Bulletin

Edited by Michelle Riordan

Independent Review Office

RECENT CASES

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

Decisions reported in this issue

1. Secretary, Department of Communities and Justice v Stewart [2024] NSWCA 59
2. Insurance Australia Limited (trading as NRMA) v James Hulse [2024] NSWSC 142
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Court of Appeal Decisions

STATUTORY INTERPRETATION – a period of absence from work due to incapacity from an injury for which a worker was paid workers compensation does not constitute a "period of unpaid leave" for the purposes of cl 2(3)(a) of Sch 3 WCA and reg 8E of the Workers Compensation Regulation 2016 (NSW)

Secretary, Department of Communities and Justice v Stewart [2024] NSWCA 59 - Leeming JA, Stern JA and Griffiths AJA – 20 March 2024

On 20/11/2020, the worker injured his shoulder at work and he had no capacity for any employment from 20/11/2020 to 1/02/2020. The appellant accepted liability paid weekly payments.

On 1/02/2021, the worker lodged a claim for PTSD as a result of the nature and conditions of employment. The appellant accepted the claim.

On 25/02/2021, the appellant made a WCD that PIAWE was $1,565.68, based on gross earnings of $81,415.30 over a 52-week period. This figure did not include any compensation payments (consistent with cl 6(2)(c) of Sch 3 WCA, but the period in which weekly compensation was paid was included in the 52-week period.

On 28/06/2022, ***Member Burge*** determined that the relevant earning period should be adjusted to exclude the period in which weekly compensation was paid. The appellant appealed.

Deputy President Wood held that the period in which the worker was paid weekly compensation was "*a period of unpaid leave*" for the purposes of cl 2(3)(a) of Sch 3 WCA and Reg 8E of the Workers Compensation Regulation 2016. Therefore, that period of weekly compensation should be excluded from the relevant earning period.

The appellant appealed to the Court of Appeal.

The Court (Griffiths AJA, Leeming JA (agreeing but with separate reasons), Stern JA dissenting) allowed the appeal.

Griffiths AJA held that the meaning of the expressions "*any*" or "*a*" "*period of unpaid leave*" should be given their ordinary meaning in this particular context. The WCA uses "*leave*" in the sense of an entitlement or authorisation which relieves a worker of their duties as conferred by or under an employment contract, statute, or industrial agreement. It is implicit in this scheme, as with the different scheme in place in South Australia, that the meaning given to "*period of unpaid leave*" should not be unduly extended. Thus, a period of absence owing to compensable injury should not be regarded as a "*period of unpaid leave*" for the purposes of the NSW legislative scheme.

His Honour considered the decisions in *Flinders Ports Pty Ltd v Woolford* (2015) 121 SASR 485; and *Knight v State of South Australia* (2022) 140 SASR 326.

His Honour also held that the receipt of workers compensation is not "*unpaid leave*" per its ordinary meaning in either cl 2(3)(a) of Sch 3 WCA or reg 8E of the 2016 Regulation. Assigning an alternate construction would sit uncomfortably with the legislative scheme in Pt 2 of the Compensation Act, which imposes an employer's liability to pay compensation. It might more accurately be described as "*paid leave*". Clause 6(2)(c) of Sch 3 is of little assistance, as it has a wider scope than reg 8E. The regulation-making power is available to redress any perceived unfairness in circumstances such as these; it should be assumed that Parliament was content to leave it to the Executive to make any regulation on the subject if seen fit to do so: [143], [146]-[147]. In those circumstances, the phrase "*person on unpaid leave*" should not be given a strained meaning.

His Honour considered the decision in *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR.

Leeming JA held that Regulation 8E did not apply to the worker because his being absent from work and in receipt of workers compensation payments was not "*unpaid leave*". That was because:

> (1) The regulation-making power authorised the making of regulations to provide for the adjustment of the relevant earning period "*to take into account any period of unpaid leave or other change in earnings circumstances*". The regulation, which referred only to "*unpaid leave*", fell short of a full exercise of a power which also extended to any other change in earnings circumstances. In those circumstances there was no occasion to adopt an expansive construction of "*unpaid leave*".
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> (2) The regulations did not deal with the case of a worker who suffers two injuries, the first of which was only partially incapacitating, nor did they have the appearance of a comprehensive scheme.

Stern JA held that:

> (1) It is unlikely that Parliament intended Sch 3 WCA (and regulations made thereunder) to have the consequence, subject to a vague and unparticularised regulation-making power to cater for "*other*" changes in earning circumstances, that those who have suffered from a period of incapacity for which compensation was paid under the WCA during the 52 weeks prior to a later injury would necessarily receive compensation under the WCA at a level that is lower than would have been the case if they had not suffered from that period of incapacity.
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> (2) None of the bases, advanced in the appellant's submissions provides any convincing basis upon which Parliament could be found to have so intended.
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> (3) The term a "*period of unpaid leave*" is, on its face, sufficiently broad to comprehend as "*leave*" a period during which a worker is expressly or implicitly permitted to be absent from work, whether that absence is by reason of sickness, incapacity, or some other matter. Such an absence is at least implicitly permitted by an employer who releases the worker from any obligation to be ready, willing and able to perform work as directed by the employer.
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> His Honour did not follow the decisions in Ports Pty Ltd v Woolford (2015) 121 SASR 485; and *Knight v State of South Australia* (2022) 140 SASR 326.
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> (4) There is nothing in either the WCA or the WIMA (noting that the two are to be construed together) to suggest that the word "*leave*" cannot include a period when a worker is implicitly permitted to be absent from work on account of incapacity.

(5) Whilst compensation is paid to a worker under the WCA in respect of loss of earnings during such period, the permitted absence from the place of employment is not on the basis of payments being made under the employment arrangement (whether contractual or under an award). That suggests that it would not be characterised, from either an employer or employee's perspective, as a period of "*paid leave*". It would be somewhat unlikely for Parliament to have provided that payments are to be excluded from the ambit of "*income*" in respect of a period of incapacity, as it did in cl 6(2)(c) of Sch 3, but at the same time to have characterised that period of incapacity as being "paid" for the purpose of cl 2(3)(a) of Sch 3.

(6) The WCA does not pursue a single purpose. However, where, as here, the construction advocated by the Secretary would lead to a result which appears, on its face, to be unjust and discriminatory against those who have had an earlier claim for compensation when compared with others, that may suggest that Parliament did not intend such an outcome. That is particularly so where no apparent purpose is served by so construing the legislation and the construction does not appear to further any of the identified statutory objectives.

His Honour considered the decision in *Hunter Quarries Pty Ltd v Mexon* (2018) 98 NSWLR 526.

(7) The legislative history provides some support for the construction adopted by the Deputy President, notwithstanding that caution is necessary where legislation has been amended to reflect a different form of words.

Supreme Court of NSW – Judicial Review Decisions

JUDICIAL REVIEW – Serious driving offence – Proceedings discontinued – Statutory interpretation – Historical fact of a charge – Revocation of statutory benefits

Insurance Australia Limited (trading as NRMA) v James Hulse [2024] NSWSC 142 – Harrison AsJ – 22/02/2024

On 11/09/2020, the first defendant was seriously injured in a MVA while riding his motorcycle. The insurer is the third-party insurer of the other vehicle, which was at fault in the collision.

On 22/10/2020, NSW Police issued to the insurer a police report relating to the MVA. On 23/12/2020, the insurer accepted liability for the first defendant's claim.

On or about after 11/09/2020, the first defendant was charged with an offence of having a prescribed illicit drug or drugs in his blood while driving his motor cycle, under s 111(1)(a) of the *Road Transport Act 2013* (NSW). He entered a plea of guilty to the offence.

On 15/06/2021, the Local Court found the first defendant guilty under s 10(1)(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), but no formal conviction was entered.

The first defendant lodged a claim for statutory benefits under Part 3 of the *MAIA 2017* (NSW).

On 2/09/2022, the insurer sent the first defendant a further liability notice, denying liability on the basis that he had been charged with or convicted of a serious driving offence related to the MVA, and it ceased paying statutory benefits.

By email sent on 12/09/2022, the first defendant sought internal review of that decision. However, on 13/09/2022, the insurer made an internal review decision affirming its decision denying liability and issued a COD affirming its original decision.

By letter dated 20/09/2022, the insurer sent the first defendant a further liability notice (in relation to his claim for damages, which was separate to the claim for statutory benefits).

On 7/10/2022, the first defendant lodged with the PIC an application for insurance claim assessment, together with written submissions. That matter was allocated to the second defendant for determination.

On 1/11/2022, the insurer lodged a reply, with attached written submissions, email correspondence dated 12/09/2022 with the first defendant, and an internal review certificate of determination with reasons dated 13/09/2022.

On 8/11/2022, a preliminary conference in the PIC was held by phone, where the Member concluded that the matter was suitable to be determined on the papers.

On 8/11/2022, the Local Court issued an Advice of Court Result in *R v James Sinclair Hulse*, which included the following description of an order made by the Court on 15/06/2021:

> The offender, JAMES SINCLAIR HULSE is found guilty but without proceeding to conviction the matter is dismissed pursuant to section 10(1)(a) of the Crimes (Sentencing Procedure) Act 1999.

On 22/11/2022 the first defendant provided submissions to the PIC.

On 25/11/ 2022, at the invitation of the Member, the insurer lodged further submissions with the PIC.

On 14/12/2022, the Member issued the Certificate with the reasons for the decision. She relevantly stated:

> (i) The first defendant had no conviction for [the] serious driving offence (Decision [63]);
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> (ii) Because the magistrate dismissed the charge under s 10(1)(a) of the [Crimes (Sentencing Procedure) Act 1999 (NSW)], there was "*effectively no charge in existence*" (Decision [52]).
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> (iii) The effect of the dismissal was "*as if there had never been a charge at all other than the 'historical fact' of a charge being laid recorded somewhere in the police files and on the court's records*" (Decision [52]);
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> (iv) The charge was "*dismissed* before Mr Hulse was convicted and that results in Mr Hulse being eligible for the payment of statutory benefits (Decision [54]);
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> (v) The first defendant "*is not charged with a serious driving offence because the charges have been dismissed and there are no proceedings pending against him*" (Decision [63]).
>
> (vi) Because the charge was dismissed, "*it is as if they were never laid*" (Decision [64]).
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> As a consequence of (i) to (vi), the first defendant was entitled to the continued payment of statutory benefits (Decision [64]).

The Plaintiff applied to the Supreme Court of NSW for judicial review of the Member's decision.

Associate-Justice Harrison determined the matter and set aside the Member's decision. Her reasons are summarised below.

- 165. Division 3.5 in Part 3 of the MAIA ('the Act') sets out restrictions and limitations on statutory benefits. One limitation is found in s 3.37. Central to this judicial review is the proper construction of s 3.37 of the Act.
- Section 3.37 of the Act is headed "*no statutory benefits payable to an injured person who commits a serious driving offence*". Section 3.37(1) of the Act is intended to restrict or limit statutory benefits. It disentitles an injured person to payment of statutory benefits under Part 3, if the circumstances described in s 3.37(1) occur. Section 3.37(2) then limits the continuation of that disentitlement by carving out circumstances that lift it. Focusing on the opening words in s 3.37(1), "*after the person has been charged with*" fixes the point of time at which the disentitlement commences. Section 3.37(2) is concerned with events which may occur after that point of time. If the person has at any time been charged with a serious driving offence that was related to the motor accident, from that point of time the person is not entitled to statutory benefits. The status of disentitlement may end, or be lifted, in accordance with s 3.37(2).
- The parties agree that s 3.37 should be read as a whole and the phrases "*acquitted of the offence*", "*charged with or convicted*" and "*the proceedings are so discontinued*" should be given their ordinary English meaning. The expressions "*charged with*" or "*convicted*" in s 3.37(1) are disjunctive. It is common ground that the first defendant was charged with serious driving offences specified under s 3.37(5) of the Act.

- The words "*or convicted*" in s 3.37(1) have "*work to do*". The words provide an alternative point of time at which benefits cease to be payable. Given that the first defendant's benefits are payable on a weekly basis, precision in fixing the date is important. There may be circumstances where the time at which a person is charged is not known, whereas the time of being convicted is known. As is conveyed by the word "or", the phrase "*or convicted of*" operates as an alternative to "has been charged".
- Focusing on the opening words in s 3.37(1), "*after the person has been charged with*" fixes the point of time at which the disentitlement commences. Section 3.37(2) is concerned with events which may occur after that point of time. If the person has at any time been charged with a serious driving offence that was related to the motor accident, from that point of time the person is not entitled to statutory benefits. The status of disentitlement may end, or be lifted, in accordance with s 3.37(2).
- The words "*has been charged with … a serious driving offence*" are in the past tense. They only require that the person has been charged in the past. The words do not require that the person remains charged at any particular later point of time.
- The Member correctly stated that the first defendant was charged with an offence (actually two offences). He pleaded guilty to both offences for which he was charged in the Local Court. For each offence, the Magistrate found the first defendant guilty but without proceeding to a conviction dismissed the matter pursuant to s 10(1)(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) That means that the offences were proved, findings of guilt were made, but no convictions were recorded. The matters were not dismissed.
- The Member rejected the first defendant's submission that s 3.37(1) refers to the historical fact of a charge having been made, regardless of whether the charge continues in existence: Decision [38]. She tended to conflate the concept of "*is acquitted of the offence charged*" in s 3.37(2) with the question whether or not the person has been "*convicted*" in s 37.3(1): Decision at [38](a).
- So far as s 3.37(2) is concerned, the first defendant was not acquitted of the offences with which he was charged. The proceedings were not discontinued. As neither of these conditions were met, s 3.37(2) does not apply. The Member correctly concluded since there was no acquittal that s 3.37(2) did not apply.
- However, she reached a conclusion that the first defendant was not disentitled under s 3.37(1). The Member's reasoning for this conclusion is set out in [50] to [52]. She agreed with the insurer that the first defendant was found to be guilty, but no conviction was recorded. Then she stated:

  > …Does the phrase "convicted of' in s 3.37(1) refer to the finding of guilt by the Magistrate or depend on the sentence and whether a conviction is recorded or not? I have not been taken to any case law on the point, by in my view s 10(1)(a) distinguishes between a finding of guilt and the decision to convict. In Mr Hulse's case the Magistrate decided that Mr Hulse's matter was an appropriate case for a s 10(1)(a) order.
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  > 51. The effect of the order is that there is no conviction of Mr Hulse on the charges laid against him. There is no conviction because the charges have been dismissed.
  >
  > 52. The charges therefore will not appear on Mr Hulse's criminal record but there is a record of the proceedings and the outcome of the dismissal. But by the Magistrate dismissing the charges, there is effectively no charge in existence. The effect of the dismissal is, in my view, as if there had never been a charge at all other than the "historical fact" of a charge being laid recorded somewhere in the police files and on the court's records.

- I disagree that the Member's view that the Magistrate by dismissing the charges, meant that there is effectively no charge in existence. The member erred in construing s 3.37(2) as lifting the disentitlement in any circumstances where a charge was no longer pending. The charge remained when the offence was proven, but s 10(1)(a) provides that no conviction be recorded.

- Secondly, the bracketed words in s 3.37(2) make it clear that it is irrelevant that proceedings on one charge are discontinued because the claimant has pleaded guilty to a charge for another serious driving offence that contributed to the injury. In those circumstances the disentitling effect of s 3.37(1) continues to operate notwithstanding that the charge referred to in s 3.37(1) is no longer pending. The charges for each of the offences referred to in the bracketed part are distinct. They may be made on different dates. None of that affects the intention that "*the offence charged*" in s 3.37(2) is a reference to the offence "*the person has been charged with*" in s 3.37(1). In short, s 3.37(2) makes it very plain that there is at least one circumstance where proceedings on that charge are discontinued but s 3.37(1) prevents payment of statutory benefits for an indefinite period after the charge was made. The construction of s 3.37(2) adopted in the decision is inconsistent with the unambiguous plain text of s 3.37(2). The construction adopted overrides the exception in the bracketed words, because it allows discontinuance on account of a guilty plea for another serious driving offence, to mean that the proceedings under the charge are no longer pending and hence the statutory benefits are payable from the date when the person was charged. It is not the legislative intention that discontinuance on account of a guilty plea for another serious driving offence is a circumstance that has the effect of reinstating the entitlement to the statutory benefits.
- The construction adopted in the decision renders s 3.37(2) otiose. The precise identification of two circumstances where entitlement to statutory benefits is reinstated, is replaced by a broad test of "*proceedings are no longer pending*". That test is said to flow from s 3.37(4). If s 3.37(4) states the test as to when disentitlement by force of s 3.37(1) stops or is lifted, then there would have been no need to include s 3.37(2).
- The Member fell into error in the Decision at [43], in holding that while the first defendant was charged with a serious driving offence, "*there are no longer proceedings pending against him and therefore the first option in s 3.37(1) is not met*".
- The purpose of s 3.37(4) is to fix the time when the disentitlement occurs. This date is critical throughout s 3.37. After the date of the charge, it is lawful to cease paying the statutory benefits.
- Nor does s 3.37(4) alter the substance of s 3.37(1) by defining "*has been charged*" to mean "*has been and remains charged in existing proceedings*". That reads into s 3.37(1) the additional words "*and remains*" and "*in existing proceedings*". Section 3.37(4) is focused upon the past, and seeks to clarify when a person "*has been charged*" in the past.
- The Member's misconstruction and misapplication of s 3.37 of the Act is an error of law. The error appears on the face of the record of the PIC. Insofar as it is necessary to show that the error materially affected the decision, the error deprived the insurer of the possibility of a successful outcome in the referral.
- The Member erred in holding that if there are "*no longer proceedings pending against [the first defendant]*" then the words "*has been charged with... a serious driving offence*" in s 3.37(1) are not met: Decision [43]. That is not an available construction of the words in s 3.37(1). According to their ordinary English meaning the words refer to a past act of charging a person with an offence. They do not refer to a continuous state of being charged that occurs when the PIC determines the referral.
- If the first defendant's construction were correct, there would have been no need to include s 3.37(2), which demonstrates that only certain clearly defined and exhaustive events bring the disentitlement to an end. One of those events is acquittal. Section 3.37(1) needs to be construed so that it is harmonious with s 3.37(2). Moreover, it is not a question of what brings the charge to an end. It is a question of what is capable of bringing to an end the disentitlement (which was triggered by the discrete event of the charge).

- The insurer contended that a person may be disentitled for all time, because the person has been charged at one point in time and the disentitlement is not terminated pursuant to s 3.37(2). The first defendant's construction appears to produce unworkable or even absurd consequences. It entails that a person can only be permanently disentitled if the charge remains permanently pending against the person, and since a charge is always disposed of in some way, and is never permanently pending against a person, a person can never be permanently disentitled (unless the person is convicted). The first premise is erroneous, mis-applying s 3.37(4) within s 3.37(1). The conclusion is erroneous since it is the legislative intention that some persons who have been charged but not convicted will be permanently disentitled.
- The fact that disentitlement under s 3.37(1) or similar provisions in Div 3.3 may continue permanently does not demonstrate that the insurer's construction of s 3.37 is "*illogical*". In the circumstances where the first defendant has been discharged under a conditional release order, I agree that the legislative outcome may be considered to be harsh, but I am obliged to interpret the words as they are, harsh it may be, because that is considered the legislative intention.
- The court does not have a mandate to "*rewrite the statute*", and the court must proceed with caution. The first defendant's references to various statutes are not persuasive. The first defendant refers to the *Criminal Records Act 1991* (NSW). The defendant does not define the word "*convicted*". Its purpose is different to the purpose of s 3.37(1) of the Act. First, the purpose of s 3.37(1) is broader because it is concerned with the legal effect of a charge, not just a conviction. Secondly in a different respect it is narrower, as it is concerned only with a certain class of charges or convictions, being those for a "*serious driving offence*", rather than any conviction.
- The first defendant is in substance no more than disagreeing with the legislative policy behind s 3.37 in choosing the making of a charge for a serious driving offence that was related to the motor accident as the point of time after which disentitlement commences. Complaint could just as easily be made as to the legislative policy behind disentitlement after a certain period of time where the accident is established to have been caused wholly or mostly by the fault of the injured person; or as to disentitlement to loss of earnings or earning capacity after the first anniversary of the injured person's reaching retiring age. However, disagreement with the merits of a legislative policy behind a provision does not mandate a construction of the provision that is not available. The making of a charge is an objective fact. The circumstances where a charge has been made are further clarified by s 3.37(4). Section 3.37(1) does not pose any question as to whether the charge is reasonable, any more than it poses a question as to whether a conviction is reasonable. Whether a charge is reasonable is not justiciable. The outcome of the charge is not made entirely irrelevant. Pursuant to s 3.37(2), certain outcomes are relevant in that they lift the disentitlement. The first defendant pleaded guilty to two offences. The offences were proved. An order under s 10(1)(a) of the Crimes (Sentencing Procedure) Act 1999 (NSW) does not fall into either category of being acquitted.

Accordingly, her Honour remitted the proceedings are remitted to the President of the PIC to be dealt with according to law. She also ordered the first defendant to pay the insurer's costs.

Appeal against MAC - whether MAP merely conducted a preliminary review and failed to determine the appeal – whether the MAP's failure to re-examine the plaintiff despite her request constitutes reviewable error

Johnson v Suncorp Staff Pty Ltd [2024] NSWSC 102 – Griffiths AJ – 15/02/2025

On 17/05/2022, the plaintiff claimed compensation under s 66 WCA for 22% WPI for an alleged psychological injury.

The respondent made an offer of 19% WPI, but the plaintiff rejected the offer and commenced PIC proceedings.

The PIC referred the dispute to an AMS, Dr Clayton Smith, and on 3/05/2023, he issued a MAC that assessed 8% WPI.

The plaintiff appealed against the MAC under ss 327(3)(c) and (d) WIMA. She requested the MAP to re-examine her.

The MAP confirmed the MAC and provided a detailed statement of reasons. The MAP reasoned that even if the plaintiff was correct in her assertion that the effects of her psychiatric injury caused her marital breakdown, the evidence was consistent with a Class 2 impairment and did not satisfy the class descriptor for a Class 3 impairment. Although the MAP considered this conclusion was sufficient to dismiss the appeal, it went on additionally to conclude that it was reasonably open to the AMS to find that the marital breakdown resulted from causes which did not include the effects of the psychiatric injury.

The plaintiff applied to the Supreme Court of NSW for judicial review of the MAP's decision.

Griffiths AJ identified the issues for determination as follows:

(1) Whether the MAP simply conducted a "*preliminary review*" and failed to discharge its statutory function of determining whether or not the MAC contained a demonstrable error with respect to the cause of the plaintiff's marital breakdown;

(2) Whether the MAP's alleged failure to make a "*full assessment of all aspects of the relationship before and after the couple separated by re-examining the plaintiff and asking her pertinent questions*" constitutes a reviewable error; and

(3) Whether the MAP erred in not re-examining the plaintiff as per her request;

His Honour dismissed the summons, with costs. His reasons are summarised below:

His Honour rejected ground (1). He held that the MAP's reasons make clear that it correctly understood that the plaintiff challenged the MAC on the basis of demonstrable error and incorrect criteria. Fairly read, the reasons indicate that after it had "*conducted a preliminary review*", it proceeded to determine the appeal on the papers as it was entitled to do under [5.17.1] of the SIRA NSW Workers Compensation Medical Dispute Assessment Guidelines. It gave detailed reasons why it rejected the plaintiff's claim that the AMS' assessment involved demonstrable error or the application of incorrect criteria and it confirmed the MAC pursuant to its power under s 328(5) WIMA. Further, there was no basis to find that the MAP "*filled in any gaps*" in the AMS' path of reasoning.

His Honour rejected ground (2). He held that firstly, this was not squarely raised before the MAP. Secondly, Campbell J's reasons in *Ferguson v State of New South Wales* [2017] NSWSC 887 at [27] should be read in the context of that case, which relevantly differ to the proceeding here.

In this matter, the MAP engaged in a full and comprehensive on the papers assessment of the plaintiff's grounds of appeal, including the issue of causation. To the extent this ground challenges the MAP's finding of fact as to the causation of the plaintiff's marriage breakdown, this does not amount to a reviewable error as there was some evidence to support the MAP's confirmation of the AMS' finding on causation.

Even if there was no evidence to support this finding, any such error would not be material given the MAP's alternative reasoning that even if the plaintiff's psychiatric injury is taken to have caused her marital breakdown, the evidence was consistent with a Class 2 impairment and did not satisfy the class descriptor for a Class 3 impairment: at [93].

There is no basis in the plaintiff's complaint that she was not re-examined as she requested and asked questions on topics such as her ex-husband's gambling because the Panel had no power to re-examine her where no error was found in the MAC which warranted its revocation. His Honour followed the decision in *NSW Police Force v Registrar of the Workers Compensation Commission of New South Wales* [2013] NSWSC 1792 and considered the decision in *Finnegan v Komatsu Forklift Australia Pty Ltd* [2023] NSWSC 38.

His Honour also rejected ground (3) for the reasons set out in relation to ground (2).

PIC - Presidential Decisions

Psychological injury – COVID-19 vaccine mandate – psychological injury not wholly or predominantly caused by reasonable action taken by the employer in respect of discipline under s 11A WCA

Secretary, Department of Education v Davis [2024] NSWPICPD 18 – President Judge Phillips – 25/03/2024

The respondent worked at the Verona School in Fairfield, where she worked with the school's teaching staff to provide assistance and implement programs which support students with additional needs on a one-on-one basis.

The respondent suffers from various medical pre-existing conditions, including diabetes and auto-immune conditions. The history of these was set out in great detail in her statement dated 2/02/2022. These conditions were not employment related, although as a result of these health challenges, the respondent was auto-immune compromised which is a relevant matter when it comes to this dispute, and the respondent's concerns about receiving the COVID-19 vaccination.

When the COVID-19 pandemic commenced in 2020, given the respondent's auto-immune status, she was permitted to, and did, work from home providing online support to staff and students. This continued during multiple lockdowns throughout 2020 into 2021.

On 27/08/2021, the respondent emailed all school-based staff advising them that the Premier of NSW was expected to announce that they would require mandatory double doses of the COVID-19 vaccination from 8/11/2021. On the same day, a second email was sent, which confirmed this announcement. The respondent asserts that this is when she began to feel anxious about receiving the mandatory vaccination and the effect it may have on her body, noting her medical history.

On 2/09/2021, the Deputy Secretary, Chief People Officer of the appellant sent an email to all school-based staff confirming the vaccination requirements by 8/11/2021. In the days following this, email correspondence ensued between the Verona School principal, Ms Scott, and the respondent, in which Ms Scott confirmed the vaccination requirements and advised that work-from-home arrangements for staff would not be supported from 8/11/2021. Ms Scott advised the respondent that she did not intend to pressure her into receiving the vaccine, but needed to discuss the way forward as it could affect staffing at the school.

According to the respondent, in a telephone conversation on 6/09/2021, the respondent expressed to Ms Scott her anxieties regarding the vaccination, given her prior medical history. She says that Ms Scott informed her of other staff being concerned about working with an unvaccinated staff member. Ms Scott expressed sympathy about the respondent's concerns, but reiterated she could not return unless fully vaccinated. The respondent said this made her feel discriminated against. On this same day, the respondent consulted her general practitioner, Dr Nguyen, about the safety of the COVID-19 vaccination and the potential risks involved.

The respondent said Ms Scott offered her support in text messages after this exchange, and on 9/09/2021, the respondent received her first dose of the vaccine, to which she claimed to react poorly, both physically and psychologically. She visited Dr Nguyen again on 20/09/2021 with feelings of anxiety, at which point, the doctor implemented a Mental Health Care Plan.

On 23/09/2021, the then Minister for Health and Medical Research, the Hon. Brad Hazzard MP, issued a Public Health Order directing education and care workers that they must not carry out relevant work on or after 8/11/2021 unless the worker had: (a) received two doses of a COVID-19 vaccine, or (b) been issued with a medical contraindication certificate.

The respondent emailed Ms Scott on 29/09/2021 seeking advice and a risk assessment about the vaccine, including potential adverse reactions, its legal status, and risks, advising she would only be happy to receive it if it could be confirmed she would suffer no harm, and that her position would not be compromised in the organisation if she declined to receive the vaccination if it was still in trial stages. She also sought advice from Dr Nguyen by way of a questionnaire as to whether she could be prescribed Ivermectin for the treatment and prevention of COVID-19, so she could be fully informed before proceeding with a second vaccine. The doctor advised she could not.

On 1/10/2021, Ms Scott advised the respondent that she could not provide advice to individual staff about the vaccination program, but provided links to information on NSW government websites and indicated the Department may be able to provide more information. On 3/10/2021, the respondent requested the same advice directly from the Department Secretary. On 4/10/2021, the respondent informed Ms Scott that the period had been very difficult on her both physically and mentally and of her adverse reaction, by way of a rash on her arms, to the first vaccination. The respondent visited her general practitioner about this rash on 6/10/2021.

The respondent ceased work on 8/10/2021, and obtained a SIRA certificate of capacity from her general practitioner on 11/10/2021 certifying her as unfit for work as a result of stress/anxiety from this time.

On 12/10/2021, a claim form for workers compensation was completed, which reported that her psychological injury occurred "*as a result of events arising out of, or in the course of employment concerning the mandate to be vaccinated commencing on 27 August 2021 and continuing*".

The respondent subsequently came under the care of psychologist, Anil Kaushik, who reported that she suffered from anxiety and depression from a fear of losing her job, as it requires her to be fully vaccinated but she had fears of side effects.

On 18/10/2021, the respondent issued Determination No 1 of 2021 under the *Teaching Service Act 1980, COVID-19 Vaccination Evidence*, which required as a condition of employment that all staff receive two vaccinations and provide evidence of same, or a medical contraindication certificate if they could not be vaccinated.

On 21/10/2021, Dr Nguyen examined the respondent noting on-going side effects of the first vaccination on her physical health, as well as panic attacks. The respondent advised the doctor she did not wish to receive another dose of the vaccine.

On 25/10/2021, the appellant disputed liability on the basis of ss 4, 11A(3), 9A, 33 and 60 WCA, as well as the defence pursuant to s 11A(1) WCA. The insurer held that the respondent had not provided evidence of a psychological or psychiatric disorder, noting the diagnosis of "*stress*" was insufficient. Furthermore, should the respondent prove a diagnosable injury, it was not compensable under ss 4 and 9A as it was not caused by employment, but rather was attributable to "*the actions of the NSW Government generally and [her] personal concerns regarding the COVID-19 vaccine*". In the event the respondent proved injury, then, with regard to her concerns as to the potential to lose her job if not vaccinated, she would not be entitled to compensation as her injury was wholly or predominantly caused by action taken or proposed to be taken with respect to "*transfer, discipline, dismissal, and/or the provision of employment benefits*" pursuant to s 11A WCA.

The insurer referred to the respondent's employment being governed by the *Teaching Services Act 1980* and the *Education Teaching Service Regulation 2001* which provide that the protection of children is the paramount consideration when taking action against an employee, and that teachers are to comply with lawful directions given by the Department or the NSW Government. It was argued that the Department's "*actions in issuing and enforcing the directive [were] reasonable*", and that support was provided when implementing the mandate in regular communications. In the notice, the insurer acknowledged that it held "*little medical evidence upon which to determine [the respondent's] claim*" and would be investigating the claim further, including seeking an independent medical examination and evidence from treating doctors. Ultimately, it did not tender an independent medical report.

On 1/11/2022, Dr Nguyen completed an immunisation medical exemption form exempting the respondent from receiving the second dose of the COVID-19 vaccination. Thereafter, the doctor recorded on-going psychological symptoms relating to the vaccination and also noted the respondent's belief that COVID-19 was a conspiracy.

On 14/11/2021, the respondent was independently medically examined at the request of her solicitors by Dr Rastogi, psychiatrist, who delivered a report of the same date. The report referred to the respondent feeling coerced and under duress due to the emails she received regarding the vaccine, and also described her feeling traumatised and fearful for her life. Dr Rastogi opined that the respondent's existing mental health issues magnified following "*coercive emails*" to receive the vaccine, and that she "*felt discriminated*" and under duress to receive it, noting the adverse impact of the first dose on her physical and emotional wellbeing. The respondent was diagnosed with adjustment disorder with exacerbation of anxiety. The doctor was of the view that in the absence of any other stressors, the respondent's employment was the main contributing factor to her condition, arising from "*being coerced and discrimination [sic] to receive vaccination as a mandatory requirement and possible threat to her employment with no support provided. Her anxiety has been magnified and deteriorated following adverse reaction to vaccination and being ostracised further with possible termination threat causing vocational jeopardy and displacement*". Relevantly, the doctor found that the respondent's condition was not wholly or predominantly caused by either discipline or dismissal.

On 31/03/2022, Principal Member Bamber conducted a conciliation and the matter proceeded to written submissions. The issues for determination were whether the respondent had sustained a psychological injury arising out of, or in the course of, her employment between 27/08/2021 and 8/11/2021 (s 4), whether employment was a substantial and/or main contributing factor to the injury (depending on its nature) under ss 4(b) and 9A, and, whether a defence was available to the appellant pursuant to s 11A WCA.

Dr Chris Wood, Executive Director of the appellant, was cross examined on a statement he provided of 31 May 2022.

In a Certificate of Determination dated 13/12/2022, the Principal Member held that the respondent had sustained a psychological injury to which employment was both a substantial and main contributing factor. The Principal Member was not satisfied that a defence was available pursuant to s 11A WCA and awarded the respondent weekly compensation and s 60 expenses.

The appellant appealed on the following grounds:

> (1) The Principal Member erred when assessing the s 11A defence in failing to conclude that the respondent's feelings of being discriminated against resulted from the appellant's reasonable action taken or proposed to be taken in respect of discipline and/or termination of employment;
>
> (2) The Principal Member erred in assessing the s 11A defence in concluding that the respondent's feelings of being ostracised were of sufficient weight to militate against a finding of injury wholly or predominantly resulting from reasonable [action] taken or proposed to be taken in respect of discipline and/or termination; and
>
> (3) The Principal Member erred in assessing the s 11A defence in failing to conclude that the respondent's feelings of being ostracised resulted from the appellant's reasonable action taken or proposed to be taken in respect of discipline and/or termination of employment.

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

His Honour rejected ground (1). He noted that the appellant did not identify any particular section of the decision as revealing the asserted error, but a fair reading of the decision would indicate that the impugned aspects can be found at reasons [135], [136] and [139].

His Honour noted that the appellant led no medical evidence, nor did it obtain any statement from Ms Scott about the terms of the 6/09/2021 telephone call, despite flagging calling evidence from the principal in its Reply.

The appellant strongly asserts that the vaccine mandate was in fact discriminatory and argued that the error was in "*quarantining*" this discrimination from the assessment of whole or predominant cause of the injury. However, his Honour held that this is not a fair assessment of the Principal Member's reasoning when considered as a whole. The Principal Member noted that *"I find in this matter the cause of Ms Davis's psychological condition is complex*." This is undoubtedly correct; she described at some length the various matters impacting on the respondent's psychological condition. Clearly the vaccine mandate and its effect was part of the complex factual matrix being considered.

The Principal Member had to discern from this complexity the factual findings necessary to either accept or reject the appellant's assertion that it was its action with respect to discipline and/or termination that was the whole or predominant cause of the psychological injury, a requirement of *Hamad*.

The Principal Member found on the facts that this was not established and there was, on the evidence I have outlined above, a proper basis for that finding to be made without error and her findings had rational support in the evidence. Such findings of fact will not normally be disturbed on appeal.

His Honour rejected ground (2). He stated that the essence of the Principal Member's rejection of the appellant's argument can be traced to para [135] of the reasons, where she found that the appellant "*cannot establish this was the 'whole' cause of her psychological injury*". She then identified that it was not just the threat of discipline and/or termination that caused the psychological injury, but that the respondent "*also felt discriminated against and ostracised*". She found that this "*was her perception of real events*", and this was not challenged on appeal.

This finding was a necessary one in terms of the Principal Member's discussion of *K's* case which immediately follows at [137]. A fair reading of the decision as a whole reveals that the Principal Member was not satisfied that the respondent's injury was wholly or predominantly caused by the threat of discipline and/or termination. This was based upon the Principal Member's view about the respondent's feelings of discrimination and ostracism, although in this ground the appellant concentrates on "*ostracism*" only.

The appellant argued that the evidence of ostracism was insufficient. However, the evidence about ostracism was not questioned by the appellant and it led no evidence from Ms Scott, despite specifically flagging the potential of calling evidence from her.

In considering this complaint, the starting point is that weighing the evidence sits within the province of the first instance decision maker. In this case there was unchallenged evidence about ostracism and there was an evidentiary basis for the Principal Member to rely upon. The fact that evidence is unchallenged does not automatically necessitate its acceptance, however, "*unless the evidence is shown to be defective in some way, there is usually no reason not to accept evidence that is unchallenged*." Therefore, the Principal Member was right to rely on it.

As to whether the evidence of ostracism was sufficient, his Honour stated that this is analogous to an issue that was discussed by Heydon J in *Strong v Woolworths Ltd*. His Honour said:

> In the second sense, '*evidential burden*' refers to circumstances in which a plaintiff calls evidence sufficiently weighty to entitle, but not compel, a reasonable trier of fact to find in the plaintiff's favour. There is then said to be an '*evidential burden*' in the sense of a '*provisional*' or '*tactical*' burden on the defendant: if the defendant fails to call any or any weighty evidence, it will run a risk of losing on the issue – that is, a risk that at the end of the trial the trier of fact will draw inferences sufficiently strong to enable the plaintiff to satisfy the legal (ie persuasive) standard of proof. The '*provisional*' or '*tactical*' burden raises the question whether a defendant should as a matter of tactics 'call evidence or take the consequences, which may not necessarily be adverse'.
>
> And:

> The better view is that the 'evidential burden' to which Lawton LJ referred [in *Ward v Tesco Stores Ltd* [1976] 1 WLR 810] was the '*provisional*' or '*tactical*' burden of meeting the plaintiff's evidence or facing the possible peril that the trier of fact would draw inferences from it sufficient to satisfy the legal (ie persuasive) burden resting on the plaintiff. This is what Jacobs J was referring to when he said that in some circumstances '*the plaintiff need only produce slight evidence of negligence before a factual onus may shift to a defendant*.' *Dulhunty v J B Young Ltd* (1975) 50 ALJR 150 at 151; 7 ALR 409 at 411. That is an '*evidential burden*' in the second sense discussed above.

These passages are apt to the circumstances of this matter. The appellant did not call evidence to counter the evidence in the respondent's statement about ostracism. Clearly the appellant was capable of responding to that evidence, but a decision was made not to do so. As a consequence, the appellant ran the risk that "*the trier of fact will draw inferences sufficiently strong*" as discussed by Heydon J in *Strong*, even on evidence which may be considered to be "*slight*". This is precisely what happened.

The type of reasoning undertaken by the Principal Member was an evaluative one and of the type discussed by Allsop J in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* where the following was said at [28]: "*in [the] process of considering the facts for itself and giving weight to the views of, and advantages held by, the trial judge, if a choice arises between conclusions equally open and finely balanced and where there is, or can be, no preponderance of view, the conclusion of error is not necessarily arrived at merely because of a preference of view of the appeal court for some fact or facts contrary to the view reached by the trial judge*." The Principal Member undertook this task.

His Honour observed that the Principal Member said that the respondent's feelings of discrimination and ostracism displaced the argument that the whole and predominant cause of the injury was the appellant's action in respect of discipline and/or termination. He felt that it was somewhat artificial to separate discrimination and ostracism, as has been done in this appeal ground, and obviously both were weighed by the Principal Member, in circumstances where that evidence was unchallenged.

His Honour also noted that the appellant's submissions about Dr Rastogi's evidence and how it did not support the use to which it was not put to the Principal Member and he stated that the Principal Member could not err in failing to deal with an argument that was not put.

His Honour also rejected ground (3) for reasons provided in relation to grounds (1) and (2). However, the submission at paragraph [50] raised a question, even though not stated in these terms, as to whether the PIC had the power to hear the application in as much as the respondent relied upon an allegation of ostracism from the events of 27/08/2021 and on the respondent's case after this date.

The appellant argued that the assertion of ostracism was not claimed or notified by the respondent. However, this was not argued before the Principal Member.

His Honour noted that usually not taking a point before a member at first instance will be fatal to arguing that point on appeal, but arguments going to jurisdiction are in a different category. If there is no power to entertain an application, or part thereof, the Commission cannot hear the application or the part which is beyond power. The power to decide a controversy, as I have described above, is prescribed by the statute. It is therefore necessary to decide this assertion.

In this matter the respondent made a claim for weekly compensation and medical expenses under s 60 WCA. The word "*claim*" as it appears in s 289(1) and (2) WIMA (dealing with claims for weekly compensation and medical expenses respectively) is defined in s 4 WIMA as being "*a claim for compensation or work injury damages that a person has made or is entitled to make*." "*Compensation*" is defined in s 4 WIMA as "*under the Workers Compensation Acts, and includes any monetary benefit under those Acts*." The Workers Compensation Acts are defined later in s 4 as being the WIMA and WCA.

In *South Western Sydney Area Health Service v Edmonds* McColl JA said at [68]:

> The Deputy President observed (at [11]) '*that proceedings in the Commission are not governed by 'formal pleadings' ... '*. She referred to the decision in *Far West Area Health Service v Colin Robert Radford* [2003] NSWWCCPD 10 in which she had remarked (at [24]–[25]) that the '*issues before the Commission could be identified both in the ARD and Reply, as well as during the first telephone conference with the Arbitrator and in the conciliation and arbitration hearing*'. She accepted, however (at [12]), that the '*issues in dispute must be referrable to the 'claim' that was made by the worker*'.

The s 78 notice did not accurately respond to the claim, being wider than just the single day. However for the purposes of deciding this issue, the dispute had been framed by the claim and response in terms of the psychological injury suffered by the respondent as a result of the events of 27/08/2021 and on the respondent's case, what happened thereafter. This was the dispute before the Principal Member.

The issue pertaining to '*ostracism*' is but a particular of how the injury is said to have come about. In *Jaffarie v Quality Castings Pty Ltd*, White JA said that "*the question of whether a worker has suffered an injury as defined, that is, relevantly, a personal injury arising out of or in the course of employment, is a question to be determined not by an approved medical specialist, but by the Commission*." The same approach applies to this matter.

The respondent made a claim about psychological injury at work, which was resisted by the appellant and ultimately the contest came down to whether the injury was caused wholly or predominantly by the actions of the appellant (for the purposes of s 11A). This was the matter that the Commission was appropriately seized of the power to determine. The issue regarding the contribution of the assertion about '*ostracism*' is merely a factual element for the Principal Member to decide in terms of the overall dispute as framed by the parties.

To hold otherwise would introduce into the process of making a claim and it being disputed before filing in the Commission, a requirement for particularisation approaching the strict pleading rules found in the common law courts. There is no warrant for such a construction arising from Part 4 of the WIMA. In any event, the appellant did not argue that this is what Part 4 WIMA requires.

The PIC is not bound by strict pleadings, and the objects and the guiding principle both direct attention to the "*just, quick, and cost effective resolution of the real issues in the proceedings*". This is subject always to the observance of procedural fairness. I would note, as I have stated above, that in the Reply the appellant flagged calling evidence from the school principal in response to the ARD but chose not to do so. No claim about a lack of procedural fairness on the issue of ostracism was made at the hearing.

Accordingly, his honour confirmed the COD.

PIC – Member Decisions

Workers Compensation

The applicant sought a finding that she had suffered a psychological injury arising out of or in the course of her employment connected to the imposition of the COVID mandated vaccinations by the respondent – Held: the applicant did not suffer an injury

Herring v Secretary, Department of Education [2024] NSWPIC 76 – Member Drake – 21/02/2024

The applicant was a school teacher employed by the respondent. She alleged that she suffered a psychological injury as a result of the respondent imposing COVID-19 mandated vaccinations. She claimed weekly payments and s 60 expenses.

The respondent disputed causation and incapacity and relied upon s 11A WCA.

Member Drake conducted an arbitration. She noted that the worker had an acknowledged history of generalised anxiety pre-dating the events alleged in the ARD. She also noted that in July 2021 and August 2021, the respondent issued emails relevant to the pandemic and the need for vaccinations under the Public Health Order 2021 (the PHO).

The worker alleged that the Principal of Como West Public School (where she was employed in a temporary Assistant Principal position) and the Principal of Caringbah Public School (her children's school) both slandered and defamed her to other staff, causing her to become demoralised and humiliated, thereby undermining her health and the legitimacy of her medical exemption during the pandemic. She was also embarrassed by being questioned directly by her Principal regarding her vaccination status at executive meetings.

The worker alleged that she suffered a panic attack at school on 12/10/2021, at an executive professional learning day that was conducted on Zoom. She told her Principal that "*she could not do this anymore*" and took sick leave on 13/10/2021.

On 15/10/2021, she had a zoom meeting with her Principal, who said that she wanted her to complete the reports, presentation awards and programmes and any executive duties that were outstanding until she was stood down on 8/11/2021.

The worker received emails regarding her vaccination status from the Secretary of the respondent in July, August, September and October. These were emails forwarded to all relevant staff.

On 18/10/2021 the worker alleges that she had a panic attack. She consulted a GP and was certified unfit from 18/10/2021 to 19/11/2021 due to "*extreme severe anxiety*". She did not return to her employment and remained on sick leave until the end of term. She was placed on a mental health plan and consulted a psychologist, Ms Therese Hatfield.

The Mandatory Notice that the worker took exception to her and all other teachers working on site in NSW schools that they were required to have 2 doses of a COVID-19 vaccine by 8/11/2021 in order to be able to return to work on site.

The worker alleged that she became totally incapacitated for work as a result of these events and she was stood down from her employment on 9/11/2021 because she had failed to have the required COVID-19 vaccinations.

The worker alleged feelings of helplessness and hopelessness; a loss of interest in daily activities; appetite and weight changes; sleep changes; anger and irritability; loss of energy; self-loathing; concentration problems; appetite changes; significant weight loss or gain; nausea; migraines; unexplained aches and pains; bad feelings and thoughts; adverse changes to her behaviour and physical symptoms of tiredness and fatigue, headaches and muscle pain.

On 29/11/2021, the worker commenced work in her husband's consultancy as a trainer and she ceased that work in April 2023.

On 1 July 2023 she was offered and accepted reassignment to the respondent as a classroom teacher. She had been offered an earlier opportunity to reapply for such work but did not take that up.

The worker claimed weekly compensation from 18/10/2021, as well as the "past and present differential" between her PIAWE as an Assistant Principal, the work she performed for her husband and her current salary as a classroom teacher, and interest under s 110 WIMA.

The worker's solicitors qualified Dr Rastogi who examined her and issued a report dated 23/12/2021. The doctor stated, relevantly:

> In absence of any other non-work stressors, her employment is the main contributing factor to the injury sustained and/or diagnoses. The reasons being ***constant coercion and discrimination to receive vaccination as a mandatory requirement, refusing her medical exemption***, and possible threat to her employment with no support provided. There was further victimisation by principal presenting with hostile behaviours, causing misconduct and lack of support provided. She felt punished and discriminated whilst she was still contemplating vaccination due to fear about the side effects and felt the undue pressures and coercion magnified her anxiety and distress leading to anxiety disorder and panic attacks. (emphasis in decision)

The respondent qualified Dr Young. He referred to the worker's opposition to vaccination and her previous mental health difficulties and noted that the worker was distressed and affronted that her medical exemption had been rejected. He concluded that she suffered a psychological injury due to an unreasonable fear of the vaccination itself, which she continued to avoid. He stated that employment was a substantial contributing factor as she was unable to avoid vaccination without causing consequences to her employment and that the whole and predominant cause that the worker described relates to the vaccination mandate and later dispute over leave and her being stood down.

In a later report, Dr Young called the worker's credibility into question.

The Member found that the worker was a committed anti-vaxxer and that her correspondence to the principal of her children's school dated 14/09/2021 set out her position clearly and that position was replicated in her statement, as follows:

> To Susan Oliveri,
>
> I write to you as a concerned parent, who would currently be sending my children to school were it not for the current government lockdowns.
>
> I see that on the 27th of August 2021 the NSW Premier announced that vaccinations would become mandatory for N.S.W. Teachers, early childhood educators, support staff, and all other personnel working in an education environment as of October 25th.
>
> We as parents are writing today to express our outrage and disgust at the vile and oppressive implementation of an '*experimental vaccine*', in direct contravention of human rights and multiple federal laws.
>
> It has also come to our attention that you are, not only neglecting your duty of care toward our children and your staff, but are actively pursuing this unlawful agenda via coercion, conspicuous harassment for private medical information, whilst parading a seemingly wilful ignorance toward the independent and factual evidence.
>
> Permit me to remind you of several laws and legal philosophies that I need to impress upon your decision-making It is a long-established principle of law that consent cannot be given in circumstances of duress and coercion. Your consistent threat that education employees will lose employment and thus wages, if they are not injected with a Covid-19 vaccine, is tantamount to unconscionable and illegitimate economic duress, by you, upon citizens of this country (many of them parents themselves).
>
> Consent to a medical procedure requires the patient or recipient, after being informed of the risks and benefits of the procedure, be able to freely choose to undergo or decline the procedure,
>
> In the Australian Government's own Immunisation Handbook, under Section 2.1.3 'Valid Consent', it states that for consent to be legally valid, '*It must be given voluntarily in the absence of undue pressure, coercion or manipulation.*'
>
> The threat contained within your personal correspondence to staff (which has been distributed amongst our community) is party to exerting economic duress (and our community members) by forcing them to choose between their jobs/career and participating in a Covid-19 vaccination clinical trial.
>
> You are interfering with people's freedom lo decline a ('medical procedure') Covid-19 vaccine by threatening loss of employment if they do not provide evidence to you that they have been injected with a Covid-19 vaccine. Without the evidence (are schools not obliged to ensure that anything introduced to their grounds is evidence-based?) to assert your position, you are essentially committing malpractice. I, and many others within our community, question what standard of education you promote, when you appear unable to observe (even denying) simple scientific data.

As so-called protectors of our children you are required to protect them from political interference. Yet, here we see exactly that, as you enforce a 'science-by-media' narrative that is unsubstantiated nor reconcilable with moral ethics. I would like to bring to your attention my areas of concern.

1.The alarming and rising suicide rate exacerbated by the Covid responses. This is just one example of the major issues that have been largely ignored by media and the incessant but superficial governmental Covid information sessions.

Especially troubling are actions taken with negative impacts on children and teenagers that are demonstrably lacking in efficacy with respect to mitigation of negative virus outcomes. While all elements of society have suffered during the Covid-19 situation it is appalling that those who most trustingly rely on us to shelter, protect, and provide for them have suffered terribly from the alarmist rhetoric and overreaction of government. The unnecessary fear that has been not only allowed but encouraged should be a cause for shame for many in public life.

2. Prolonged and unwarranted overreach of emergency powers, including a lack of sunset clauses and weaponization of police against the populace. The use of our police forces to enforce often unclear and unjustified restrictions and impose extravagant fines and detention on the populace rather than helping to facilitate "business as (much as possible) usual" has done much to undermine confidence in the benevolence of our police service. It used to be that the police force in Australia was generally viewed as a group that one could turn to in times of need. They have now been turned against us and are often exhibiting bullying behaviour with seemingly political motives. The partisan focus of some of these actions is obvious and these can no longer be excused as anomalies.

While we understand this perception should not be transferred to individual officers (in fact, many have expressed concerns with the current situation), and we deplore the 'baiting' of police and service personnel it is none the less clear that the overall image of policing has taken a major negative turn.

3. Coerced medical treatment. The institution by stealth of a compulsory vaccination system (if you don't vaccinate you will be punished or discriminated against). This is a clear violation of human rights through travel restriction, loss of employment and other punitive '*Second class citizen*' measures designed to enforce compliance. Are they seriously moving towards medical apartheid however they look to sugar coat the situation? The questions many Australians have around this medical trial are real and are not always driven by misinformation or propaganda. As one small example, there are many who report that their side effects were brushed off and unreported by doctors and who were consequently fearful of second doses. The vaccines may well be immensely beneficial but honest balanced data, not fear and myopic reporting, are required. That we are moving toward a two-tier society based on this current crisis is unconscionable.

4. Lack of government accountability, open discourse, and platforms for honest dissent. The lack of dissemination of detailed information is deeply disturbing. The lack of nuance around the material that the media is promulgating has the effect that genuine concerns are rot being raised. The emperor may not be completely naked but there needs to be a recognition that his fashion choice could be better.

The treatment of Australians as needing dumbed down sound bites to ensure we "*do the right thing*" is insulting and breathtaking in its arrogance. The presentation of alternate views is essential for healthy outcomes. The view that science is established by consensus is historically laughable. There has been a breathtakingly profound lack of accountability for government failures and questionable actions specifically related to this crisis. Any exposure has been met not with contrition and renewed efforts to improve policy, process, and transparency but with self-protection. This is corruption and needs to be addressed as such.

Failure of government to nuance and adjust their approach to the unfolding situation and to consider and service the needs of the 'common person'. The profound disregard of the need for

government to be flexible and compassionate when dealing with the details of people's lives and livelihoods is notable. The stories abound of heartless disregard for the needs of sick and dying family members and the destruction of livelihoods based on (as far as the pandemic is concerned) arbitrary borders and lines of demarcation.

While we don't disapprove of facilitating sporting fixtures, the fact that these have taken such a high priority in the media compared to the devastation of our small businesses is simply ridiculous. To hear that they need 'consistency and security' when businesses have gone to the wall due to broad ranging snap decisions shows the ineptitude of government to truly understand and get a handle on the problems faced by Australian's day to day.

States have used 'demarcation lines'' to deny Australians the right to go about their business. The examples of twin cities being separated, small children unable to re-join parents and older ones unable to attend the bedside of dying parents are some of the ludicrous examples of this behaviour. Governments should be working hard to manage each one of these '*special*' situations. It is the job of governments (for which we taxpayers provide the resources!) to 'make a way'' to figure out a '*solution*' and to assist and serve.

There is a reason that government officers are given the term '*minister*': the non-religious application of the word says it all: ' *... to give service, care, or aid; attend, as to wants or necessities.*' The government's primary role and mandate is to enable the reasonable activities of their populace. There has been little evidence of the respective governments applying any degree of graduation or refinement to their covid approach and their draconian and heartless responses lo specific calls for help have done nothing to mitigate negative infection outcomes. Currently this is unbelievable and the fact that the general populace has tolerated a level of incompetence that they would not from any other service provider is testament to the willingness of citizens to resolve matters. The draconian, unnuanced restriction of free movement, association, and ability to work. The life's work of many citizens has been effectively destroyed through repeated lockdowns. Many hard-working Australians will be unable to rebuild their businesses. The restrictions under which they labour appear at best to be implemented with little common sense and at worst on partisan terms and has sent a seriously problematic message to the Australian people.

Slate edicts on freedom of movement and association based on dubious science and undemonstrated benefits have not been questioned and tested. Employer's restrictions based on vaccine status are likely to see many more people lose their employment or have their career trajectories destroyed. The need for some of these restrictions, such as those imposed on teachers and truck drivers, are so clearly unnecessary as to leave one completely nonplussed.

I await your reply and hope that you will affirm a commitment that might illustrate your social contract toward the protection of those who populate our community.

Yours Sincerely,

Mrs J. Herring

The Member noted that the applicant's history as presented to the PIC portrayed a person of delicate sensibilities who was demoralised and humiliated by the attitude of two Principals who allegedly undermined her health and the legitimacy of her medical exemption. However, that was inconsistent with the attitude and approach that she exhibited when corresponding with her children's Principal. Her own Principal was advised by an official of the respondent to contact another official within the department regarding the worker. She stated, relevantly:

...Jennifer is a temp teacher at my school (permanent at Fairfield PS). She is also my Relieving AP.

Jen has previously been referred to PES for her quite vocal anti-vax statements on social media and urging parents to send letters to principals which breach our code of conduct. She sent one herself to a Principal (see email thread).

I am writing to you today as Jennifer has previously told me that several times that she couldn't get an exemption. Last term, Jennifer informed me that she has Lupus which her doctor advised her doesn't fall under the exemption category. She told me she was going to "*shop around for a dodgy doctor at Bankstown*". I also spoke to her on Friday just gone in which she told me her GP said that if he was to write her an exemption he would "*get the sack*". This morning Jennifer sent me an email to say she now has a medical exemption. This afternoon she contacted me to say she couldn't attend our Executive Meeting as she was medical certificate from a random medical centre with 'extreme anxiety' unable to work from today to 19/11/21.

There is a whole lot more to this story which I am happy to share if need be.

The Member held that a medical exemption is a matter for the respondent following the application of strict guidelines. It is not a matter able to be legitimised or otherwise by anyone employed at school, no matter how senior, and the worker's exemption was not approved on grounds relevant to the guidelines. She did not have any medical basis for an exemption.

The Member rejected the argument that mention of these matters to the worker would have been a sensitive issue in the manner that she described.

The Member stated, relevantly:

44. Where there is a factual dispute, the Commission is entitled to consider the material before it and determine which version of the facts it accepts.

45. I am persuaded that the applicant's conduct is consistent with the version of events described by the principal in the memorandum she provided to the Department of Education. In this application I prefer the evidence of the applicant's principal.

46. I reject the evidence of the applicant as to injury.

47. The applicant's portrayal of the collapse of her health is exaggerated and inconsistent with her early return to work and high earning capacity.

48. I am in full agreement with the opinion expressed by Dr Young regarding the applicant's credibility in the self-reporting of her injury, symptoms and capacity for work.

49. The applicant's portrayal of her demoralised and humiliated state is inconsistent with the woman portrayed by her own correspondence which correspondence was aggressive and in some respects abusive.

50. I am not satisfied that there were any actual events which could constitute bullying or harassment and I do not accept that the applicant perceived the events described by her as bullying or harassment.

51. I am not persuaded that the applicant suffered any injury in the course of, or arising out of, her employment.

52. What the applicant was facing was the inexorable application of government policy to the COVID-19 pandemic, for the protection of school populations, all of which was in direct opposition to the political/social/medical views held by her. Any incapacity in the applicant, and I do not accept that she had any, arose directly from the confrontation of her own views with the policies of the government, which required implementation of those policies by the respondent. She realised that, despite her express opposition to that government policy, it would be applied to her to her detriment unless she complied.

53. The applicant was vehemently opposed to the Mandatory Notice and any imposition of an obligation to vaccinate, and I am satisfied that it was her fixed position and its consequences arising from the Department of Education's obligatory imposition of the order which caused her to invent exaggerated symptoms, provide a history of those symptoms to Dr Mikhail,

54. Dr Rastogi and her psychologist, claim sick leave, and then refuse to vaccinate and be suspended from her employment.

55. I am satisfied that the applicant did what she said she would. She went to a doctor with a story and relied on that story to claim workers compensation. In making that finding I make no criticism of the doctors who took her history and relied upon it.

56. Having found that the applicant was not injured out of or in the course of her employment, it is not necessary for me to deal with the issue of incapacity. However, if injury had been established, I would have found on the material available to me, that the applicant suffered no incapacity for work.

57. Had I had to determine the respondent's defence pursuant to s 11A I would have found that the respondent acted reasonably in relation to both discipline and the provision of benefits.

Accordingly, the Member entered an award for the respondent.