment with the Department.

This applied to all employees of the respondent employed in Teaching Service. Clause [4.1] made it a condition of employment in the Teaching Service that an employee must provide, to the responsible person for their ordinary place of work:

> (a) vaccination evidence; or
>
> (b) if the employee is unable to be vaccinated against COVID-19 because of a medical contraindication, a medical contraindication certificate.

Clauses [4.2] and [4.3] of Determination 1 provided:

> 4.2 All employees who work, or will be required to work, on a Department site to support the staged return of student cohorts to a Department school are required to provide their vaccination evidence or their medical contraindication certificate to the responsible person by 18 October 2021.
>
> 4.3 All other employees who attend, or ordinarily attend, a Department school for their work will be required to provide their vaccination evidence or their medical contraindication certificate to the responsible person by 8 November 2021."

The worker reported her injury to the respondent on 19/10/2021 and the respondent disputed the claim under ss 4, 9A, 11A(1), 11A(3), 33 and 60 WCA.

On 23/12/2021, Dr Rastogi, psychiatrist, examined the worker at the request of her solicitors. The doctor reported that the worker was fearful of having the vaccine as she believed that it would compromise her underlying medical conditions, which included anaemia, and that she was working from home through Zoom and Microsoft Teams, but was not allowed to do face to face teaching. The doctor diagnosed an adjustment disorder with anxious distress to which employment was the main contributing factor "due to the constant coercion and discrimination to receive vaccine as a mandatory requirement, refusing the worker a medical exemption, and possible threats to her employment with no support provided".

On 7/02/2022, the Respondent's Chief People Officer sent an email to the worker, which noted that she had provided the respondent with a medical contraindication certificate, which did not certify that because of a specified medical contraindication she was unable to have a COVID-19 vaccine. Attention was drawn to cl 5(1) of the Public Health (COVID-19 Vaccination of Education and Care Workers) Order (No 2) 2021. The worker was directed to show her principal or workplace manager by 14/02/2022 a copy of her vaccination evidence or submit a valid medical contraindication certificate so that they were able to validate the entry she had made. She advised that failure to comply with the direction could lead to disciplinary action, including termination of employment.

Member Batchelor determined that the worker suffered a psychological injury arising out of or in the course of her employment on 27/08/2021 and that employment was a substantial contributing factor to the injury. He also found that employment was the main contributing factor to the contraction of a disease injury. He referred to Snell DP's decision in *Hamad* at [88] as follows:

> The extent to which aspects of the appellant's history contributed to causing the psychological injury was not, in the circumstances, something which could be decided in the absence of medical evidence. There may be cases in which causation of a psychological injury can be established without specific medical evidence, for example where there is a single instance of major psychological trauma, with no other competing factors. The need for medical evidence, dealing with the causation issue in s 11A(1) of the 1987 Act, will depend on the facts and circumstances of the individual case. In the current case, as in most, there are a number of potentially causative factors raised in the appellant's statement and the medical histories. Proof of whether those factors, which potentially provide a defence under s 11A(1), were the whole or predominant cause of the psychological injury, required medical evidence on that topic. The extent of any causal contribution, from matters not constituting actions or proposed actions by the respondent with respect to discipline, could not be resolved on the basis of the Arbitrator's common knowledge and experience.

The Member held that the respondent had not produced any medical evidence to show that its action with respect to discipline, reasonable or otherwise, was the whole or predominant cause of the injury. He found that the worker was so affected by the respondent's email dated 27/08/2021 that she ceased work by 6/09/2021 and that there was no evidence to show that the injury was caused by the action that the respondent took with respect to discipline.

However, in the event that he was incorrect in relation to this finding, the Member considered whether the action taken by the respondent was reasonable. He noted that the worker argued that there was no problem with the Public Health Order, but that it was the respondent's implementation of it that caused her injury.

The worker argued that no consideration was given in the disciplinary process to: (a) her continuing to work remotely and teaching pupils at a school; (b) redeploying unvaccinated teachers such as herself in non-teaching roles such as curriculum development, policy development or even on the School of the Air; (c) the fact that the pandemic would not last indefinitely, and that suspension from employment for unvaccinated teachers rather than cessation thereof was an option; (d) the long term effects on a teacher dealt with by way of disciplinary action as opposed to the short term nature of the restrictions, noting that these were eased in December 2021; (e) the denial of any special leave provisions for unvaccinated teachers, and (f) the fact that the only reason a teacher could escape the consequences of not being double vaccinated was to submit a medical contraindication.

The Member noted that Dr Wood, an Executive Director of the respondent, was cross-examined about these matters and that he was unable to give any explanation about why no special leave provisions were made available to those who refused to comply with the Guidelines. He stated that Daryl Currie was responsible for disciplinary matters.

In relation to allowing teachers to continue to work remotely as they had been doing for the previous 12 to 18 months, Dr Wood said most employees worked from a school site and that from a logistic point of view, teachers could have continued to work from home, but that in terms of the professional support supervision and the range of other things that were also part of their employment, there were reasons why the respondent's employees worked from a school site, to be supported by that range of things. He confirmed that the vast majority of the respondent's staff work in schools, but he could not answer why employees working in areas such as curriculum development were required to be double vaccinated, even though they were working from home.

In respect of the anticipated duration of the pandemic, Dr Wood said that his committee gave thought to how long the pandemic was going to continue and Policies and procedures were put in place to support schools at particular points in time that were not necessarily given end dates. Policies were revised as circumstances changed.

In respect of disciplinary action, Dr Wood said that if a person's employment was terminated as a result of disciplinary action, that would remain as such on that person's record, and could not be erased over time. In that circumstance, opportunities for re-employment would depend on the level of detail around conduct and performance. He could not comment on employment conditions and hiring policies of the independent or Catholic school sector.

In respect of the easing of restrictions in December 2021, Dr Wood said that as of May 2022 it was his understanding that there was a change of approach by the respondent to people who were not double vaccinated, and that he was aware that teachers were being directed to work at schools even though they were not double vaccinated.

The Member stated, relevantly:

> 111. The applicant submits that a *Jones v Dunkel* inference should be drawn against the respondent for the failure to call Mr Currie to give evidence as to why the disciplinary matters with which she was threatened were put in place. I think that it is reasonable to draw that inference, that is, that his evidence would not have assisted the respondent. That was conduct that required explanation, and there may well have been an explanation available. However, on the face of it, the threat of calling the police if staff were found to be, or suspected of being, in breach of the Public Health Order ([8.8] of the Guidelines), and of disciplinary action ([8.9] of the Guidelines) does appear somewhat draconian in the context of employees suddenly being faced with the situation of a pandemic through no fault of their own, with serious consequences to their livelihood. Mr Currie was available to be called, apparently had a close knowledge of the facts in respect of disciplinary action, and it might reasonably have been expected that he have given such evidence.
>
> 112. I do have regard to the fact that the respondent was dealing with a very serious threat to the health of a large number of its employees and students in the context of a worldwide pandemic, the scale of which had not apparently occurred for over a century. There was no evidence to this effect in the proceedings, and no submissions were forthcoming from the parties as to the seriousness and scope of the pandemic, but I think that I can take notice of it. Dr Wood did give evidence that the Department was dealing with a serious and rapidly evolving situation when explaining why the email of 27 August 2021 was issued. However, the onus is on the respondent, and for the reasons I have outlined above, I find that the actions taken by the respondent with respect to discipline were not, in the circumstances of this case, reasonable.

The Member awarded the worker continuing weekly payments and s 60 expenses.

Fall at work causing rupture of breast implant – dispute as to whether worker suffered an injury being a pathological change – Held: treatment fell within the definitions in s 59 WCA even though the original implant was not an artificial aid

McKinnon v Port Marina Pty Ltd [2022] NSWPIC 654 – Member McDonald – 25/11/2022

The worker was employed as a cleaner. On 6/05/2021, she slipped and fell at work and landed on her left breast and left side and suffered a ruptured left breast implant and a bulge in her right breast implant. She also suffered a secondary psychological injury.

The worker claimed continuing weekly payments and s 60 expenses including the cost of surgery to remove and replace the implant in her left breast.

However, the respondent disputed injury on the basis that the worker did not suffer a pathological change as a result of the incident. It also disputed that there was a compensable psychological injury, incapacity and that the proposed surgery was reasonably necessary medical treatment under s 60 WCA.

Member McDonald found for the worker in relation to the issue of injury for reasons that are summarised below.

In *North Coast Area Health Service v Felstead*, Roche DP quoted from *Petkoska* and said:

> It follows that the description of a personal injury as 'a sudden identifiable pathological change' is consistent with the authorities. It suggests no more than that, to qualify as a personal injury, there must be some sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state. Such a change or disturbance may be as simple as a bruise or a soft tissue strain. If the personal injury also aggravates a pre-existing disease, that does not mean it is no longer a personal injury.

In *Military Rehabilitation and Compensation Commission v May* (*May*) the majority cited the statement quoted above from *Petkoska* and said:

> That physiological change or disturbance of the normal physiological state may be internal or external to the body of the employee. It may be, for example, the breaking of a limb, the breaking of an artery, the detachment of a piece of the lining of an artery, the rupture of an arterial wall or a lesion to the brain . Each would be described as an 'injury' in the primary sense.
>
> However, as the Full Court correctly held, 'suddenness' is not necessary for there to be an 'injury' in the primary sense. A physiological change might be 'sudden and ascertainable'. A physiological change might be 'dramatic'. The employee's condition might be a 'disturbance of the normal physiological state'. That an 'injury' in the primary sense can arise, and can be described, in a variety of ways does not mean that 'suddenness' is irrelevant. As the Full Court said, suddenness is often useful where there is a need to distinguish a physiological change from the natural progress of an underlying (and in one sense, closely related) disease (as occurred *in Zickar v MGH Plastic Industries Pty Ltd* and *Kennedy Cleaning*). But it is the physiological change – the nature and incidents of that change – that remains central.

Gageler J who concurred with the majority said:

> More than a century of teasing out the ordinary sense in which injury is used in the context of workers compensation legislation has shown that suffering an injury is not confined to 'getting hurt' (an injury might be constituted by nothing more than 'something going wrong within the human frame itself, such as the straining of a muscle or the breaking of a blood vessel') but that suffering an injury involves something more than merely 'becoming sick'. An injury, it has long been repeatedly explained, is some definite or distinct 'physiological change' or 'physiological disturbance' for the worse which, if not 'sudden', is at least 'identifiable'. The universality of that explanation has been questioned, and the comment has fairly been made that 'a distinct physiological change is not itself an expression of clear and definite meaning'. The expression has nevertheless been shown by repeated usage to have utility as an exposition of the particular sense in which injury has been used, and continues to be used, in the particular legislative context.

There were medical reports that confirmed, based on the worker's history of a fall on 6/05/2022, that there were observable and identifiable physiological changes, which could be described as a soft tissue injury to the left breast. A rupture of the implant was revealed by an ultrasound and an MRI scan and the complaints of left breast pain were accepted by the doctors who saw her as being a result of the fall and the rupture.

Therefore, the fall caused a soft tissue injury and resulted in the rupture of a breast implant, which resulted in a physiological change in the area around the implant, observed by the medical practitioners as swelling, inflammation and a contracture of the left breast upwards as a result of the rupture.

The respondent argued that the breast implant was not an artificial aid or member and that the proposed surgery fell outside s 60. However, that argument did not consider the definitions in s 59 WCA. The Member stated, relevantly:

81. Port Marina seeks to submit, in effect, that the treatment sought is not medical or related treatment because the original implant was not an artificial aid or member because it was not provided for the purpose of treatment as a result of an injury. In effect it seeks to read the definition from the middle, rather than the beginning.

82. The starting point of the definition is medical treatment by a medical practitioner which is clearly encompassed by the definition. The following paragraphs include other forms of treatment in the definition. In the context of that definition, sub-s (d) ensures that the provision of items by persons who may not be medical practitioners are compensable under s 60.

83. *Thomas*, on which Port Marina relied, was a decision made under the 1926 Act when there was no provision equivalent to paragraph (g) of the definition of medical and related treatment. It was necessary for the Court of Appeal to consider the meaning of artificial aid to determine if vehicle modifications as result of an injury were compensable. Hutley JA said that an artificial aid was something specially constructed to enable the effects of the disability resulting from the injury to be overcome.

84. Several cases with respect to artificial members or aids have arisen as a result of the limits on payment of s 60 expenses imposed by s 59A. The time limits in s 59A do not apply to medical or related treatment which is "the provision of crutches, artificial members, eyes or teeth and other artificial aids or spectacles (including hearing aids and hearing aid batteries." The time limits otherwise prevent compensation for surgery which would fall within the definitions in s 59. In *Baldachino* the Court of Appeal upheld a Presidential decision of the Workers Compensation Commission to the effect that a knee replacement was an artificial aid within the meaning of s 59A(6)(a) of the 1987 Act.

85. Port Marina did not submit that any treatment should be limited to the removal of the ruptured implant without replacement. It could not make such a submission in the absence of medical evidence that removal of the implant without replacement was appropriate. Ms McKinnon's existing implant was clearly not an artificial aid or member intended to overcome the effects of an injury. That does not mean that surgery which involves the removal of a ruptured and painful implant recommended by a medical practitioner is not reasonably necessary medical treatment as a result of an injury to her breast. The new breast implant could be said to be an artificial aid to enable the effects of injury to be overcome. Mr McMahon conceded that a breast reconstruction as a result of injury would be compensable.

Accordingly, the Member held that the proposed surgery was reasonably necessary medical treatment as a result of the injury on 6/05/2021.

Worker was a resident of Victoria – Respondent is a private company engaged in a cleaning business and was insured in NSW (workers compensation & CTP) – Held: whilst the insurer exercises a statutory right of subrogation, that does not alter the identity of the parties to the proceedings – There is no arguable defence that the respondent is considered a State for the purposes of the Commonwealth of Australia Constitution Act

Watts v BKFY Pty Ltd [2022] NSWPIC 700 – Principal Member Harris – 13/12/2022

On 16/10/2015, the worker, a resident of Victoria, was injured whilst working for the respondent as a cleaner and she alleges that she developed CRPS as a consequence. She applied for lump sum compensation under s 66 WCA.

The respondent disputed the claim on multiple grounds, but also argued that the matter was potentially federally impacted and that the claim should be litigated in the District Court of NSW and not the PIC.

Principal Member Harris determined that the matter is not federally impacted and that it could be determined by the PIC. His reasons are summarised below. relevantly:

10. Division 3.2 of the Personal Injury Commission Act 2020 (the PIC Act) provides for matters to be heard in the District Court if the determination of the matter by the Personal Injury Commission (the Commission) "would involve an exercise of federal jurisdiction". The application must first be made to the President or the Commission.

11. There are three requirements in determining whether a claim is potentially federally impacted. They are:

(a) jurisdiction can only be exercised by a court of a State;

(b) the resolution of the dispute requires the exercise of judicial power ("judicial" as understood in the constitutional sense), and

(c) the matter is between residents of different States, or between a State and a resident of another State.

12. A Tribunal cannot decide whether the determination involves an exercise of federal jurisdiction and should express a view consistent with the test set out in *Citta Hobart Pty Ltd v Cawthorn*. If the matter is potentially federally impacted then a court of a State will decide whether the determination does in fact involve such an exercise.

13. The plurality in *Cawthorn* stated:

35. The resolution in principle is that for a claim or defence in reliance on a Commonwealth law or in reliance on the Constitution to give rise to a matter of a description in s 76(i) or s 76(ii) of the Constitution, it is enough that the claim or defence be genuinely in controversy and that it give rise to an issue capable of judicial determination. That is to say, it is enough that the claim or defence be genuinely raised and not incapable on its face of legal argument.

36. That is what should be taken to have been meant by repeated acknowledgements that the assertion of a claim or defence will not give rise to a matter within the description in s 76(i) or s 76(ii) of the Constitution if the claim or defence is 'unarguable' or if the claim or defence is 'colourable' in that it is made for the purpose of 'fabricating' jurisdiction.

37. Thus, the State jurisdiction of a State tribunal that is not a court of the State within the meaning of s 77(ii) and s 77(iii) of the Constitution is not denied, just as the federal jurisdiction of this Court under s 76(i) or s 76 (ii) or of another court under s 77(i) or s 77(iii) of the Constitution is not engaged, by the assertion of a claim or defence that amounts to 'constitutional nonsense' or any other form of legal nonsense. But examination of what the prospects of success of a legally coherent claim or defence might be, were that claim or defence to be judicially determined on its merits, forms no part of the requisite assessment. (footnotes omitted)

14. Accordingly, it is for a Member to decide whether the defence that federal jurisdiction exists is arguable, colourable or the argument amounts to judicial nonsense. It is not an error by a Member to decide that the application may be federally impacted and for the District Court to determine that it is not.

15. The parties submitted or otherwise assumed that criteria (a) and (b) were established.

The Principal Member noted that the parties assumed that the determination of this claim involved the exercise of judicial power, but this assumption was far from clear. In *Searle v McGregor* Kirk AJA considered whether the determination of a claim for statutory benefits in the PIC is an exercise of judicial power and noted that this was "open to substantial doubt". His Honour ultimately left that question open. He stated:

23. Damages assessments under the motor accidents legislation by the Commission are an "advisory opinion" (Searle at [36]). It is incorrect to say that the Commission "determines" damages (Searle at [92]). Under both the Motor Accident Injuries Act, 2017 (the MAI Act) and the workers compensation legislation, "it is for courts ultimately to determine the damages claim" (Searle at [44]).

24. In *Rafiqul Islam v Transport Accident Commission of Victoria* and *Heather Worldon v Transport Accident Commission of Victoria*, the District Court recently held that the Commission does not exercise judicial power in assessing a claim for damages under the MAI Act.

25. The suggestion that medical assessments, including reviews and appeals, involve an exercise of judicial power is "counter-intuitive" (Searle at [80]). This observation is consistent with authority that the nature of the function may be judicial or administrative depending by whom it is exercised (the chameleon doctrine). Indeed, the process in which medical assessments are exercised involving an examination without the presence of the parties' legal practitioners is far removed from the notion that it involves the exercise of judicial power.

26. In *Campbelltown City Council v Vegan*, Basten JA observed that appeal panels constituted under the Workplace Injury Management and Workers Compensation Act, 1998 (the 1998 Act) "might not constitute an exercise of judicial power for the purposes of the federal Constitution, but they are functions properly characterised as judicial in nature, for the purposes of determining their incidents." In *Islam* and *Worldon*, the District Court also held that a medical assessor under the MAI Act does not exercise judicial power.

27. The observations by Basten JA are consistent with the distinction between a determination which is final and binding in adversarial proceedings without that determination being considered an exercise of judicial power: *Tomlinson v Ramsay Food Processing Pty Ltd*.

28. It is likely that the finding that medical assessors in the Motor Accidents Division do not exercise judicial power (and determinations by review and appeal panels) would apply in both divisions of the Commission.

29. In Searle, Kirk JA discussed other types of disputes where the Commission was not exercising judicial power.

30. The exercise of a power to exempt a claim for assessment under the motor accidents legislation because it falls within a mandatory exemption could not be characterised as judicial.

31. State tribunals are not forbidden from taking steps or resolving issues which do not involve the exercise of judicial power, even if the dispute might otherwise be seen to fall within the scope of what is federal jurisdiction: *Searle* at [14]. Examples include attempts at conciliation (Searle at [20] applying *Gaynor v Attorney-General of New South Wales* [2020] NSWCA 48 at [94]–[99], [124], [138]).

32. I accept that this criterion is arguable until a Court definitively rules on the issue. No doubt consideration of this issue with respect to the Workers Compensation Division will include the exclusive jurisdiction of the Commission to hear and determine all matters under the 1987 Act and the 1998 Act and the finality of the decision subject to appeal based on error of law, fact or discretion. Issue estoppel and Anshan estoppel applies to decisions in the Workers Compensation Division of the Commission.

33. Indeed, some disputes such as claims for the payment of death benefits involve significant amounts of compensation and may be suggestive of an exercise of judicial power. Lump sum payments under s 66 of the 1987 Act can also be significant and provide the gateway to an entitlement to bring a claim for damages.

The Principal Member stated that the issue in this matter is whether it is a claim between a State and a resident of another state. He stated:

35. In *Bank of NSW v The Commonwealth* Dixon J (as his Honour then was) stated:

> [F]rom beginning to end (the Constitution) treats the Commonwealth and States as organizations or institutions of government possessing distinct individualities. Formally they may not be juristic persons, but they are conceived as politically organized bodies having mutual legal relations and amenable to the jurisdiction of courts upon which the responsibility of enforcing the Constitution exists.

36. These observations were cited with approval by Gibbs CJ in *Crouch* and by a unanimous full bench in *Deputy Federal Commissioner of Taxation v State Bank of New South Wales* which accepted that the reference in the Constitution to the Commonwealth or States must include "references [that] are wide enough to denote a corporation which is an agency or instrumentality of the Commonwealth or the State as the case may be".

37. The Court then stated:

> The activities of government are carried on not only through the departments of government but also through corporations which are agencies or instrumentalities of government.

38. The respondent noted that the employer had obtained workers compensation through the statutory scheme and obtained insurance from Icare workers insurance. It submitted that Insurance and Care NSW (ICNSW) is incorporated by s 4 of the State Insurance Care Governance Act 2015 and is a government agency. ICNSW appoints agents to manage workers compensation claims.

39. The applicant relevantly submitted:

> The Respondent is not the State of New South Wales but an independent entity subject to workers compensation scheme run by the State. The liability for the injury lies with the employer and not with the insurer. The insurer pays the compensation, but the suit, the matter, is against the employer.

40. The respondent filed a supplementary submission dated 13 December 2022. It submitted that if "the correct approach is to look to the insurer of the respondent" then ICNSW is relevantly a State. In these circumstances, it submitted that it is a matter for the Division Head of the Workers Compensation Division of the Commission to determine the issue.

41. In my view the respondent's contention is "unarguable" and is rejected for the following short reasons.

42. The claim is brought by the worker against the employer, not the insurer. Section 9 of the 1987 Act provides:

> A worker who has received an injury … shall receive compensation from the worker's employer in accordance with the Act.

43. The clear words of the section is that the worker receives compensation from the employer.

44. This view is consistent with the observations of Kirk JA in Searle that the appropriate party should be identified when this issue is considered. His Honour stated:

> There is a wide range of disputes that may arise under statutory schemes such as the MAI Act and the workers compensation legislation. For some disputes the relevant disputants may be the claimant and the insurer of the other person involved (ie the other driver or the employer).

45. This observation is consistent with s 59(2) of the PIC Act which provides that a certificate for the recovery of the amounts ordered to be paid must identify "the person liable to pay the certified amount".

46. In the present matter, the action is brought against a private company and not the insurer. It is not submitted that the respondent employer is a "State" but rather that the insurer may be a State. The applicant was employed by the respondent to clean apartments. The respondent clearly is a private company engaged in a cleaning business.

47. Whilst the insurer exercises a statutory right of subrogation, that does not alter the identity of the parties to the proceedings. Accordingly, in the action between the applicant and the respondent, there is no arguable defence that the respondent is considered a State for the purposes of the Constitution.

48. I note that there is no legislation requiring that the Commission's opinion is provided by the Division Head. The respondent's submission that the matter be remitted to the Division Head is rejected.

49. The parties referred to my previous decision of *Ritson v Sate of New South Wales* where I expressed the opinion that the NSW Self-Insurance Corporation was a statutory body representing the Crown and is properly considered a State in accordance with the Constitution.

50. That decision has been taken out of context. In *Ritso*n the State of New South Wales was the respondent and is obviously a State for the purposes of the Constitution. After its alternative arguments were rejected, the State sought to have the insurer joined as a party and relief sought directly against it. It was in the context of the alternative application to join the insurer that I held that it had no utility because the insurer "is properly characterised as the State consistent with the above authorities".

51. The case does not stand for the proposition, as the parties suggested, that I determined that all self-insurers "are clearly statutory bodies representing the Crown". Nor do I agree with that as a general proposition.

52. The applicant's submission that all self-insurers are entities of the State is said to have arisen from *Ritson* and the decision of *Fletcher International Exports Pty Ltd v Lee*. That proposition is not self-evident.

53. A decision of any Member of the Commission, like this one, does not create binding precedent because a Tribunal cannot pronounce judicially upon the limits of its of authority concerning federal jurisdiction. It is entitled to express an opinion as to the limits of that authority which "produces no legal effect".

54. A self-insurer may or may not fall within the meaning of a "State". Actual evidence about the corporate structure of the employer such as a securities commission search would show the corporate identity. The provisions concerning self-insurance, such as s 178(2) of the 1987 Act, provide that the regulator considers the paid-up capital of a corporation and its memorandum and articles when deciding to issue a license of insurance.

55. A private corporation that has the right to hold a license of self-insurance because private funds are secured against potential claims, in circumstances where that company is operating a private business, does not suggest that it is a State. In my view, the bare suggestion that because a company is a self-insurer does not, without more evidence, form an arguable basis that a private company is a State as defined in the Constitution.

Accordingly, the Principal Member confirmed the date for conciliation/arbitration.

Motor Accidents

Claim for damages referred to the PIC under Div 7.6 of the MAIA – Claim without evidence lodged 3 days before end of limitation period - insurer disputed that there was a genuine attempt to settle the claim - meaning of "best endeavours" - proceedings dismissed under s 54 of the PIC Act as the claimant failed to use his best endeavours to settle the claim before referring it for assessment

Payne v Allianz Australia Insurance Limited [2022] NSWPIC 673 – Member Radnan – 11/12/2022

The claimant alleged that on 10/09/2019, he was involved in a head-on collision. He made a claim for common law benefits on 25/08/2022 and on 3/09/2022, he lodged an application for claims assessment with the PIC. The claimant argued that he did this in order to preserve the 3-year limitation period and that the matter is not ready for assessment and should be placed into the "not ready/stood over" list.

The insurer disputed that the claimant complied with s 7.32(3) of the MAIA and sought dismissal of the application, on the basis that he had failed to use his best endeavours to resolve the claim before referring it for assessment.

Member Radnan determined the dispute and dismissed the application for assessment. Her reasons are summarised below.

In *Mammone v NRMA* [2021] NSWPIC 501, Member Williams stated:

> I consider that what constitutes "best endeavours", for the purposes of s 7.32(3), must depend on the circumstances of each claim. The provision may not require an offer of settlement to be made in every case. It can be envisaged that, in some circumstances, the provision of particulars and evidence in support of a claim for damages may be found to satisfy the "best endeavours" requirement. Different considerations may also arise in claims that cannot be made before the expiration of 20 months after the accident, in accordance with s 6.14(1).

The insurer argued that the obligation to use "best endeavours" requires a party to act honestly, reasonably and make a positive effort to settle the claim before referring it for assessment even where success is unlikely.

The Member agreed with the insurer's argument as this allows the flexible application of the provision on a case-by-case basis and in a "manner that is consistent with the objects of the MAIA. In particular, this construction furthers the stated object of encouraging the early resolution of motor accident claims and the quick, cost effective and just resolution of disputes, by requiring the parties to take reasonable steps to settle the claim before referring it for assessment.

In *Golding v NRMA* [2021] NSWPIC98, Member McTegg formulated the test as follows:

> It seems that what is required of the claimant was to do all she reasonably could in the circumstances to attempt to achieve a settlement of her claim, or to take steps which a prudent, determined and reasonable person acting in her own interests and desiring to achieve a settlement would take.

In relation to the injuries allegedly suffered by the claimant, the insurer argued that in the application for personal injury benefits dated 19/09/2019, the alleged were "broken knuckle and rotated finger on right hand, bruised knee, sore right shoulder, arm and leg". A Medical Certificate from Dr Ya dated 13/09/2019 certified the claimant as unfit for work from 10/09/2019 until 8/10/2019 due to a right-hand fracture. However, the schedule of damages attached to the application to the PIC referred to more extensive injuries and disabilities including an alleged head injury with concussion, fractured finger, knuckle, nerve damage to the right arm, soft tissue damage to the right arm, nerve damage to the left arm, soft tissue damage to left arm, left shoulder, soft tissue damage to right shoulder and a psychiatric injury.

The insurer argued that the matter was not ready to be assessed for many reasons:

> (a) The claimant alleges a variety of disabilities and makes a substantial claim for damages.
>
> (b) The alleged circumstances of the accident are that the claimant and the Allianz insured driver, for presently unknown reasons, collided head on in the middle of Blacktown Road.
>
> (c) The insurer submitted that further investigations need to be made on liability. The liability decision of 22 November 2022 contemplated that ongoing investigations are required in particular noting a joint letter signed by the claimant and insured's driver both agreed they equally contributed to the accident, which has yet to be verified.
>
> (d) A photograph has been provided of the two vehicles it seems in situ after the impact. It is clear that both airbags deployed.
>
> (e) The insurer submitted that a causation issue arises as to how the claimant could have sustained a fractured right finger, let alone the other injuries.
>
> (f) These need to be explored by medical doctors and possibly through an ergonomic assessment. There is no evidence contained in the application.

The alleged additional injuries in the application will need to be fully ventilated by the claimant and explored before a meaningful opportunity to settle can be effected and a lot of evidence needs to be collated, which is conceded by the claimant's solicitor.

The Member stated, relevantly:

> 52. The claimant lodged his application for assessment of damages with the Commission on 6 September 2022 three days before the third anniversary of the motor vehicle accident.
>
> 53. The claimant approached the insurer on 30 August 2022 to hold a settlement conference on 1 September 2022 two days after it provided particulars of the claim with no supporting evidence…
>
> 55. There were no medical records or any primary documentation provided to the insurer with the application merely the list of injuries.
>
> 56. Economic losses were also claimed as past $102,700 at the rate of $790 for 130 weeks and future losses contemplated a buffer of $350,000.
>
> 57. There were no primary financial records or tax records produced to provide evidence to support the claimed loss of earning capacity, merely a calculation of losses claimed. There was no medical evidence submitted to evidence loss of earning capacity.
>
> 58. The claimant provided scant information and followed it with a request to the insurer that it concede that the claimant's injuries exceeded the statutory threshold of 10% whole person impairment without a scintilla of evidence to establish the injuries exceeded the relevant threshold prescribed by the Act…
>
> 63. The intention and provisions of the Act are that the parties in using best endeavours would at the very least provide sufficient evidence to support the ambit of the claim, the nature of the injuries and medical evidence to establish the basis of the claim.
>
> 64. The actions of the claimant in this matter were taken merely to preserve the rights of the claimant in relation to a limitation period. It was clear to the claimant the matter was not ready for assessment as the application included a request for the matter to be placed into the stood over list on the basis it was not ready to be assessed.
>
> 65. Similarly, providing the insurer with a claim and not enabling the insurer time to investigate and obtain medical evidence or opinion in reply is not a genuine attempt to resolve any dispute as the ambit of the dispute is unknown.
>
> 66. I agree with the insurer's submission that the fact the three-year anniversary of the accident was approaching when the claimant commenced the proceedings in PIC did not expressly nor impliedly excuse him from compliance with s 7.32(3).
>
> 67. The claimant should have marshalled sufficient medical evidence and other evidence to support the heads of damage being claimed.
>
> 68. In these circumstances, I find the claimant has made an application lacking in substance and commenced the proceedings prematurely. The provision of s 7.32(3) mandate that the parties must use their best endeavours to settle the claim before referring it for assessment under Division 7.6
>
> 69. By failing to provide any evidence to support the claim, the claimant did not take reasonable steps to settle the claim before referring it for assessment. The claimant's actions of simply making a request to the insurer to participate in a settlement conference before commencing these proceedings was insufficient to establish that his conduct satisfied the requirements of s 7.32(3).

Accordingly, the Member dismissed the application under s 54(b) of the PIC Act.

Wishing you a very Merry Christmas
And a happy and prosperous 2023.