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.

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Supreme Court of NSW Decisions

Section 323 WIMA - Pre-existing impairment – MAP gave no reasons for decision that the degree of pre-existing impairment could not be determined – Gastrointestinal tract – Whether there were "signs" or "Symptoms" that satisfied the Guidelines for Upper Digestive Tract impairment – MAP's decision quashed

Coles Supermarkets Australia Pty Ltd v Gandhi [2023] NSWSC 1251 – Davies J – 17/11/2023

Between March 2018 and August 2018, the worker was a storeman in the dairy department, which included unloading stock using a pallet jack and unloading stock from crates using cages. He had a pre-existing pars interarticularis defect at the L5/S1 level. He worker injured his back at work and suffered pain in the right buttock and occasional left leg pain and alleged that work caused an aggravation of the pre-existing pathology.

In September 2020, the worker underwent a L5/S1 anterior interbody fusion and on 10 September 2020, he underwent an L5/S1 lumbar decompression and fusion. The plaintiff disputed liability for the surgery under s 60 WCA.

The worker also had pain management treatment was prescribed anti-inflammatory and opioid medications. In July 2021, he began to suffer gastrointestinal symptoms, which he attributed to the use of medications following the surgeries. He claimed compensation (deemed date 7/08/2018), including s 60 expenses for a gastroscopy and colonoscopy on 30/08/2021.

The worker then claimed compensation under s 66 WCA for 29% WPI (comprising 25% (lumbar spine) + 4% WPI (upper and lower digestive tracts)). The s66 dispute was referred to a MA.

On 11/11/2022, the PIC published a MAC, which certified 17% WPI (comprising 26% (lumbar spine less a 1/3 deduction under s 323 WIMA) + 1% WPI (scarring) + 0% (digestive system).

The worker appealed against the MAC and the appeal was referred to a MAP.

Following a preliminary review, the MAP arranged for the worker to be re-examined (digestive system). It then revoked the MAC and issued a MAC that assessed 25% WPI (26% (lumbar spine less 1/10 deduction under s 323 WIMA) + 1% scarring + 1% (upper digestive system) + 0% (lower digestive system) + 0% (anus)).

The plaintiff applied to the Supreme Court of NSW for judicial review on the following grounds:

> (1) The MAP erred in law by failing to properly apply s 323 WIMA regarding the assessment for the lumbar spine;

(2) The MAP erred in law by failing to properly address its submissions and failed to exercise jurisdiction regarding the correct application of s 323 WIMA when assessing WPI of the lumbar spine;

(3) The MAP fell into jurisdictional error by misdirecting itself and/or proceeding on the basis that in the absence of evidence of symptoms related to the pre-existing condition of the lumbar spine, it was not possible to determine the proportion of the impairment attributable to the pre-existing condition of the lumbar spine;

(4) The MAP erred at law by failing to consider relevant evidence before it when determining the deductible proportion of the assessment of permanent impairment of the lumbar spine injury due to the pre-existing condition when applying s 323 WIMA;

(5) The MAP erred at law by failing to provide sufficient reasons when finding that the 'proportion of the impairment due to the pre-existing condition cannot be determined' in relation to the assessment of WPI for the lumbar spine and thereby failed to exercise jurisdiction;

(6) The MAP erred at law by failing to correctly apply the NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment (4th ed) in relation to the assessment of the degree WPI for the upper digestive tract;

(7) The MAP erred at law by failing to give adequate reasons as to why mild abdominal tenderness amounted to a 'sign' of digestive tract disease as opposed to a 'symptom' for the purposes of the assessment of WPI for the upper digestive tract;

(8) The MAP erred at law by failing to address its submissions in relation to the finding on examination of mild abdominal tenderness when assessing the degree WPI for the upper digestive tract;

(9) and (10) were not pressed at the hearing; and

(11) Error of law in failing to provide adequate reasons as to why it accepted that the findings on endoscopy were sufficient to establish "signs" thereby satisfying paragraph 16.9 of the Guidelines.

Davies J quashed the MAP's decision and remitted the matter to a differently constituted MAP for re-determination according to law. His reasons are summarised below.

His Honour considered grounds (1) to (5) together, as they essentially related to the application of s 323 WIMA. He noted that the MAP concluded that the proportion of the impairment due to the pre-existing condition cannot be determined and it was appropriate to make the assumption in s 323(2). However, no reason was put forward for that conclusion. It might reasonably be inferred that the MAP found that it was "*difficult … to determine*", because it applied that subsection, but the MAP has failed to set out the reason for that conclusion.

What was said in *Wingfoot* and *Vegan* is entirely apposite. What the MAP failed to do is to provide reasons sufficient to see if there is an error of law. Similarly, where there are different medical opinions, and the MAP has reached a different conclusion, there needs to be some explanation for one conclusion over another. Whilst its conclusion is reached as a matter of its special expertise, its rejection of the other approaches as "arbitrary" highlights the need for additional reasons of its own.

Therefore, the WPI assessment for the lumbar spine should be quashed.

His Honour considered the grounds relating to the digestive tract together and he stated, relevantly:

> 70. The Guidelines require both a sign and a symptom. While Dr Garvey acknowledged that "relatively mild upper abdominal tenderness" was a vague physical sign and might not qualify under the Guidelines, he went on to say that the first defendant had objective clinical evidence of upper digestive tract impairment, being LA grade 1 reflux oesophagitis "endoscopy proven".

71. It seems to me, however, that that conclusion is question-begging because the endoscopy, taken two years earlier, identified the Helicobacter pylori (something likely to have contributed to the gastritis and the reflux), which had subsequently been eliminated. If there was other objective clinical evidence, Dr Garvey does not say what it is. It seems to me, therefore, that no "sign" has been identified to bring the first defendant within the Guidelines for upper digestive tract impairment. Dr Garvey appears to accept the upper abdominal tenderness might not qualify as a "sign" under the Guidelines, and it is difficult to see how it could be regarded as anything other than a symptom.

72. While the oesophagitis was a sign, shown on the endoscopy, that was at a time when the Heliobacter pylori infection had not been treated. It was not a sign that identified the opioids as the cause of the oesophagitis. Dr Garvey does not explain how the Heliobacter pylori is not a relevant consideration as the cause in the light of what Dr Berry has said about the persistence of gastritis and its symptoms after the infection's treatment.

73. The first defendant in his submissions placed a great deal of emphasis on Dr Garvey's expertise as a general surgeon in reaching his view about the causes of the reflux. The problem is that his reasons do not adequately consider the competing contentions about the cause of the ongoing impairment constituted by the reflux. The matter is made more difficult because the last section of his assessment is said to be "*Answers to the specific questions raised by the Medical Appeal Panel*", but those questions are not set out despite the importance of what is contained in that section of his report to justify his overall finding of 1% WPI.

His Honour concluded that the MAP's reasons were inadequate to explain its conclusion in adopting Dr Garvey's assessment. Therefore, the assessment regarding the digestive tract should also be quashed.

PIC - Presidential Decisions

Section 4 WCA – dispute regarding injury – credit and cross-examination – whether Member failed to engage with evidence and submissions – approach to expert evidence

Hinde v Tarago Operations Pty Ltd [2023] NSWPICPD 66 – Acting Deputy President Parker SC – 2/11/2023

The appellant injured his right shoulder in a fall at work on 12/11/2019. The respondent paid compensation until 9/12/2021 with respect to the right shoulder injury, but the appellant then claimed the costs of a C6/7 anterior discectomy and fusion. The respondent disputed that claim. The issue for determination was whether the appellant also injured his neck at work on 12/11/2019.

Member McDonald determined the dispute and on 7/10/2022, she issued a COD, which determined that the appellant did not injure his cervical spine at work on 12/11/2019.

The appellant argued that the frank incident on 12/11/2019 aggravated a pre-existing disease in the cervical spine. He did not allege that this was a consequential injury. He denied any neck symptoms before the fall.

The Member noted that the patient report form from Goulburn Base Hospital dated 12/11/2019 indicated right shoulder pain caused by a fall at work, but no other injury. She held that "*It was necessary for Mr Hinde to prove on the balance of probabilities that he suffered a neck injury. Tarago did not carry an onus to prove that he did not*."

The Member observed that "*It is not necessary that a witness be cross-examined before the Commission can make an adverse finding about his or her credit*." She relied upon the decisions in *New South Wales Police Force v Winter* and *Donovan v Secretary, Department of Education and Communities*.

The appellant relied upon the decision in *Bradley v Matloob*, but the Member rejected this. She held:

> *Bradley* does not stand for the proposition that Mr Adhikary sought to draw from it and turns on its own facts. The appeal was from a decision given after an oral hearing. A plaintiff suffered a brain injury in a motor accident when she swerved to avoid a collision with a car that turned across her path, causing her to collide with a stationary truck. An independent witness identified Mr Bradley's vehicle as the vehicle at fault. The plaintiff sued Mr Bradley and the Nominal Defendant.
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> The trial was conducted on the basis that the driver of the at-fault vehicle could not have failed to notice the near-miss with the plaintiff's car. The trial judge found that Mr Bradley was liable but that conclusion necessarily meant that Mr Bradley had lied to the police on the day of the accident and lied at the trial. However, that contention was not put to him in cross-examination nor were submissions made to that effect so that there was no scope for a finding against him. The only conclusion available on the evidence was that Mr Bradley was not the driver.

The Member stated that the fact that the worker was not cross-examined does not preclude an adverse credit finding. His statement was prepared in May 2022, after the decision notices were issued and he was no doubt was assisted in its preparation. He disclosed only three 'prior' conditions – polymyalgia rheumatica, hip replacement in August 2021 and bowel injury, but said he had recovered from the effects of any previous injuries at the time of the injury that was before the PIC. Given the significant history disclosed in Dr Dubey's notes, that was an inadequate description of past medical history. It also implied that polymyalgia rheumatica was in the past whereas the treatment for that condition began after the injury and ceased when A/Prof Arnold determined that it was not an appropriate diagnosis. His statement about recovery was inconsistent with the medical evidence and was a matter on which he was not qualified to give an opinion.

The Member also held that the description of the injury itself was brief and the statement included the appellant's expressions of opinion as to the benefits he believed he would experience from the surgery if undertaken and an explanation of why he disagreed with Dr Bosanquet's opinion that the fall at work did not aggravate the changes in his cervical spine, "*because there were no other causes beside the workplace [fall] for the condition"*.

The Member concluded:

> Mr Hinde's expression of opinion is unhelpful and contravenes rule 73 of the Personal Injury Commission Rules [2021] which provides that unqualified opinions are unacceptable. There are numerous inconsistencies between his evidence and the contemporaneous medical evidence and to be [sic, the] extent of the inconsistency, I do not accept his evidence on the issue of whether or not he suffered a neck injury.

In relation to the medical evidence, the Member referred to *Murphy v Allity Management Services Pty Limited* and she stated, relevantly:

> A consideration of the medical evidence shows that Mr Hinde has not proved on the balance of probabilities that he suffered a neck injury in November 2019 which made a material contribution to the need for surgery.
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> There is no reference to an injury to Mr Hinde's neck in the notes of Goulburn Base Hospital. The doctor recorded that there was pain around the shoulder joint and no other injuries. If Mr Hinde had said he suffered neck pain, it is likely that an X-ray of his neck would have been ordered with the shoulder X-ray.
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> Dr Bodel's report and Dr Suttor's report of 7 June 2022 were prepared after surgery was proposed and after liability for it was disputed. The assumption underlying both reports is that Mr Hinde suffered a neck injury on 12 November 2019. The letters of instructions were not provided. Where the dispute is about injury, the omission of those letters is relevant. It is not necessary that the history recorded by a medical expert correspond exactly to the facts for the opinion to be persuasive. However, the assumptions relied on by the expert must represent a fair climate for the opinion expressed.

The Member cited the decision of Samuels JA (Hutley and Priestley JJA agreeing) in *Paric v John Holland (Constructions) Pty Ltd* and stated that Drs Bodel and Suttor were not afforded a fair climate in which to express their opinions. They both based their opinion on the worker's statement that he had recovered from all previous conditions as the date. What Dr Bodel and Dr Suttor would have said if they were aware that there was a real dispute about the occurrence of the injury and aware that there was a history of, and treatment for, radicular complaints before it, is unknown.

The Member found that Dr Bodel's report was unsatisfactory in that it expressed a number of inconsistent explanations for the worker's condition and without explaining his reasoning, he "*said that the fall clearly aggravated a disease process*." After quoting from *South Western Sydney Area Health Service v Edmonds* the Member said:

> That statement is apposite in respect of Dr Bodel's opinion that the injury was the aggravation of a disease. However, he expressed other opinions in the report which are not consistent with it. He said that there was a neck injury or 'at the very least' a consequential condition being an aggravation of a previously asymptomatic condition while recovering from the shoulder treatment. That is a different concept. While Mr Adhikary eschewed the characterisation of Mr Hinde's neck condition as a consequential condition, the inclusion of that opinion in Dr Bodel's report and the multiplicity of explanations means that his report provides no assistance in determining the claim.

The Member noted that neither of the treating doctors (Dr Ashton and Associate Professor Arnold) made any detailed comments about causation and found it significant that in his report to the GP dated 20/01/2021, Dr Suttor "*did not mention a neck injury nor explain the reason why he recommended that Tarago's insurer should pay for the surgery*."

The Member referred to the GP's clinical notes and noted that: (a) in April 2019, the appellant was referred to a chiropractor because of neck pain; (b) in May 2019, he sought referral to a neurosurgeon and he was referred for a CT scan due to a history of tingling and numbness in both arms ("cervical radiculopathy?)"; (c) a CT scan on 30/05/2019 showed a narrowed right C6/7 intervertebral foramen and queried whether the nerve root was compressed; and (d) On 4/06/2019, Dr Ow-Yang, neurosurgeon, reported that there was no significant nerve compression and advised against surgery.

The Member felt it was significant that neither Dr Bodel nor Dr Suttor referred to the CT scan, because the findings were "*at the same level as those highlighted in the MRI scan dated 15 September 2020*". She stated:

> A/Prof Arnold saw Mr Hinde one week after the injury and recorded that he felt that he had lost strength in his hands. He recorded that Mr Hinde had a shoulder injury. Because of the complaints about Mr Hinde's hands, it would be expected that A/Prof Arnold would record any history of a neck injury.

The Member stated that the GP's notes "*do not make specific mention of cervical radicular pain between the date of Dr Ow-Yang's report and the injury, Mr Hinde was under active investigation and treatment as at the date of the injury. In those circumstances, it is disingenuous to suggest that Mr Hinde was not suffering neck and arm pain at the date of the injury*."

Therefore, injury to the neck on 12/11/2019 was not established on the balance of probabilities.

The appellant appealed and alleged that the Member erred as follows: (1) in law by determining that he did not need to be cross-examined and impugned his credit; (2) in fact and law by determining that he was "*under active investigation and treatment*" to the cervical spine as at the date of the injury; (3) in law by not determining whether he sustained injuries to his cervical spine on the balance of probabilities and on the basis of the whole of the evidence (4) in fact and/or law by effectively placing no weight upon the medical evidence which he relied; (5) in law by failing to respond to substantial, clearly articulated arguments; (6) in law by making findings and determinations which he was not on notice of; (7) the decision regarding the interpretation of Dr Dubey's records "*so unreasonable that no reasonable body could have [reached] it*"; (8) in law by failing to acknowledge [an] injury can have multiple causes; and (9) in fact and law by indicating that she did not accept his evidence on the issue of whether or not he suffered a neck injury.

Acting Deputy President Parker SC dismissed the appeal. His reasons are summarised below.

Parker ADP rejected ground (1). He noted that the Member was not persuaded by the totality of the evidence, including the appellant's statement, that the appellant had discharged his onus of proof. There is a difference between a conclusion that the tribunal was not persuaded by the evidence and a finding that a witness's evidence is dishonest or is otherwise impugned. He stated, relevantly:

> 60. The Member addressed the requirement for procedural fairness. She identified leading cases and directed herself accordingly. The Commission is required to afford procedural fairness by giving the parties notice of the case to be put against them, and a reasonable opportunity to put evidence and submissions before the tribunal on that case, but it does not follow that in circumstances where cross-examination has not occurred either that evidence is uncontested or that there has been a denial of procedural fairness.

He held that the appellant was not denied procedural fairness because there was no cross examination as the Member made her concerns clear to the appellant. He also stated:

> 68. The appellant's submission that the Member should not accept the respondent's submission in the absence of cross examination was made late in circumstances where the issue of injury to the neck was "live", and indeed the only issue from the outset.
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> 69. The Member expressly concluded that cross examination was not required. That conclusion was open to the Member.

Parker ADP rejected ground (2) and he was not persuaded that the inference drawn by the Member was not available on the evidence.

Parker ADP rejected ground (3) and he observed that the alleged errors were more aptly addressed in relation to ground (1). He stated, relevantly:

> 97. The appellant's challenge that the Member in effect required the appellant to provide corroboration is without merit. The appellant sought to prove that he had recovered from the previous cervical complaints on the basis that Dr Dubey's notes made no mention of the cervical radicular pain between the date of Dr Ow-Yang's report and the injury.
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> 98. The Member found the appellant to be under active treatment and investigation at the date of injury. That finding was based on the Member's assessment of all of the evidence which she had referred to in the previous paragraphs. It did not depend on a conclusion as to contemporaneity. To the extent the finding was made, even though there were no mention of cervical radicular pain in Dr Dubey's notes between the date of Dr Ow-Yang's report and the date of injury to the right shoulder on 12 November 2019, the contemporaneity issue works in favour of the appellant.
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> 99. The Member did not fail to apply the standard of proof she directed herself to by the reference to the decision in *Nguyen*.
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> 100. The issue of whether a contemporaneous complaint of neck injury or even neck pain was made at or about 12 November 2019 was against the appellant. He did not make any complaint of neck injury at or about the time of its alleged occurrence.
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> 101. The Member did not require corroboration. She simply said:
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> > There is no reference to an injury to Mr Hinde's neck in the notes of Goulburn Base Hospital. The doctor recorded that there was pain around the shoulder joint and no other injuries. If Mr Hinde had said he suffered neck pain, it is likely that an X-ray of his neck would have been ordered with the shoulder X-ray.
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> 102. The Member had previously recorded at reasons [15]–[16] that the patient report form at the mine recorded that Mr Hinde suffered pain in the right shoulder caused by a fall at work.
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> 103. So far as Goulburn Hospital was concerned, the Member recorded that the doctor there had noted "*no other injuries, no 'head strike' and no back pain*."

Parker ADP rejected ground (4). He stated that the appellant alleged multiple errors emanating from the Member's treatment of Dr Bodel's report under a single ground of appeal. This is unsatisfactory and contrary to the Rules relating to specificity with respect to the grounds of appeal. Contrary to the appellant's submission, the Member gave cogent reasons for the significance she attached to the absence of the letter of instructions to Drs Bodel and Suttor and the fact that Dr Bodel chose to express multiple opinions in the report leaves the report ambiguous to say the least.

The focus of the Member's attention was whether the report could be relied upon as providing probative evidence of an injury to the neck on 12 November 2019. If there are multiple explanations for the doctor's findings, a frank injury on 12 November 2019 is merely one of a range of possibilities. The Member was concerned with the ambiguity in Dr Bodel's opinion.

Parker ADP rejected ground (5) and he stated that a constructive failure to exercise jurisdiction is not a mere failure to address an argument or submission, but a failure to understand and determine the case: *Day v SAS Trustee Corporation*. He stated:

> 150. It is simply not correct that, as the appellant submits, the Member failed to address the arguments that the injury consisted of an aggravation to an underlying disease of the cervical spine or that she failed to address the submission that the appellant had not complained about the neck injury at an earlier point of time because of his and his doctors' concern with the right shoulder injury.

Parker ADP rejected ground (6) and he stated:

> 160. The Member directed the appellant's counsel to the concern she had with the GP's notes concerning treatment being provided to the appellant before 12 November 2019. With respect, it cannot have been a surprise when she relied on those notes to make the finding she did.

Parker ADP rejected ground (7) and he held that the appellant had not identified where the alleged finding was made. The Member did not find that the appellant made complaints to the cervical spine which were not recorded by the treating GP.

Parker ADP rejected ground (8) and he held that the ground "*simply does not grapple with the finding the Member made*". The appellant's problem derived from Dr Bodel's report is that the doctor provided more than one explanation for his conclusion and because the explanations were offered with equal force, they did not assist the Member to determine the claim.

Parker ADP also rejected ground (6). He stated, relevantly:

> 180. The thrust of the Member's conclusion was that the appellant's statement was inconsistent with the contemporaneous medical evidence and that, to the extent of the inconsistency, she was not prepared to accept his evidence on the issue of whether or not he suffered a neck injury.
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> 181. I regard the Member's observation at reasons [99] as being a terse reminder that lay witness statements when prepared by professional advisers ought to avoid providing medical opinion. Such material ought not be included in a professionally prepared statement even in a jurisdiction such as the Commission which is not dependent on strict rules of evidence.
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> 182. It may well be that the appellant did not purport to be a medical adviser and that the intention was to convey the effect of these conditions on him. However, it is of no assistance for the appellant to express what are essentially medical opinions…
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> 184. The point of the Member's observation at paragraph [100] was that the irrelevant unqualified opinion evidence from the appellant could not assist in determination of the issue, namely, whether or not Mr Hinde had suffered an injury to the neck on 12 November 2019. The thrust of the Member's remarks was that the inconsistencies between Mr Hinde's lay evidence contained in the statement and the contemporaneous medical evidence were such that, where there was an inconsistency, she preferred the contemporaneous medical evidence to the statement evidence.
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> 185. In my view that was open to the Member.

Federal diversity jurisdiction - jurisdiction to determine a claim involving section 38 WCA

Fletcher International Exports Pty Ltd v Lee [2023] NSWPICPD 67 – President Judge Phillips – 3/11/2023

This matter has a lengthy history, including a lengthy delay occasioned by the appellant arguing (unsuccessfully) that the matter was Federally impacted because the worker is a resident of another state. Ultimately, the worker applied to the District Court of NSW for leave to proceed against the appellant and Judge Andronos SC granted leave and remitted the matter to the President.

On 9/08/2022, ***Member Homan*** determined the dispute in favour of the worker and gave the following reasons:

> 280. The [appellant] relies on the decision in *Lee v Bunnings* and the more recent Presidential decision of *Ferro* to submit that the Commission cannot make the award for weekly compensation under s 38 of the 1987 Act sought by the [respondent]. In *Ferro*, Parker SC ADP commented in reference to *Lee v Bunnings*:
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> > ... the Member has no authority to make findings with respect to current work capacity for the purpose of s 38 of the 1987 Act. Section 38 requires the insurer to make a work capacity assessment. Therefore the Member's function in the event of a contest is to determine whether the insurer has made an assessment and what is the assessment.
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> 281. I accept, however, the [respondent's] submission that *Lee v Bunnings* was determined before the legislative amendments made by the *Workers Compensation Legislation Amendment Act 2018* (the 2018 Amending Act). Those amendments removed from s 43(1) of the 1987 Act the provision that work capacity decisions are final and binding on the parties and not subject to appeal or review except under s 44BB or judicial review by the Supreme Court. Other amendments included the omission of the former s 43(3) and Part 3, Division 2, Subdivision 3A about review of work capacity decisions and repeal of the note in s 105 of the 1998 Act relating to the restriction of the Commission's jurisdiction to determine any dispute about a work capacity decision.
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> 282. The letter dated 27 October 2021 notified the [respondent] of decisions that she was not incapacitated, had a current capacity for work and was able to earn as much as or more than her pre-injury average weekly earnings in employment including suitable employment as defined. The letter relied, amongst other provisions, on s 38 of the 1987 Act. I find that the letter dated 27 October 2021 notified the [respondent] of a work capacity decision within the meaning of s 43 of the 1987 Act.
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> 283. The 2018 Amending Act enacted s 78 of the 1998 Act which included in sub-s 2 a provision that an insurer's decision notice can involve both a liability dispute and a discontinuation or reduction of weekly compensation. The 2018 Amending Act also inserted ss 81 and 83 in the 1998 Act to enable a stay of a work capacity decision where a dispute for determination is referred to the Commission. Those sections envisage jurisdiction for the Commission to determine disputes that have been referred to it about an insurer's decision to discontinue or reduce weekly compensation payments.
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> 284. None of these matters appear to have been raised for the Acting Deputy President's consideration in *Ferro*, probably because the issue in that case was whether the Commission member had erred by making an award for the respondent pursuant to s 38 of the 1987 Act without making relevant findings as to the application of s 38 of the 1987 Act. The actual application of s 38 and the Commission's role in determining a dispute about an insurer's decision pursuant to s 38 were not matters the Acting Deputy President was called upon to determine as I am here.
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> 285. I am satisfied in all the circumstances that the Commission has jurisdiction to determine the dispute about [the respondent's] claim for weekly compensation pursuant to s 38 of the 1987 Act.

The appellant appealed and asserted that the Member erred in law in determining that the PIC has jurisdiction to award weekly payments under s 38 WCA.

President Judge Phillips DCJ dismissed the appeal. His reasons are summarised below.

His Honour noted that the appellant submitted that the Member erred in considering that she had jurisdiction to determine any entitlement to weekly payments of compensation in respect of the period provided for in s 38 WCA. It argued that the issue of the PIC's jurisdiction in respect of the s 38 period was firstly dealt with by President [Judge] Keating in *Lee v Bunnings Group Limited* and it was also considered by acting Deputy President Parker SC in *Ferro*. It particularly relied upon para 38 of the decision in *Ferro*. It argued that the Member was obliged to follow the decision of Parker ADP and did not do so and that this is an error of law. It sought revocation of order 8 in the COD dated 9/08/2023.

The worker argued that the Member's determination was made in accordance with the law.

His Honour noted that the worker conceded that the requirements of s 38(3) had not been met, but the claim was made under s 38(2) WCA, having no current work capacity, and a decision under s 38(3) was not necessary in that circumstance. He stated, relevantly:

> 19. As I have set out above, the appellant maintains that the Member was bound by two Presidential decisions, *Lee v Bunnings* in 2013 and *Ferro* in 2023 and failed to follow them and was thus in error. I would note that the Member dealt with the Workers Compensation Legislation Amendment Act 2018 (2018 Amendments) in the decision at reasons [281] to [283] and that no issue has been taken on appeal with regard to those paragraphs. Indeed, the appellant has made no submission at all on appeal about the effect of the 2018 Amendments. I would also note that in the passages from page 24 of the transcript I have extracted above, counsel for the appellant, whilst still placing reliance on *Lee v Bunnings*, acknowledged that since *Lee v Bunnings*, the Commission did have jurisdiction to review a work capacity decision. However no specific submission on the effect of the 2018 Amendments was made by the appellant.
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> 20. At the time *Lee v Bunnings* was decided a different regime applied to work capacity decisions. A different entity, the former Workers Compensation Independent Review Office, had responsibility for reviewing work capacity decisions. This changed with the 2018 Amendments which the Member has set out in reasons [281] to [283] and which I have repeated above. The circumstances that were decided in *Lee v Bunnings* were clearly superseded by the 2018 Amendments and it is no longer to be followed. This was the effect of the Member's reasoning at reasons [281]. No issue has been taken on appeal with this reasoning.
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> 21. In so far as the appellant's submissions rest on the authority of *Lee v Bunnings*, such a submission cannot be accepted. The appellant has failed to grapple with the effects of the 2018 Amendments and more importantly the Member's construction of them. Intervention on appeal depends upon the identification and correction of error.[10] This aspect of the appeal ground is rejected.
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> 22. I would also add the following remarks for the sake of completeness, given the manner in which the appellant has attempted to circumscribe the Commission's power with respect to work capacity decisions since the 2018 Amendments. The respondent has made reference to the decision of *Roberts v University of Sydney*, dated 21 January 2021. The appellant makes no submission in response to the respondent's reliance on this decision. In that case Arbitrator Harris, as he then was, said as follows:
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> > 58. Section 289B provides that the referral of a dispute to the Commission of a work capacity decision that discontinues or reduces the amount of weekly compensation is 'stayed'. The section clearly contemplates that the Commission will 'determine' a dispute about a work capacity decision. It would be nonsensical that the Commission has jurisdiction within the first and second entitlement period where a work capacity decision had been made but had no such power after the second entitlement period.

59. The respondent in its reply accepted that the Commission had jurisdiction to review a work capacity decision in the ss 36 and s 37 period but not thereafter.

60. Whilst the wording of s 38 refers to an insurer deciding the matter, the issue is whether a worker can contest the insurer's decision before the Commission. Despite the reference to the matters in s 38 being decided by an insurer, in my view, the broad jurisdiction of the Commission under s 105 of the 1998 Act to 'hear and determine all matters arising under' the 1987 Act and the 1998 Act encompass jurisdiction and power within the Commission to hear disputes regarding a worker's entitlement under s 38.

23. I endorse these remarks as constituting the proper approach to s 38 disputes and the Commission's power to deal with them. This was effectively the approach taken by the Member in this matter.

24. To this point, I would refer to the Member's factual finding at reasons [282] that the "*letter dated 27 October 2021 notified the [respondent] of a work capacity decision within the meaning of s 43 of the 1987 Act*." This finding has not been challenged in this appeal. Consequently, it is this work capacity decision that the Commission is appropriately seized of power to determine.

25. This leaves the matter of *Ferro*. The appellant asserts that *Ferro* stands for the proposition that the Commission lacks jurisdiction to hear a work capacity dispute. Reference is made to *Ferro* at [38]. The Member dealt with the appellant's submissions about *Ferro* at reasons [284] and no issue is taken with those remarks on this appeal. The Member distinguished the circumstances in *Ferro* from those which the Member was confronting in this matter. The appellant has not said how this approach was wrong.

26. In the passages referred to from *Ferro* by the appellant, the Acting Deputy President was grappling with an appeal ground which alleged the Member below erred in the inadequacy of reasoning in making a s 38 order. The issue was not whether the Member in *Ferro* was possessed of the jurisdiction to entertain the s 38 application, although I accept that Acting Deputy President Parker's reasons at [34] of *Ferro* may have this colour. I would note though, that no submissions regarding the effect of 2018 Amendments and the matters I have extracted from *Roberts* were made to the Acting Deputy President. *Ferro* is not authority for the proposition advanced by the appellant in this matter that the Commission lacks jurisdiction to determine a s 38 application. This point advanced by the appellant was simply not decided in Ferro and that case is therefore not authority for this proposition. There is therefore no inconsistency between the Member's decision in this matter and *Ferro*.

27. This aspect of the ground of appeal, based on *Ferro*, fails.

Construction of cl 8C of the Workers Compensation Regulation 2016 – meaning of "employment arrangement" in cl 8C – adequacy of reasons for an ex-tempore decision

Secretary, Department of Communities and Justice v Farrugia [2023] NSWPICPD 75 – Acting Deputy President Perry – 28/11/2023

The worker filed an ARD seeking weekly payments with respect to an injury that she suffered on 4/05/2022 in the course of her employment as a correctional officer. The appellant admitted liability.

The dispute concerned the calculation of the rate of weekly payments to the worker, which involved a calculation of PIAWE under cl 2(1)-(3) of Sch 3 WCA.

An important factor in calculating the PIAWE is "*the relevant earning period*". Sch 3, cl 2(2) provides that this is a period of 52 weeks ending immediately before the date of injury.

However, Sch 3, cl 2(3) authorises regulations providing for adjustment of the relevant earning period. Clause 8C of the *Workers Compensation Regulation 2016* (the 2016 Regulation) is one such provision and is at the heart of this case. It says:

(1) The relevant earning period for a worker is to be adjusted in accordance with this clause if, during the unadjusted earning period, there was a change of an ongoing nature to the employment arrangement resulting in a financially material change to the earnings of the worker (for example, a change from full-time to part-time work).

(2) The relevant earning period is to be adjusted by excluding from the period any period before the change to the earnings of the worker occurred.

The relevant facts are undisputed. The respondent's employment was governed by the Crown Employees (Correctional Officers, Department of Justice - Corrective Services NSW) Award (serial 8629), (the Award). The Award provides, amongst other things, "for Correctional Officers who have completed twelve (12) months service on the 2nd year rate to progress to the rank of First Class Correctional Officer, subject to [certain] criteria".[1]

Up to on or about 28/03/2022, the worker was classified as "*Correctional Officer, Level 02*", which carried a base rate of pay of $68,246. During the pay period 28/03/2022 to 10/04/2022, this classification changed and she progressed to Correctional Officer, FST CLSS Level 01. The latter classification carried a base rate of pay of $72,077. The worker argued that her progression through these classifications enlivened cl 8C so that the relevant earning period of 52 weeks for calculating the PIAWE should be adjusted to exclude those weeks before that progression.

The appellant argued that the alleged classification change did not constitute a relevant change of an ongoing nature to the employment arrangement (within the meaning of cl 8C) because there was an expectation under the Award that she would progress through the classifications after a certain period of service, with a resulting entitlement to a higher rate of pay. Therefore, there was a "*normal expectation*" that after a certain period of service, there would be an increase in her pay.

The issue before the Member was whether the classification change, from "*Correctional Officer, Level 02*" to "*Correctional Officer, FST CLSS Level 01*", was "*a change of an ongoing nature to the employment arrangement resulting in a financially material change to the earnings of the worker*" within the meaning of cl 8C.

In an ex-tempore decision, ***Member Wynyard*** found in favour of the worker and issued a COD, which found that cl 8C of the 2016 Regulation "*apply to circumstances where an award provides for a financially material change to the earnings of the worker*".

The appellant appealed and asserted that the Member erred as follows:

(1) He failed to give adequate reasons (in determining that clause 8C applied); and

(2) He erred in finding: (a) The classification change from Correctional Officer, Level 02 to Correctional Officer, FST CLSS Level 01 constituted a change within the meaning of cl 8C; and (b) The Award was contractual or a contractual guarantee of a financially material change to the earnings of the worker.

Acting Deputy President Perry granted leave to the appellant to raise an additional ground of appeal. He revoked the COD and redetermined the dispute.

The appellant argued that the Member was required to provide detailed reasons as to why the classification change, which formed part of the Award, was a change of an ongoing nature to the employment arrangement. It also argued that the Award is not a contract or a contractual guarantee that there will be a financially material change to the worker's earnings and that industrial awards are legal documents that outline the minimum pay rates and conditions of employment.

The appellant says that it follows that cl 8C cannot apply, because there was no change to the ongoing nature of the employment arrangement as required by cl 8C. There was also a failure to give adequate reasons "*to the extent that they were not able to be transcribed*".

The worker argued that the appellant did not tender evidence to show the change in her role was to be temporary, and cl 8C applies as there was an ongoing material financial change in the rate of remuneration pursuant to a change in her classification under the Award.

Perry ADP first considered ground 2(a). He rejected the appellant's argument that the classification change did not constitute "*a change of an ongoing nature to the employment arrangement*" within the meaning of cl 8C.

The text of cl 8C needs to be read with the context and purpose of the provision in mind. Sch 3, cl 2(3) of the 1987 Act authorises the primary "*relevant earning period*" of 52 weeks in Sch 3, cl 2(2) to be adjusted by extending or reducing that period. Clearly enough, it does so in an attempt to ensure the PIAWE calculation properly reflects what an injured worker would have been paid but for the injury and this is its purpose. This is not new.

In *Lismore City Council v Garland*, Kirby P detailed the legislative history of the "*provision for the calculation of weekly compensation for a worker incapacitated for work as a result of a compensable injury*" in the versions of the 1987 Act going back to the Workers' Compensation Act 1926. His Honour concluded that the:

> ... policy which lay behind the introduction of the present approach to the requirement under s 36 of the Act [is] that, during the first twenty-six weeks of incapacity, the worker should be paid his or her 'current weekly wage rate as defined by s 42. *That policy I take to be that the worker should, during such incapacity, be paid the ordinary rate which would have been paid as wages had there been no compensable injury* (emphasis added).

Garland is not perfectly analogous to the present situation as the provisions for payment of weekly compensation have of course changed since both 1926 and 1992, and the first 26 weeks of incapacity had long expired in the present case. Nevertheless, the core principle, that a worker should be paid weekly compensation at a rate which would have been paid as wages had there been no injury (subject to statutory modifications), is sufficiently analogous for present purposes. This is consistent with Sch 3, cl 2(1) WCA, in outlining the meaning of PIAWE, referring to earnings "*at the time of the injury*".

Perry ADP rejected the appellant's argument that the worker's employment is governed by the Award, the Award is the employment arrangement cl 8C refers to, thus the classification change was not a change to the arrangement, as this ignores the change in the worker's position from a Level 1 Officer to an Officer First Class – except to say this was no change at all and not ongoing as it was "*embedded in the Award*" and or was to be expected.

The appellant did not explain how the interaction between the Award and cl 8C could practically or logically operate if it were read this way. It is implicit in appellant's argument that those emphasised words have no work to do if the relevant "*employment arrangement*", or at least the one in the present case, the Award, is the employment arrangement itself for the purposes of cl 8C. In the present case, the appellant's focus appears to be on whether "*there was a change ... to the employment arrangement*".

Perry ADP stated, relevantly:

> 40. …In my opinion, it is clear that if there is such a change, it is ongoing and also one which has resulted in a financially material change in the earnings. It is not totally clear whether or not the appellant's submissions focus on the "*ongoing nature*" or "*financially material change to the earnings*" aspects, except to the extent of being part of the essential focus of the submissions noted above under Ground 2(a), particularly at paragraphs [12] and [14] of those submissions. If they do, again, there are no submissions explaining how that may be so. Otherwise, I do not see how that point is arguable.
>
> 41. This returns the discussion to whether the appellant is correct in submitting that the Award itself is the employment arrangement referred to in cl 8C, and if so, whether that makes a difference anyway. Again, there is little if any analysis or assistance provided in support of this submission. In essence it is rather put as a bare proposition or conclusion. One question that arises though is why, if the appellant's position is right, does cl 8C(1) use the term "*arrangement*" rather than "*contract*" or "*agreement*" or "*award*". In my opinion, this is because cl 8C contemplates its applicability to any specified or class of contract of employment, industrial agreement, award or other employment arrangement.

42. These terms are used elsewhere in the 1987 Act. Sections 49 and 50 relevantly provide for weekly compensation being payable despite having received holiday pay or "*sick leave*" under any "*Act … award or industrial agreement … or contract of employment*". Similarly, s 87A authorises the regulations to prescribe additional or alternative compensation, including payments to workers or their dependants in respect of injuries or deaths under any specified or class of contract of employment, industrial agreement, award "*or other arrangement*". These examples are not exclusive.

43. Perhaps a more important question arising is this: even assuming the Award itself is the "*employment arrangement*" referred to in cl 8C, what does the appellant's argument mean? The essential extent of the submission in that respect is that there could not have been a relevant change because the classification change was the employment arrangement. If this means, for example, cl 8C has no work to do unless the Award itself is changed, another question arises of how that would work. If it means cl 8C would only apply in this instance if there was a change, for example, to the salary rates payable under cl 6, or allowances under cl 7, of the Award, I do not see how there would be a difference between such change and the change ("*Progression and Promotion*") in cl 8 of the Award.

44. The issue appears to largely boil down to what "*employment arrangement*" means. This requires consideration of the text, context and purpose of the matter to be interpreted.

45. The statute authorising cl 8C, the 1987 Act, provides some assistance in the interpretation of it. Schedule 3, cl 2(3) relevantly provides "*for the adjustment of the relevant earning period … (a) to take into account any period of unpaid leave or other change in earnings circumstances in the employment …*" (emphasis added). The emphasised words are consistent with the statute contemplating regulations in many and varied situations where there is a change in earnings circumstances in the employment, and likely in a more general rather than limited way.

46. When cl 8C provides for an adjustment where "*there was a change of an ongoing nature to the employment arrangement*", it is difficult to see how the legislative intention would be to limit the type of change – except of course in the way spelt out in Sch 3, cl 2(3)(a) ("*earnings circumstances in the employment*") and in cl 8C ("*of an ongoing nature to the employment arrangement resulting in a financially material change to the earnings*"). The appellant also submits (at paragraph [12]), inconsistently with its own argument, that the "*classification change*" (my emphasis, pointing to an apparent acceptance of 'a change'), "*… formed part of*" the Award.

47. Making the appellant's argument even harder to accept is the appearance of the cl 8C example. There is no hint that this operates in the context of an employment arrangement (whether it be a contract, award or other type of employment) *only* where the machinery to facilitate the change is not already part of the arrangement. There is also no explanation of how the appellant's interpretation might be consistent with the statute and regulation. In my opinion, this interpretation attempts to create an artificial distinction between the employment arrangement itself and its constituent parts. It is a specious argument, and a distraction from what should be addressed: whether the respondent's classification change "*was a change of an ongoing nature to the employment arrangement*" (my emphasis).

Perry ADP stated that it was difficult to see how the worker's earnings circumstances relevantly differ from the cl 8C example, particularly given the way the appellant has put its case: thus, if cl 8C does not apply in this case, as there was no change to the employment arrangement because the change was the very nature of the arrangement, how can that be reconciled with the cl 8C example? The appellant has not addressed this either. In other words, if a change from full-time to part-time work does constitute a change of an ongoing nature to the employment arrangement why would a change in a worker's job classification, through progression and promotion, not also qualify?

Clause 19 of the Award ("*Permanent Part-Time*") contemplates arrangements being made to allow for part-time work, subject to those arrangements being acceptable to the employer and in compliance with the relevant legislation and policies). In my opinion, there is no reason why there should be a difference. Of course, it does not matter whether an award or a contract is involved. It is not difficult to envisage a clause similar to cl 8 of the Award in an employment contract.

The appellant's submissions, in relation to both grounds of appeal, also ignore the criteria the respondent needed to comply with before being progressed and promoted from the classification of Officer Level 02 to Officer First-Class Level 01. It may even be said that the terms of cl 8C make it unnecessary to show the circumstances underlying the change. It is unnecessary to determine that in this case. But the terms of the criteria are relevant here because they are further evidence confirming a change, and one that has resulted "*in a financially material change to the earnings*" of the respondent.

Perry ADP stated, relevantly:

> 51. The criteria make clear, as the Member found, that "*it cannot be said that the increase … the financially-material change is an automatic one …*". In my opinion, the terms of the criteria are inconsistent with the appellant's argument that "*there could not have been a change to the ongoing nature of the employment arrangement because the classification change was the very nature of [it]*". This is a fallacy by circular reasoning. The Member's reference to "*automatic*" was appropriate in circumstances where the appellant was submitting there was an "*expectation*" or a "*normal expectation*" (see [7] above).
>
> 52. This is also relevant to the appellant's complaint of inadequate reasoning. The Member clearly regarded this as important in his reasoning, as he recorded in those reasons both the chapeau to the criteria as well as each criterion. It is unnecessary to repeat that detail here. His comment that it could not be said to be automatic may be pithy but that was appropriate in the circumstances.
>
> 53. In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*, the High Court stated (footnotes omitted) that:
>
> > The language which has actually been employed in the text … is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.
>
> 54. For the reasons expressed above, and taking into account the text, context and purpose of Sch 3, cl 2 of the 1987 Act and cl 8C of the 2016 Regulation, "*employment arrangement*" in my opinion refers to the nature of the employment relationship, that is, whether it be, for example, by contract, award or other arrangement, and includes the various ingredients of the arrangement, which include other arrangements within the purview of that arrangement including, for example, terms or clauses or understandings (of contracts, agreements or awards or other arrangements). This is all limited to a "*worker for work in any employment*" (Sch 3, cl 2(1)).

Perry rejected ground 2(b), including appellant's characterisation of an industrial award, including the Award, as being relevantly different to a "*contract or a contractual guarantee … as found by the Member*". The bare reason or basis given for this statement is "*an industrial award, like the subject Award, are legal documents that outline the minimum pay rates and conditions of employment*". It can be accepted that industrial awards do provide for minimum entitlements or standards, and that an employment contract may "*guarantee*" higher entitlements or standards. But that is not always the case or necessarily so. More importantly, it is beside the point of this case and is another distraction. There is no basis in the WCA or cl 8C, or the evidence, for this submission.

Whether or not the Member was mistaken (in referring to "*[i]t simply is a contractual, if you like, guarantee …*"), he was correct in concluding that it would be wrong to find the Award does not apply to cl 8C simply by reason of its status as an award. The Member did not find that the award was a contractual or a contractual guarantee that there will be a financially-material change to the earnings. Rather, he was saying that the terms of the Award are relevantly analogous to a contract, and there was no relevant difference between the effect of the Award and a contract of employment.

The Member's decision was of concern in the context of whether the classification change constituted "*a change … to the employment arrangement …*" limb of cl 8C. His finding was dispositive, and only relates to part of the correct test in cl 8C, omitting the limb of the test which represented the appellant's main argument ("*a change of an ongoing nature to the employment arrangement …*").

This error has consequences as this language found its way into the COD, which appears to be formulated as a type of general declaration about the applicability of an award. It states:

> The provisions of regulation 8C of the *Workers Compensation Regulation 2016* apply to circumstances where an award provides for a financially material change to the earnings of the worker.

Accordingly, the Member erred in applying a wrong test and/or identifying a wrong issue. In *Minister for Immigration and Multicultural Affairs v Yusuf*, Gleeson CJ stated that (jurisdictional) error occurs if a decision-maker applies a wrong test. This statement is consistent with the observations of McHugh, Gummow and Hayne JJ in *Yusuf* (at [82], including in relation to an identifying a wrong issue also being an error of law).

Accordingly Perry ADP revoked the COD. He redetermined the matter and found that the change in classification under the Award did constitute a change of an ongoing nature to the employment arrangement resulting in a financially material change to the worker's earnings within the meaning of cl 8C of the Regulation.

PIC – Member Decisions

Motor accidents Workers Compensation

Motor Accident Injuries Act 2017 – claimant injured whilst riding an e-bike – Held: the e-bike was not a "motor vehicle"; definition of "motor accident" not met; injury was a result of being pushed by a pedestrian; neither section 1.9 or section 3.1 were engaged.

CFD v AAI Limited t/as AAMI [2023] NSWPIC 592 – Member Williams – 8/11/2023

On 29/07/2022, the claimant was injured whilst riding an "e-bike" through Prince Alfred Park, Surry Hills. No other vehicles were involved in the incident.

The Nominal Defendant denied liability and in an internal review decision dated 2/02/2023, it determined that the e-bike was not a "*motor vehicle*" as defined by the MAIA, and that the claimant's injuries did not result from a "*motor accident*" as that term is defined. Therefore, she was not entitled to weekly payments of statutory benefits under s 3.1 of the MAIA. The reasons are summarised below.

Section 1.9 is the gateway provision to the MAIA, and the MAIA does not apply unless it is satisfied. The section provides:

> **1.9 General restrictions on application of Act**
>
> (1) This Act (including any third-party policy under this Act) applies in respect of the death of or injury to a person that results from the use or operation of a motor vehicle only if the death or injury is a result of and is caused (whether or not as a result of a defect in the vehicle) during—
>
> (a) the driving of the vehicle, or
>
> (b) a collision, or action taken to avoid a collision, with the vehicle, or
>
> (c) the vehicle's running out of control, or
>
> (d) a dangerous situation caused by the driving of the vehicle, a collision or action taken to avoid a collision with the vehicle, or the vehicle's running out of control.
>
> (2) This Act (including any third-party policy under this Act) does not apply in respect of an injury that arises gradually from a series of incidents.

Section 3.1 governs the payment of statutory benefits, and provides:

> **3.1 Statutory benefits payable in respect of death or injury resulting from motor accident**
>
> (1) If the death of or injury to a person results from a motor accident in this State, statutory benefits are payable in respect of the death or injury as provided by this Part.

(2) Statutory benefits are payable (except as otherwise provided by this Part)—

(a) whether or not the motor accident was caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle, or

(b) even if the motor accident was caused by the fault of the person to whom the statutory benefits are payable.

The term "*motor accident*" is defined in s 1.4 of the MAIA as follows:

"**motor accident**" means an incident or accident involving the use or operation of a motor vehicle that causes the death of or injury to a person where the death or injury is a result of and is caused (whether or not as a result of a defect in the vehicle) during—

(a) the driving of the vehicle, or

(b) a collision, or action taken to avoid a collision, with the vehicle, or

(c) the vehicle's running out of control, or

(d) a dangerous situation caused by the driving of the vehicle, a collision or action taken to avoid a collision with the vehicle, or the vehicle's running out of control.

Section 1.4 of the MAIA states that "*motor vehicle*" means a motor vehicle or trailer within the meaning of the *Road Transport Act 2013* (Transport Act).

Section 4 of the Transport Act defines "*motor vehicle*" as a vehicle that is built to be propelled by a motor that forms part of the vehicle. The definition of "*vehicle*" is also found in s 4, and is in the following terms:

"**vehicle**" means--

(a) any description of vehicle on wheels (including a light rail vehicle) but not including any other vehicle used on a railway or tramway, or

(b) any description of tracked vehicle (such as a bulldozer), or any description of vehicle that moves on revolving runners inside endless tracks, that is not used exclusively on a railway or tramway, or

(c) any other description of vehicle prescribed by the statutory rules.

The statutory rules are the regulations and rules made under the Transport Act. Rule 15 of the *Road Rules* states:

15 What is a vehicle

A vehicle includes—

(a) a motor vehicle, trailer and tram, and

(b) a bicycle, and

(c) an animal-drawn vehicle, and an animal that is being ridden or drawing a vehicle, and

(d) a combination, and

(e) a motorised wheelchair that can travel at over 10 kilometres per hour (on level ground), and

(f) an electric skateboard, unless a person is driving the electric skateboard in the circumstances set out in rule 228–1,

but does not include another kind of wheelchair, a train, or a wheeled recreational device or wheeled toy.

Note 1— Various terms mentioned in this rule are defined in the Dictionary.

Note 2— This rule is not uniform with the corresponding rule 15 of the Australian Road Rules.

Schedule 1, Part 2 cl 15 of the *Road Transport (Vehicle Registration) Regulation 2017* provides:

> **15 Power-assisted pedal cycles and electrically power-assisted bicycles**
>
> The registration provisions do not apply to a registrable vehicle that is—
>
> (a) a power-assisted pedal cycle within the meaning of vehicle standards, as amended from time to time, determined under the Road Vehicle Standards Act, section 12 other than 1 that has an internal combustion engine or engines, or
>
> Note— Power-assisted pedal cycle is defined in the Vehicle Standard (Australian Design Rule – Definitions and Vehicle Categories) 2005 determined under the Road Vehicle Standards Act, section 12. The definition of power-assisted pedal cycle includes electrically power-assisted cycles, within the meaning of that Standard.
>
> (b) an electrically power-assisted bicycle that has a maximum continued rated power of 500 watts, if the power output—
>
> (i) progressively reduces as the bicycle's speed increases above 6 kilometres per hour, and
>
> (ii) is cut off when—
>
> (A) the bicycle reaches a speed of 25 kilometres per hour, or
>
> (B) the rider of the bicycle stops pedalling and the speed is more than 6 kilometres per hour.

"*Power-assisted pedal cycle*" is defined in *The Vehicle Standard (Australian Design Rule – Definitions and Vehicle Categories) 2005 (Cth)* (Standard) as follows:

> POWER-ASSISTED PEDAL CYCLE - means a vehicle, designed to be propelled through a mechanism primarily using human power, that:
>
> (a) meets the following criteria:
>
> (i) is equipped with one or more auxiliary propulsion electric motors with a combined maximum power output not exceeding 200 watts;
>
> (ii) cannot be propelled exclusively by the motor or motors;
>
> (iii) has a tare mass (including batteries) of less than 50 kg;
>
> (iv) has a height-adjustable seat; or
>
> (b) is an electrically power-assisted cycle;
>
> but does not include a vehicle that has an internal combustion engine.

"*Electrically power-assisted cycle*" (EPAC) is defined in the Standard as:

> ELECTRICALLY POWER-ASSISTED CYCLE (EPAC) - means an electrically-powered pedal cycle with a maximum continuous rated power of 250W, of which the output is:
>
> (a) progressively reduced as the cycle's travel speed increases above 6 km/h; and
>
> (b) cut off, where:
>
> (i) the cycle reaches a speed of 25 km/h; or
>
> (ii) the cyclist is not pedalling and the travel speed exceeds 6km/h.

For s 1.9 to be engaged, the claimant must establish (among other things) that her injuries result from the use or operation of a "*motor vehicle*", as defined in the MAIA. Likewise, as s 3.1 requires that her injuries result from a "*motor accident*", as that term is defined, she must also establish that the incident involved the use or operation of a "*motor vehicle*". In short, she must prove, on balance, that the bike involved in the incident was a "*motor vehicle*".

The Member made the following findings about the operation and configuration of the bike at the time the incident occurred: (a) The bike had an adjustable seat; (b) Pedals were used to operate the bike; (c) There was a battery located under the seat of the bike; (d) There were brakes on each handle; (e) There was a throttle located on the right handle of the bike; (f) A motor was attached to the rear wheel of the bike near the axle; (g) The motor was powered by the battery located under the seat; (h) The motor was activated by the throttle; and (i) The throttle was used to increase speed while the bike was being pedalled, including when moving off at intersections and going up hills.

However, the Member was not satisfied that the evidence allowed him to make findings, on the balance of probabilities, with respect to the power of the motor and the maximum speed of the bike when the motor was engaged. He was also not satisfied that the evidence allowed him to make findings, on the balance of probabilities, about when the motor was attached to the bike, the means by which it was attached to the bike, and whether it was attached to the bike at the time it was built or subsequently. Nor did the evidence allow him to make findings about when the throttle and battery were affixed to the bike, and what, if any, modifications were made to the bike after it had been sold by the manufacturer. This is of particular relevance in circumstances where the bike appears to have passed through a number of hands between when it was built and when it was lent on hire to the claimant.

The Member was not satisfied that he was able to make a finding as to whether the bike is a power assisted pedal cycle or an electrically power-assisted cycle, as those terms are defined in the Standard. He stated, relevantly:

> 53. The definition of "*motor vehicle*" focuses attention on the intended operation of the vehicle in question at the time it was built. In this case, the question is: was the bike built to be propelled by a motor that forms part of the bike? The definition is not concerned with the operation of the vehicle after modifications have subsequently been made to it by someone other than the manufacturer, where those modifications alter the manner in which the vehicle operates, and where the manufacturer neither intended nor anticipated that such modifications would be made when the vehicle was built.
>
> 54. I have found that at the time the incident occurred, a motor was attached to the rear wheel of the bike near the axle, that there was a battery under the seat, and that the motor was engaged by a throttle located on the right handle of the bike. However, as previously recorded, I am not satisfied that the evidence supports a finding about when the motor, throttle, and battery were attached to the bike, whether at the time it was built or subsequently, or whether modifications were made to the bike after it was sold by the manufacturer. In the absence of evidence about these matters, I am not persuaded, on balance, that the bike was built to be propelled by a motor that forms part of the bike.
>
> 55. I am not satisfied, on the balance of probabilities, that the bike is a "*motor vehicle*" as defined by and for the purposes of the MAI Act. That being the case, I find that for the purposes of s 1.9 of the MAI Act, CFD's injuries did not result from the use or operation of a motor vehicle. The MAI Act, therefore, does not apply. This finding on its own would prevent CFD from recovering statutory benefits under the MAI Act. For completeness, I will also address s 3.1.

The Member noted that s 3.1 states, relevantly, that if injury to a person results from a motor accident in this State, statutory benefits are payable. For s 3.1 to be engaged, there must be a "*motor accident*". For the purposes of the MAI Act, "*motor accident*" means, relevantly, an incident or accident involving the use or operation of a motor vehicle that causes injury. Because I have found that the bike was not a "*motor vehicle*", the definition of "*motor accident*" cannot be satisfied. Therefore, s 3.1 is not engaged, and CFD is not entitled to statutory benefits under the MAI Act.

The Member was satisfied, on balance, that the injuries suffered by CFD were the result of her being deliberately pushed by one of the young men in Prince Alfred Park. As a result of being pushed, she lost her balance, hit a street light and fell to the ground, suffering injury. The push was the dominant cause or that which was proximate in efficiency and the real effective cause of her injuries. However, the injuries did not result from the use or operation of a motor vehicle. Nor were her injuries a result of one of the four specified circumstances referred to in s 1.9(1) of the MAI Act.