Bulletin

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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.

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Court of Appeal Decisions

CONSTITUTIONAL LAW — Federal jurisdiction — Principle in Burns v Corbett — Inability of administrative Tribunal to determine matters where judicial power being exercised — Taking administrative steps preliminary to exercising judicial power - statutory interpretation of 'personal injury claims' under s 26 of the PIC Act 2020 (NSW) – 'Compensation matter application' means an application made in respect of a particular dispute or issue that has arisen in the course of dealing with a claim, not a generic reference. Note: there was no specific application that required determination

Searle v McGregor [2022] NSWCA 213 – Bell CJ, Ward P and Kirk JA – 26 October 2022

The decision in *Burns v Corbett* (2018) 265 CLR 304; [2018] HCA 15 (Burns) recognised that a State Parliament lacks legislative capacity to confer judicial power on a State administrative tribunal to determine any matter of a kind described in ss 75 or 76 of *the Constitution*. Section 26 of the *Personal Injury Commission Act 2020 (NSW)* (the PIC Act) was enacted as a legislative response to *Burns* and provides that the District Court may grant leave for an application concerning a compensation or damages claim arising under the workers compensation or motor accident schemes to be made to that Court instead of the PIC.

Section 26(3) provides that leave may only be granted where the District Court is satisfied of 3 matters: (a) that an application was first made to PIC or its President; (b) that determination of the matter by the usual decision-maker would involve an exercise of federal jurisdiction; and (c) that the usual decision-maker would otherwise have had jurisdiction to determine the application. An application for leave must be accompanied by the relevant application needing determination, completed in the form and manner required under the relevant statutory scheme.

The respondent was injured in a MVA in Albury and resided in NSW at all material times. The appellant resided in Victoria and was indemnified by the TAC (Victoria).

The respondent wished to make a claim for common law damages under the *Motor Accident Injuries Act 2017 (NSW)* (MAIA), but he had not yet satisfied its preconditions. He applied to the District Court under s 26 by filing a statement of claim, which also sought damages. However, at the hearing of the application, he sought to proceed by way of summons only so that his damages claim was not being immediately pursued. In effect, he sought to "park" his matter in the District Court.

Before making the application to the District Court, the respondent's solicitors applied to the PIC for leave to proceed in the District Court. However, the PIC has no statutory power to grant leave and the respondent did not identify any issue or dispute for determination by either the PIC or the District Court.

The primary judge held that the requirements of s 26 of the PIC Act were met.

The Court of Appeal (Kirk JA, Bell CJ and Ward P agreeing) granted leave to appeal and upheld the appeal. The headnote is summarised below.

The Court stated that s 26 should be construed in the context of the *Burns* constitutional limitation to which it was responding. A dispute will only be within federal jurisdiction when resolution of the claim or issue in question would involve the exercise of judicial power such that there is a justiciable controversy, and the dispute is of a kind that falls within the nine types of disputes comprehended by ss 75-76 of *the Constitution*.

The *Burns* principle does not prohibit State administrative tribunals from taking steps or resolving issues which do not involve the exercise of judicial power: at [14], [22].

The Court considered the decisions in *Burns*, *Citta Hobart Pty Ltd v Cawthorn* (2022) 96 ALJR 476; [2022] HCA 16 at [1] and *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372; [2002] HCA 16 at [61 and it applied the decisions in *Attorney General (NSW) v Gatsby* (2018) 99 NSWLR 1; [2018] NSWCA 254, *Meringnage v Interstate Enterprises Pty Ltd* (2020) 60 VR 361; [2020] VSCA 30 at [101], *Gaynor v Attorney General of New South Wales* (2020) 102 NSWLR 123; [2020] NSWCA 48 at [94]-[99], [124], [138].

The Court also stated that the reference in s 26 of the PIC Act to an "application" that had first been made to PIC or its President means an application to determine some particular dispute or issue that had arisen in the course of dealing with a claim. It is not a generic reference to claims arising from a workplace or motor accident injury: at [65].

However, in this matter, the respondent did not present any application relating to a particular issue or dispute requiring determination. The application he did submit was beyond the power of PIC to determine and the requirements in ss 26(4)(a)(i) and 26(3)(a) and (c) had not been met: at [76]-[77].

LIMITATION OF ACTIONS - MACA 1999 - Failure to commence proceedings within 3 years of MVA - Requirements of leave under ss 66(2) and 109(3)(a) MACA – Was there a "full and satisfactory" explanation for delay – Whether evidence from each of the appellant's former legal advisors was required to constitute a full and satisfactory explanation for delay

Stein v Ryden [2022] NSWCA 212 – McFarlan & Gleeson JJA & Griffiths AJA – 26 October 2022

On 7/02/2014, the appellant was injured in an MVA. The respondent's insurer admitted liability and on 21/05/2014, the appellant approached Stacks Goudkamp for legal advice and on 2/09/2020, they lodged a claim with CARS. On 1/03/2021, CARS was replaced by the PIC.

However, the PIC did not have jurisdiction to determine the claim because it related to residents of 2 different States and therefore involved federal jurisdiction. It was therefore necessary for the appellant to commence proceedings in the District Court.

Under s 109(1) of the *MACA*, proceedings must not be commenced more than 3 years after the date of the accident without leave of the Court. Under s 109(3)(a), the Court must not grant leave unless the claimant has provided "a full and satisfactory explanation … for the delay".

The appellant gave unchallenged evidence, which the primary judge accepted, to the effect that she was unaware of the relevant limitation period until early May 2021, when an amended summons seeking leave was filed. However, the judge found that the explanation was neither full nor satisfactory because only one of the several solicitors who had carriage of the matter in the preceding years gave evidence stating that no advice had been given regarding the limitation period.

The appellant appealed and the respondent filed a notice of contention, arguing that the decision should be affirmed because the judge ought to have found, in the alternative, that the explanation was neither full nor satisfactory as she did not give evidence that she was not told by her solicitors of the requirements of the *MACA*, in particular the time limitations imposed by it.

The Court of Appeal (Griffiths AJA, Macfarlan and Gleeson JJA agreeing), granted leave to appeal, allowed the appeal and dismissed the notice of contention. The headnote is summarised below.

- The primary judge erred in finding that the lack of direct evidence from the solicitors who had carriage of the appellant's matter was fatal to the application for leave: [41].
- The appellant's explanation for the delay was the central focus of the inquiry and she gave unchallenged evidence that she had no knowledge or awareness at any relevant time of limitation period requirements and that she relied upon her solicitors to progress her claim: [39], [45].
- It was unnecessary in the particular circumstances of this case for the appellant to adduce further evidence from individual solicitors who had carriage of her matter in order for her to comply with the statutory requirement that she provide a "full and satisfactory explanation" for the delay.
- The explanation was sufficiently full to enable an evaluation to be made of whether it was satisfactory in the sense that a reasonable person in the position of the applicant (i.e., one who had no knowledge of the limitation periods) would have been justified in experiencing the same delay: [40].

PIC - Presidential Decisions

Federal jurisdiction – Div. 3.2 of the PIC Act - Application of Citta Hobart Pty Ltd v Cawthorn [2022] HCA 16 and associated authorities

Fletcher International Exports Pty Ltd v Lee [2022] NSWPICPD 39 – Deputy President Snell – 21/10/2022

In *Lee v Fletcher International Exports Pty Ltd* [2022] NSWPIC 271, ***Member Whiffin*** considered whether the PIC would be exercising federal jurisdiction under Div. 3.2 of the *PIC Act* if it determined the dispute between the worker (resident of QLD) and the respondent (registered office in NSW).

The Member held that the PIC would not be exercising federal jurisdiction in determining the dispute, and he proceeded to determine it: see Bulletin no. 116 for a full report of the decision. However, he held that the respondent was a corporation and was therefore not a resident of a state within the meaning of s 75(iv) of *the Constitution*. On 7/06/2022, he issued a COD, in which he made findings of fact and awarded continuing weekly payments and s 60 expenses.

On appeal, the appellant asserted that the Member erred as follows: (1) in law in regard to the determination as to jurisdiction; (2) by denying it procedural fairness; (3) in fact with respect to the issue of current work capacity; and (4) by determining the matter on a basis not put by or to the parties.

Deputy President Snell allowed the appeal and revoked the COD.

Snell DP upheld ground 1 and stated that Div. 3.2 of *the PIC Act* provides for the determination of matters which could not otherwise be determined by the PIC because they involve the exercise of 'federal jurisdiction' as defined in s 25. Section 25 defines 'compensation claim' as a claim for compensation or WIDs to which *the WIMA* applies. Section 26(1) describes a 'compensation application matter'.

He stated that by way of summary, a person with standing to apply to the President or the PIC for determination of the matter may seek leave to make the application to the District Court instead. The application for leave is to be filed with the District Court, in the form and manner required, accompanied by any applicable fee (s 26(4)). Section 26(3) provides that leave may only be granted by the District Court if it is satisfied that: (a) an application was first made to the President or the Commission, and (b) the determination of the matter by the usual decision-maker would involve an exercise of federal jurisdiction, and (c) the usual decision-maker would otherwise have had jurisdiction enabling the decision-maker to determine the application. If the Court is satisfied that the usual decision-maker has jurisdiction to decide the matter it may, instead of or after granting leave, remit the matter to the usual decision-maker for determination consistent with any orders it makes to facilitate the determination (ss 26 (5), (6) and (7)).

If the Court grants leave for the application to be made to it instead of the President or the PIC ('substituted proceedings') the Court may exercise all the jurisdictions and functions that the original decision-maker would have had if the original decision-maker could exercise federal jurisdiction (s 27(3)). This extends to matters involving medical assessment, and reviews or appeals before the panel (s 27(4)).

The substituted proceedings are taken to have been commenced in the District Court on the day when the application was first made (s 27(1)(a)). Section 27(2) deals with the position of a party where time limits on the bringing of a claim or action may have expired, in circumstances where the application was first lodged to be dealt with by the usual decision-maker before the expiry of the period.

Section 28 of the *PIC Act* contains provisions relating to the determination of substituted proceedings.

Division 3.2 draws a distinction between a 'compensation claim', an application to the President or the PIC that a claim be determined by the usual decision-maker (the definition in s 25) and a 'compensation matter application' to the District Court for leave under s 26.

Section 26(3)(a) requires that an application be first made to the President or the PIC, before leave may be granted by the District Court under s 26. There are specific procedural requirements pursuant to s 26(4), relating to the application to the District Court for leave, which must be satisfied. It is appropriate that the provisions of Div. 3.2 be read together.

In this matter, an application under s 26, for determination by the District Court, would have required a specific application to the Court for leave, in addition to the application initially made to the PIC for decision by the usual decision-maker. It would involve compliance with the various requirements in s 26. Neither of the parties made such an application.

The appellant argued that the PIC lacks jurisdiction to determine the dispute and that the issue of jurisdiction is a matter for the District Court. It relies on two decisions of the Commission dated 30/03/2022 and 31/03/2022, both of which involved claims for damages for personal injuries sustained in MVA's and which were de-identified. In decision no. M10452902/21, the claimant resided in Tasmania when the application was filed in the PIC and the insurer was licensed in NSW. In matter no. APP-10486197, the claimant resided NSW at the date of filing and the insurer was "RACQ Insurance" (QLD). Both matters were dismissed under s 54(c) of the PIC Act and r 77(b)(iv) of the Rules, primarily because of where the claimant resided, and it was determined that "the District Court is the appropriate venue to determine the issue of jurisdiction in matters such as these" and that "determination of the dispute may potentially involve the exercise of federal jurisdiction".

The date on which residency is assessed is the date of filing the relevant application and Snell DP rejected the appellant's argument that he should follow the motor accident decisions because he was not bound by them. He stated, relevantly:

> 69. … On the limited factual background set out, it could not be concluded the above matters were between States, between residents of different States, or between a State and a resident of another State (see the passage from *Crouch* quoted at [28] above). It could not be concluded that the circumstances described would potentially involve an exercise of federal jurisdiction. The orders dismissing the proceedings effectively relied on the premise that there was no jurisdiction to determine the relevant disputes (r 77(b)(iv) of the Rules). The relevant provision in r 77(b)(iv) applies to "motor accidents legislation" (the situation in the two decisions relied on), not to "an application made under the workers compensation legislation" (like the current one). I do not accept that the circumstances represent an appropriate basis for the dismissal of proceedings pursuant to s 54 of the 2020 Act, at the least in applications brought under the workers compensation legislation. These decisions can be readily distinguished from the current matter. They do not assist the appellant's argument.

In *Gatsby* Leeming JA said:

> Only a superior court can pronounce authoritatively on the limits of its own jurisdiction. At best, all that NCAT could do was to form and express an opinion ....

His Honour quoted from what was said by Brennan J in *Re Adams and the Tax Agents' Board*:

> An administrative body with limited authority is bound, of course, to observe those limits. Although it cannot judicially pronounce upon the limits, its duty not to exceed the authority conferred by law upon it implies a competence to consider the legal limits of that authority, in order that it may appropriately mould its conduct. In discharging its duty, the administrative body will, as part of its function, form an opinion as to the limits of its own authority. The function of forming such an opinion for the purpose of moulding its conduct is not denied to it merely because the opinion produces no legal effect.

In *Cawthorn,* the High Court in considered the power of a court or a non-court tribunal to consider the limits of its jurisdiction. The plurality said:

> 22. The power which a court or a non-court tribunal necessarily has to ensure that it remains within the limits of its jurisdiction is not of a nature that is inherently judicial. The reason is that the exercise of the power is incapable of quelling a controversy between parties about existing legal rights. Nor is it inherently non-judicial. Rather, the power takes its nature from the nature of the power to which it is incidental: '[t]he nature of the final act determines the nature of the previous inquiry'.
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> 23. A court in which judicial power is invested therefore 'has jurisdiction to determine – and to determine judicially – whether it has the jurisdiction to entertain a particular application or to make a particular order'. The court, in other words, has 'jurisdiction to decide its own jurisdiction' in the performance of which it exercises judicial power.
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> 24. A tribunal that is not a court and that is invested with non-judicial power correspondingly has authority – in the exercise of non-judicial power – to 'make up its mind' or 'decide' in the sense of forming an opinion about the limits of its own jurisdiction 'for the purpose of determining its own action'. The authority is not to 'reach a conclusion having legal effect' but to form an opinion for the purpose of 'moulding its conduct to accord with the law'.
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> 25. The 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 on which State judicial power is conferred by State legislation is to be understood in conformity with the same principles. The State tribunal must be taken to have incidental jurisdiction to determine whether the hearing and determination of a particular claim or complaint would be within the legislated limits of its State jurisdiction. The Federal Court and the Court of Appeal of the Supreme Court of New South Wales have correctly so held.
>
> 26. Taking its nature from the nature of the power to which it is incidental, that 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 itself a conferral of State judicial power. Accordingly, the State tribunal exercises judicial power when it decides that a claim or complaint in respect of which its jurisdiction is sought to be invoked is or is not a matter of a description referred to in s 75 or s 76 of the Constitution. The Federal Court has correctly so held. To the extent that the Court of Appeal of the Supreme Court of New South Wales might be understood to have held to the contrary in Sunol v Collier, that decision should not be followed.
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> 27. The legal effect of the judicial exercise by 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 of its jurisdiction to decide its own jurisdiction is no different from the legal effect of the judicial exercise of jurisdiction to decide its own jurisdiction by an inferior court of the State that is a court within the meaning of s 77(ii) and s 77(iii) of the Constitution. The limits of jurisdiction are in each case the limits that are set by the legislated conferral of jurisdiction construed in light of the Constitution. The judicial determination of jurisdiction is in neither case conclusive. In either case, if jurisdiction is wrongly determined to exist, such order as is ultimately made in the purported exercise of jurisdiction is wholly lacking in legal force."

The plurality in *Cawthorn*, dealt with whether it was necessary that an asserted constitutional defence meet "some threshold degree of arguability and, if so, what that threshold was". Their Honours said:

> 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."

The plurality said that "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". Their Honours quoted from *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* in which the Full Court of the Federal Court said that "[a]ny other approach would involve the extremely inconvenient result that the existence or absence of jurisdiction to deal with a particular claim would depend upon the substantive result of that claim". The plurality said:

> The respondent, with the support of the Attorney-General of the Commonwealth and some other intervenors, invites this Court to depart from that principled and longstanding approach. The invitation is to put in its place a requirement that, to operate to characterise a justiciable controversy as a matter described in s 76(i) or s 76(ii) of *the Constitution*, a claim or defence asserted in reliance on a Commonwealth law or in reliance on *the Constitution* must meet a threshold of arguability consistent with the raising of the claim or defence in a court not amounting to an abuse of the process of that court. The invitation is rejected…
>
> Applied by a State tribunal that is not a court of the State within the meaning of s 77(ii) and s 77(iii), it would inevitably involve that tribunal being drawn down the forbidden path of judicially determining the merits of a matter within a description in s 76(i) or s 76(ii) of *the Constitution*.

The plurality referred to decisions of the Full Court of the Federal Court in which claims, or defences were "found on analysis and after argument to be 'foredoomed to fail' or 'so clearly untenable that it cannot possibly succeed'" yet the Federal Court was held "to retain jurisdiction simply by reason of the claim or defence having been genuinely asserted".

The plurality also noted that there was an unchallenged finding that a constitutional defence had been found to be "not colourable". Their Honours said there could be no suggestion that the constitutional defence was not genuinely raised or is so incoherent as to be insusceptible of judicial determination. The hearing and determination of the defence was "beyond the jurisdiction conferred on the Tribunal by the State Act".

Snell DP stated, relevantly:

> 88. On a fair reading of the reasons, it is clear that the Member dealt with the defence based on federal jurisdiction on the basis that he was determining the substantive issue on its merits as opposed to considering its arguability. The reasons of the plurality in *Cawthorn* make it clear that this was "no part of the requisite assessment" (see [77] above). Such a course, like determining whether a claim or defence amounted to an abuse of process, would "inevitably involve that tribunal being drawn down the forbidden path of judicially determining the merits of a matter within a description in s 76(i) or s 76(ii) of the Constitution" (see [78] above).

Therefore, the Member erred in how he approached the issue of whether the PIC had jurisdiction in the circumstances and in his finding regarding whether the matter was federally impacted.

In *Burns* the plurality said:

> Chapter III of *the Constitution* provides for the authoritative adjudication of matters listed in ss 75 and 76 by federal courts and by State courts co-opted for that purpose as components of the federal Judicature. The provisions of Ch III exhaustively identify the possibilities for the authoritative adjudication of matters listed in ss 75 and 76. Adjudication by an organ of State government other than the courts of the States is not included within those possibilities and is therefore excluded from them.

Accordingly, Snell DP held that the Member's decision was made without jurisdiction, was wholly lacking in legal force and was revoked. However, the proceedings remained on foot and the most efficacious way to bring them to a conclusion would be for a party with appropriate standing to make an application to the District Court under s 26 of the PIC.

Snell DP remitted the matter to the Division Head of the Workers Compensation Division and concluded that it was not necessary or appropriate to deal with the appellant's statutory construction argument regarding s 26 or the remaining grounds of appeal.

PIC – Medical Panel/Medical Review Panel Decisions

Adequacy of MA's reasons – Whether MA entitled to rely on 1-year old expert report to supply radiculopathy findings under Ch 4.27 of the Guidelines for the Evaluation of Permanent Impairment - whether MA was correct to assess impairment on the beneficial nature of the scheme; Held – MA admitted inability to find radiculopathy - reasons inadequate to explain path of reasoning - beneficial nature of scheme irrelevant in the absence of any ambiguity of inconsistency - worker re-examined – MAC revoked

State of New South Wales (Sydney Local Health District) v Azer [2022] NSWPICMP 401 – Member Wynyard, Dr G McGroder & Dr B Stephenson – 13/10/2022

On 9/03/2020, the worker slipped at work and as she was falling, she took her body weight on her left hand on a rail. She complained of acute pain in her left shoulder, neck and upper back.

On 15/03/2022, an amended referral was made to the MA for assessment of WPI of the cervical spine and left upper extremity and on 7/04/2022, Dr P Giblin issued a MAC which assessed 18% WPI.

The appellant appealed under ss 327(3)(c) and (d) *WIMA* and the matter was referred to a MP.

Following a preliminary review, the MP determined that there was a demonstrable error in the MAC and that the worker should be re-examined. With respect to the consistency of the worker's presentation, the MA stated:

> The symptoms and signs were not proportional as the level of voluntary co-operation was restricted to near zero on account of reported pain and the objective physical findings, remained symmetrical and not indicative of gross and serious underlying structural anomalies…
>
> In my physical examination findings, the only abnormality appeared to be decreased sensation to light touch in the left C6 dermatome, to repeated testing.
>
> I could not support that with objective physical findings in terms of reflex asymmetry or absence, and it was not possible to evaluate muscle weakness in either the C6 or C7 dermatomes.
>
> However, I note that Dr Todd Gothelf in his report 31 May 2021 was able to make an assessment of muscle weakness involving the C6 dermatome which produced a DRE 3 category assessment for the cervical spine.
>
> Today, I did not have the hard copy MRI scans for contemporaneous viewing, for my assistance.
>
> Given the beneficial nature of the Workers Compensation Legislation, I have made a determination of a DRE 3 classification as opposed to a DRE 2 classification. I have had to rely on Dr Gothelf's report, Dr Brennan's letters, and minimal objective clinical evidence, today…

The appellant argued that the assessment of DRE III was not open to the MA as the criteria required for that assessment were not present and that an assessment of either DRE I or DRE II should have been made. It also challenged the assessment of 3% WPI for ADL's and, regarding the adequacy of the MA's reasons, it relied on the decision in *Wingfoot Australia Partners Pty Ltd v Kocak*, that the actual path of reasoning by which an assessor arrived at his opinion must be explained.

The worker argued that the appellant's eye was "too attuned to error" and that the MA's reference to the beneficial nature of the legislation was not a relevant error as the legislation was beneficial and "numerous authorities had stated so". The MP also noted:

> We were invited to "revisit the certificate as a whole" and it was submitted that the MA could not ignore his responsibilities simply because he was having difficulties with the examination.
>
> It was not unusual in such a situation, it was submitted, that the worker be assessed with a DRE III impairment as it accorded with chapter 1.46 of the Guides. Chapters 1.46 – 1.48 permitted the MA to undertake the assessment the way he did, it was claimed.
>
> It was submitted that "there was no serious dispute" that the evidence showed that the worker had displayed signs and symptoms consistent with radiculopathy over the years. Reference was made to scans taken in 2020, and it was submitted that the medical practitioners had supported that contention.
>
> It was also submitted that decompressive surgery was only appropriate in situations involving radiculopathy, and that therefore the recommendation of surgery made to the applicant must mean that radiculopathy existed.
>
> The appellant employer was seeking to "impugn the discretion and clinical judgment exercised by the MA" by its submission that a DRE III was erroneous, the worker claimed.
>
> The respondent submitted that the finding of DRE III assessment was "a judgment call" and that it was difficult to see what other category the worker could have fitted into.
>
> So far as the submission made by the appellant employer that adequate reasons had not been given, the respondent, in an apparent reference to the dicta in *Wingfoot*, said that the MA was not required to accept either party's expert opinion, but had to reach a conclusion based on all the circumstances. It was submitted that, although not appealed against, the Panel should also review the nil assessment of the left upper extremity.
>
> The last submission made was, as we understood the submission, that there should be an "entire re-assessment" and claimant should be re-examined.

The MP held that to conclude that radiculopathy is present, Ch 4.27 of the Guidelines requires that two or more of the listed criteria be found (one of which must be major). However, the MA admitted that the found only one sign (decreased sensation to light touch in the left C6 dermatome).. It stated, relevantly:

> 60. The Panel was unable to distinguish whether therefore the MA had in fact found two of the bold criteria necessary pursuant to chapter 4.27. We would have thought that if that were the case, he would have said so in more emphatic terms and it seems likely that he was referring to non-verifiable radicular symptoms as described in chapter 4.28.
>
> 61. Similarly, it was clear that the MA could not make a definitive finding as to any imaging study because he did not have the scans for contemporaneous viewing, and the comparative report on the MRI scan of the brachial plexus of 20 June 2020 and the MRI scan of the cervical spine caused him to doubt whether there was a neural element revealed.
>
> 62. Instead, the MA referred to the opinion of Dr Brennan, who had raised the prospect of a decompression operation…
>
> 63. The relevance of the MA's reference to Dr Brennan's opinion about proposed surgery we accordingly have difficulty in grasping.

64. Similarly, the MA referred to Dr Gothelf's examination of almost a year earlier on 31 May 2021 that found muscle weakness involving the C6 dermatome, upon which Dr Gothelf based a DRE III finding. Dr Gothelf said:

> Physical examination demonstration [sic] two criteria that satisfy the section 4.27 p. 27 the Guides criteria for a radiculopathy, including muscle weakness in the C6 dermatomal distribution, sensation loss in the dermatomal distribution, and findings on imaging consistent with clinical signs.

65. The MA disagreed with that assessment because he did not have the hard copy MRI scans. We assume also that he had some reservations as to whether the examination findings of sensation loss and muscle weakness were indeed in the C6 dermatomal distribution and/or were reproducible in view of his findings as to the decreased sensation he found in the C6 dermatome which we discussed above. Again, the MA's reasoning is unclear, although his own view following the assessment seemed to be that a DRE II classification was the appropriate one. This follows from his comment that "given the beneficial nature of the Workers Compensation Legislation", he would allow a "DRE 3 category as opposed to a DRE 2 classification".

66. Thus we find that the MA has fallen into error, as his reasons are not adequate to explain his finding. We are uncertain as to whether the MA, on his own assessment, found sufficient criteria to establish radiculopathy, although, as indicated, it would appear that he thought a DRE II was indicated.

67. In *Wingfoot* the Full Court of the High Court stated at [47]:

> ...The function of a Medical Panel is neither arbitral nor adjudicative: it is neither to choose between competing arguments, nor to opine on the correctness of other opinions on that medical question. The function is in every case to form and to give its own opinion on the medical question referred to it by applying its own medical experience and its own medical expertise.

68. Further, the MA did not himself find the presence of radiculopathy. He discounted the imaging studies as being of assistance, and found, perhaps (although it is not certain), that there was only one bold criterium, being the decreased sensation to light touch in the C6 dermatome. In opining on the correctness of Dr Brennan's opinion as to surgery, and of Dr Gothelf as to the presence of criteria a year or so earlier, the MA has again made a demonstrable error. The MA's own assessment appeared to be that a DRE II category assessment was appropriate, as we have indicated.

The MP held that the MA further erred by invoking "the beneficial nature of the jurisdiction" to justify his assessment of DRE III. It stated, relevantly:

> 69. …Whether a provision of legislative authority is beneficial or not is a question that only arises where there is some ambiguity or inconsistency in the provision concerned. It is an aid to statutory interpretation, and only relevant where there is such ambiguity or inconsistency. There was none in the present delegated legislation of the guidelines, and thus the MA has erred at law in introducing the concept to his reasons.

The MP rejected the worker's argument that there were "numerous authorities" (none of which were cited), to support that proposition that the legislation is beneficial, as in *ADCO Constructions Pty Ltd v Goudappel* the High Court stated at [29]:

> 29. It can be accepted, as was put by counsel for Mr Goudappel, that the WCA's [Workers Compensation Act'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 purpose ... was clear enough. .... Its purpose was patently not beneficial.

The MP concluded that as there was no ambiguity regarding the purpose of the Guidelines, no construction was required. The Guidelines are of a medical and scientific nature and of necessity can be quite precise. They provide criteria by which impairment is to be measured, and are accordingly technical, as can be seen from Ch 4.27. Their application can sometimes be seen as harsh, but there is no legal basis for ignoring them because of the general beneficial nature of the jurisdiction.

Therefore, the MP revoked the MAC. It adopted the clinical findings of Dr McGroder on re-examination and issued a fresh MAC which assessed 8% WPI (cervical spine) but 0% for the left upper extremity.