# Bulletin

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Independent Review Office

## RECENT CASES

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

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## Supreme Court of NSW Decisions

***Judicial Review – Rejection of additional relevant evidence – Error in PIRS Assessment of concentration, persistence, pace and employability – Matter remitted to President of PIC***

**Field-Whittaker v Thomas & Naaz Pty Ltd [2022] NSWSC 666 – Harrison AsJ – 25/05/2022**

The plaintiff was employed by the defendant as practice manager of 4 medical practices. In/about December 2019, she suffered a psychiatric injury at work and was certified as having no current work capacity by her NTD. She claimed compensation and the insurer accepted the claim.

In July 2020, the plaintiff claimed compensation under s 66 *WCA* for 19% WPI based on an assessment of Dr Allan. However, the insurer disputed the claim on the basis that MMI had not been reached.

The plaintiff commenced proceedings in the PIC and the dispute was referred to Dr Roberts (MA). On 26/11/2020, he issued a MAC which assessed 5% WPI.

The plaintiff appealed against the MAC under ss 327(3) (a), (b), (c) and (d) *WIMA*.

A delegate of the President of the PIC referred the matter to a Medical Panel (MP) with respect to grounds (a) and (d). The insurer opposed the appeal.

The MP conducted a preliminary review and directed the plaintiff to attend a further medical examination by Dr Parmegiani. On 28/05/2021, he issued a MAC, which assessed 7% WPI.

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

***Associate Justice Harrison*** determined the Summons and described the grounds as comprising "Judicial Grounds" (2)-(3), which relate to the rejection of additional evidence adduced by the plaintiff ("fresh/additional information") and "Judicial Grounds" (4)-(10), which relate to the MP's PIRS assessment.

Her Honour upheld grounds (2) and (3) and found that the MP erred when it adopted the insurer's submissions that s 327(5) *WIMA* applied. She noted that the additional evidence was ultimately rejected because it pre-dated the AMS' assessment and no explanation was given as to why it was not filed and served at that time. The plaintiff's further statement was also rejected because she was to be re-examined. Her Honour stated, relevantly:

66. …Section 327(5) adds another threshold requirement that the plaintiff has to demonstrate special circumstances to justify an increase in the period for an appeal. Section 327(5) only relates to appeal grounds raised under ss 327(3)(c) and (d) not ss 327(a) or (b). This is seemingly appropriate as if s 327(5) of the WIM Act applied to ss 327(a) or (b), a 28-day time limit would be imposed on claims of deterioration which intuitively would occur over a longer time period and so may be erroneously excluded, and on the provision of additional relevant information the attainment of which the appellant may not exercise any control…

68. On the issue of the Appeal Panel's interpretation of *Petrovic*. It is my opinion that the Appeal Panel misunderstood what was said. Hoeben J at [31] to [33] was referring to the plaintiff's evidence before the AMS. This is not the situation here as the plaintiff was updating what she says is her deteriorating medical condition. The Appeal Panel decided that this statement should be rejected on the basis that she could give this evidence when she was re-examined by Dr Parmegiani. However, it may have been better considered along with the other additional evidence. The Appeal Panel applied the correct test, the additional material did constitute additional evidence as defined in s 328(3) of the WIM Act. By applying s 327(5) of the WIM Act, the Appeal Panel made an error of law on the face of the record.

In relation to judicial grounds (4) to (10), her Honour referred to the decision in *Ballas* and held that if a MA wrongly assigns conduct to one PIRS scale, when it should have been assigned to another, this will result in their taking into account an irrelevant consideration in the context of assigning a class to each of the distinct scales. She stated, relevantly:

95. Clause 11.12 of the Guidelines provides that impairment in each area is rated by using class descriptors. Classes range from 1 to 5 in accordance with severity. The examples of activities are examples only. The assessing psychiatrist should take account of the person's cultural background, and consider activities that are usual for the person's age, sex and cultural norms.

96. The Appeal Panel assigned class 2 for concentration, persistence and pace, the same class as the AMS assigned. The Appeal Panel agreed that the AMS erred when he misapplied the relevant criteria to these categories. It was concluded that a re-examination by Dr Parmegiani was appropriate: see the Substantive Decision at [54]-[55]. The Appeal Panel adopted Dr Parmegiani's ratings under the 6 Classes. These class descriptors are "mild impairment: can undertake a basic retraining course or a standard course at a slower pace. Can focus on intellectually demanding tasks for periods of up to 30 minutes, then feels fatigued or develops headache." Part of the Appeal Panel's reasoning for assigning that class referred to the plaintiff being able to manage her finances, order groceries online and look after her two-year-old child on a fulltime basis. The Appeal Panel considered that the task of looking after a two-year-old child requires a degree of persistence, concentration and a capacity to perform complex tasks.

97. When the Appeal Panel determined that by being able to look after a 2 year old fits within the impairment rating scale for concentration, pace and persistence they erred as these activities should have been assigned to social functioning. In doing so, the Appeal Panel took into account an irrelevant consideration.

98. So far as employability is concerned, the Appeal Panel agreed with the reasoning of the AMS who assigned "class 3" for employability but decided to include it as part of the re-examination process because of the numerous issues raised by the plaintiff and for what it considered "completeness" of the appeal. Class 3 descriptors for employability are "moderate impairment." This means the plaintiff cannot work at all in same position. Can perform less than 20 hours per week in a different position, which requires less skill or is qualitatively different (eg less stressful)."

99. Part of the Appeal Panel's reasoning was again related to the plaintiff's family role looking after her daughter fulltime, taking her children to sporting activities on weekends, purchasing groceries online and preparing meals. The Appeal Panel found that these activities demonstrate abilities in homemaking and parenting. These activities are not relevant to or comparable to a capacity to employment. The Appeal Panel wrongly assigned these activities to employability when it should have assigned them to social functioning.

100 By assigning activities to the incorrect PIRS table the Appeal Panel took into account irrelevant considerations. This constitutes jurisdictional error.

Her Honour also briefly addressed judicial ground (6), which was the plaintiff's claim of apprehended bias, and rejected it. She stated, relevantly:

102. General principles regarding apprehended bias apply to tribunals: see *Morton v Transport Appeal Board (No 1)* (2007) 168 IR 403, [2007] NSWSC 1454, 414-415, at [57]-[59], *Commissioner of Corrective Services v Government and Related Employees Appeal Tribunal* [2004] NSWCA 291 at [22]-[25].

103. In *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, [2001] HCA 17, Hayne J noted that allegations of apprehended bias through prejudgment are often dealt with similarly to allegations of actual bias through prejudgment, requiring several distinct elements to be established, such as a need to show that the decision maker would apply an earlier opinion to a matter without giving it fresh consideration (at [185]-[186]; see also *South Western Sydney Area Health Services v Edmonds* (2007) 4 DDCR 421, [2007] NSWCA 16, at [97]-[106]; *Johnson v Johnson* (2000) 201 CLR 488, [2000] HCA 48, at [13]).

104. There is nothing to suggest that a fair minded-lay observer would not have reasonably apprehended that Dr Parmegiani would fail to bring an impartial and unprejudiced mind to his assessment of the plaintiff's employability scale.

Accordingly, her Honour found that the MP made errors of law on the face of the record and jurisdictional errors and she set aside the decisions dated 28 May 2021 and 15 April 2021. She remitted the matter to the President of the PIC to be determined according to law.

***Judicial Review – Error of Law and Jurisdiction – MAC in relation to Offender – "incorrect criteria" and "demonstrable error" – deduction for pre-existing condition – task to measure impairment, not condition – pre-existing impairment must exist immediately prior to injury being assessed - appeal to be heard by different panel.***

**Coenradi v The GEO Group Australia Pty Ltd [2022] NSWSC 864 – Rothman J – 29/06/2022**

The first defendant conducts a correctional facility and the plaintiff alleges that while incarcerated he was assaulted by correctional officers employed by the first defendant and that he suffered a psychiatric injury as a result.

The plaintiff claimed general damages under the Civil Liability Act 2002 (NSW) a threshold of 15% WPI applies and the assessment is made under Part 2A of the Civil Liability Act and Part 7 of Chapter 7 *WIMA*.

On 23/11/2020, Dr Baker issued a MAC which assessed 15% WPI (17% - 1/10 under s 323 *WIMA).*

The first defendant appealed against the MAC and the issue before the MAP was the effect of pre-existing injuries in circumstances where the MAS opined that the plaintiff suffered 4 pre-existing conditions, namely: (1) a mild intellectual impairment; (2) alcoholic induced mood and psychotic symptoms; (3) Organic Mood Disorder; and (4) Intermittent Explosive Disorder.

On 19/05/2021, the MAP revoked the MAC and issued a MAC that assessed 11% WPI, which applied a 1/3 deductible under s 323 *WIMA*.

The plaintiff applied for judicial review of a determination made by a MAP dated 19/05/2021, in respect of an assessment of permanent impairment for a psychological injury that occurred on 4/11/2016, on the following grounds: (1) Jurisdictional errors and errors of law on the face of the record in the making of the decision of the MAP; (2) Error by the MAP in failing to determine the existence of a ground of appeal allowed under s 327 *WIMA*; (3) The failure of the MAP to establish error before substituting its own decision; (4) Failure to set out proper and/or lawful reasons; (5) The MAP failed correctly to assess his pre-existing impairment pursuant to cl 11.10 of the Guidelines; and (6) The MAP erred by failing to apply correctly s 323 *WIMA* and/or the Guidelines.

***Rothman J*** upheld the summons and his reasons are summarised below.

His Honour stated that the necessary construction of each of the *WIMA* and the Guidelines is to focus the attention of the assessment process on the impairment and its seriousness, rather than the seriousness of the injury. Often, the two are related, but that is not always the case. Further, because the focus of the assessment is "impairment", it must be the impairment caused by the injury being assessed and sought to be compensated; therefore, it must be measured against the level of impairment that applied in the absence of the subject injury that necessarily requires that the impairment is measured "immediately prior" to the subject injury. He stated, relevantly:

> 97 The datum point for the measure of impairment must be that which applied prior to the subject injury, by which the legislative scheme refers to immediately prior thereto. It is necessary to qualify that comment by the proposition that some impairments may be spasmodic and the term "immediately prior" does not mean at the very second before the injury occurred, without taking into account a temporary lull in impairment. That construction is not "inserting words", for which the respondent contended, it is construing the provision in a manner which focuses on the "impairment" and the effect of the injury sought to be compensated.

His Honour also stated:

> 123 The task of the Appeal Panel, applying the principles relating to an appeal of this kind outlined above, was to determine whether the AMS had been in error. More importantly, from the perspective of the 1998 Act, the Appeal Panel was required to determine whether an incorrect criterion had been applied or there had been a "demonstrable error".
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> 124 Not only did the Appeal Panel not determine that there was an incorrect criterion applied, the Appeal Panel adopted the criteria and the findings of the AMS. The Appeal Panel took a different view as to the determination of whether the complex psychological history of the plaintiff could be the subject of an assessment of permanent disability that existed prior to the compensable injury.
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> 125 A different view between specialists, even those on an Appeal Panel from an AMS, is not a sufficient basis upon which to grant an appeal. As long as the determination of the AMS was reasonably open on the material before the AMS, no error has been committed.
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> 126 Even more importantly, in assessing the permanent impairment and in assessing the pre-existing permanent impairment, the AMS neither considered nor applied any criterion that could be said to be incorrect. The AMS did not calculate the assessment on the "basis of incorrect criteria".
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> 127 That brings the Court to the question of the meaning of the term "demonstrable error". If it were to mean manifest error, it would arise from an examination of the result the AMS or primary decision-maker has achieved that bespeaks of error, either in the understanding of the factors or in the application of them. However, there is a difference between a "demonstrable error" and a "manifest error".
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> 128 Ordinarily, manifest error is an error that is incapable of being identified. On the other hand, a "demonstrable error" is an error that may be demonstrated, and, as a consequence, identified. The term "demonstrable" and "manifest" may, in the context of this legislation be antonyms, rather than synonyms.
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> 129 I have extracted each of the relevant passages from the decision of the Appeal Panel relating to the attitude adopted by the Appeal Panel to the decision of the AMS. The Appeal Panel does not determine, expressly or otherwise, that the AMS conducted the assessment on the basis of incorrect criteria.
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> 130 Further, expressly or otherwise, the Appeal Panel does not express a view that the Original Certificate contains a demonstrable error, whatever be the meaning of the term "demonstrable". Nor does the Appeal Panel implicitly undertake that task.

131 Rather, the Appeal Panel has taken the view that the appeal, once filed and referred to the Panel, allows the Panel to assess for itself the whole person impairment of the plaintiff. In that respect, the Appeal Panel was in error. The Appeal Panel was dealing with an appeal in circumstances where error had to be disclosed either identifiably or manifestly.

132 The Appeal Panel certainly did not identify whether it allowed the appeal on the basis of paragraph 327(c), 327(d), or both of them. It was not entitled to allow the appeal on any other basis.

133 The Appeal Panel does express the view that the 1/10th deduction is inadequate and at odds with the "significant amount of evidence" before the AMS. Yet, the Appeal Panel does not identify the basis upon which it says the AMS used incorrect criteria or that the Original Certificate contains demonstrable error.

134 An assessment by an Appeal Panel cannot occur until the Appeal Panel has determined that there has been an error in the Certificate leading to the need for a further assessment.

135 Moreover, unlike the AMS, the Appeal Panel did not have the benefit of the clinical observations undertaken by the AMS, which observations informed the AMS views both as to the current level of permanent impairment and the impairment arising from the pre-existing conditions.

136 There has to be more than a difference of opinion on a subject about which reasonable minds may differ to establish error on which an Appeal Panel may operate and which gives it the jurisdiction to determine for itself the assessment.

137 I accept the submission of the plaintiff in these proceedings that a proper reading of the Appeal Panel's assessment was not of the level of functioning, or the permanent impairment, of the plaintiff immediately prior to the alleged assault. The assessment ranges over the entirety of the plaintiff's earlier life. Examples have been given by the plaintiff and should be summarised.

138 There is a reference by the Appeal Panel to the plaintiff drinking two litres of wine from a cask per day and having poor management of his diabetes. This information came, obviously, from the documents or the clinical examination of the AMS.

139 At no point is the timing of that conduct given and, at least in relation to the diabetes issue, it seems to have occurred in 2013. Given that the plaintiff was incarcerated at the time of the injury, which was to be compensated, it is improbable that he was consuming two litres of wine per day during the course of that incarceration.

140 Further, the Appeal Panel took into account the "possibility" of an AVO under the heading social function. This was exacerbated, it seems, in the opinion of the Appeal Panel, by the fact that there was no mention of any friends.

141 These events took place a significant time before the injury that was the subject of assessment. If, as may be the case, the Appeal Panel was suggesting that the recourse to violence and the absence of friends (if there were an absence of friends) was a continuing impairment in his psychiatric condition, rather than a single, isolated incident, such a conclusion would need to be identified and, in the circumstances in this issue, probably required a request for an explanation or a capacity in the plaintiff to respond to such a suggestion.

142 Returning to the taxonomy of appeals to which reference has been made, the power granted to an Appeal Panel to receive further evidence on appeal, generally accords with the notion that the appeal is properly described as an appeal by way of rehearing. The decision of the AMS was required to be attended by appealable error. The decision of the AMS was an evaluative one upon which reasonable minds, including specialist minds, may differ.

143 Given that the AMS was in a far better position to understand and assess whether the historical conditions suffered by the plaintiff were "permanent" and "continuing" as at the time that the subject injury occurred, the Appeal Panel did not appropriately, by which I refer to the requirements of the law, identify the error that was said to have been committed and did not assess the pre-existing level of permanent impairment by reference to that which it knew to be continuing and permanent impairment.

Accordingly, his Honour set aside the decision of the MAP dated 19 May 2021 and he remitted the matter to the President of the PIC for referral to a differently constituted MAP.

## PIC - Presidential Decisions

***Medical evidence - alleged factual error - common-sense factual findings on the basis of common knowledge or experience - procedural fairness***

**ACW v ACX [2022] NSWPICPD 19 – Deputy President Snell – 17 May 2022**

The appellant commenced employment with a NSW Government Department in a senior role in February 2015. He had previously injured his neck and back in a MVA that occurred in the Australian Capital Territory in February 2014 and made a third party claim, which resolved by way of a deed of release in February 2017. He was involved in a further accident in October 2014, when he was a passenger in a bus that collided with a car. The bus company paid a small amount to cover his GP and physiotherapy expenses, but it was not suggested that this injury had any long-term significance.

On 6 June 2016, the appellant was injured at work. He sat on an office chair, which had missing screws, and fell backwards, striking his head on the floor and twisting and compressing his spine. He complained of immediate pain in his neck and lower back, which deteriorated over time and said that in/around August 2016, he noticed pins and needles in his legs and bladder leakage.

On 7/05/2017, the appellant was at an IKEA store with his family. He spilled coffee on the floor and slipped on it, landing in a seated position on the ground. He complained of severe low back pain and an ambulance attended. However, he returned to work the next day.

On 16/06/2017, an MRI scan indicated a disc protrusion at the T12/L1 level and he underwent a microdiscectomy on 29/06/2017. However, he suffered continuing symptoms and on 30/01/2018, Dr Coughlan performed a fusion at that level. He then fell at home on 8 February 2018, but he resumed work in late-March 2018. By April 2018, he complained of acute low back pain and deteriorating symptoms affecting his bladder, bowel and legs.

Following a CT myelogram in May 2018, further surgery was recommended and on 11/09/2018, the appellant underwent T12/L1 decompression. However, symptoms worsened when the appellant resumed work. As the Department's officers were to relocate to Parramatta in late 2019, the appellant was concerned about his ability to cope including the increased travel time involved in obtaining treatment. He was offered and accepted a voluntary redundancy effective from 25/10/2019. Since then, he has done a little casual work.

The insurer paid voluntary compensation with respect to the fall on 6/06/2016, but on 1/05/2017, it advised that it was closing the claim immediately due to the appellant's "successful return to pre-injury employment and the end of treatment." On 8/06/2017, the insurer declined liability for the "reported recurrence" based on an opinion from Dr Carr that the appellant's current condition was primarily attributable to the 2014 MVA and the exacerbation at IKEA on 7/05/2016 (sic. 2017)." It relied on ss 4, 4(b), 9A, 33, 59, 60 & 66 *WCA*.

Most-recently, on 2/02/2021, the insurer disputed that the appellant's medical condition resulted from injury and that any incapacity and need for medical treatment resulted from work injury and that the injury at the T12/l1 level resulted from the fall at IKEA on 7/05/2017.

On 16/07/2021, Member Sweeney issued a COD, which entered an award for the respondent.

The appellant appealed on six grounds, which are summarised as follows: (1) In rejecting Dr Coughlan's the opinion, the Member fell into material error in ignoring the fact that that opinion had multiple bases, two of which were not addressed; (2) In rejecting Dr Steel's opinion, the Member erred in concluding that it was immaterial whether or not the doctor was contracted by the respondent's insurer to provide an opinion on the critical question and further erred in holding that he was not so contracted; (3) In rejecting Dr Steel's opinion, the Member fell into material error in ignoring the fact that that opinion had multiple bases, two of which were not addressed; (4) In rejecting the opinion of Associate Professor Fearnside, the Member ignored the material fact that the doctor was guided in forming his opinion both by the pathology and by the mechanism of the fall; (5) The Member erred in proceeding on the basis that each of the expert witnesses relied upon by the appellant conceded that the T12/L1 lesion could have been caused by the Ikea incident; and (6) The Member erred in concluding that his finding that the appellant was "not always reliable" led to the conclusion that the onus was not discharged.

***Deputy President Snell*** determined the appeal and dismissed it. His reasons are summarised below.

Snell DP rejected ground (1). He stated that the Member described the histories assumed by the neurosurgeons as "not consistent with the facts proven in evidence" and he described the evidence of symptoms after the fall at IKEA as being "grossly inconsistent with the assumed histories of the doctors who supported the (appellant's) case." He found that these inconsistencies could not be "put to one side" and regarded Dr Coughlan's opinion as being deprived of probative force and this conclusion was properly available to the Member on the evidence. He stated, relevantly (at [60]):

> … The question identified in *Paric No. 1* was "*whether the hypothetical material put to the expert witnesses represents a fair climate for the opinions they expressed*". In the context of the Commission, applying the decision in *Hancock* (see [53] above), the lack of correlation between the facts assumed and the facts as proven, deprived Dr Coughlan's opinion of probative force. This is inherent in the Member's finding in the reasons at [103], that the appellant had failed to prove the relevant causal connection. The second argument is not made out.

Snell DP rejected ground (2). He noted that the appellant postulates that the insurer, if it made the referral, could have invited some further comment if the history was flawed in some significant way. This does not go to whether the alleged error was dispositive; whether, if found, it affected the Member's decision. He held that the appellant carried the overall onus of proof and one aspect of this was adducing medical evidence that had a sufficient correlation, between the facts on which expert reports were based and the facts proven, that the expert evidence had sufficient weight to discharge the appellant's onus. The respondent carried no onus to remedy any such deficiencies and the alleged factual error, if made out, would not constitute appealable error. There is no identified basis on which the alleged error, regarding which party qualified Dr Steel, could have affected the Member's decision. The Member's reasons are specifically to the contrary, "nothing turns on this".

Snell DP rejected ground (3). He stated, relevantly:

> 87. The consideration of this ground should be read in concert with the consideration above dealing with the first argument in Ground No. 1. I accept the respondent's submission that Ground No. 3 should fail for the same reason. The Member concluded that the appellant could not discharge his onus on the causation issue, because of the lack of appropriate correlation between the facts assumed (in this instance by Dr Steel) and the proven history as found by the Member. This finding was open to the Member. This is sufficient to dispose of Ground No. 3.

Snell DP also rejected grounds (4) and (5). He stated that a fact finder is entitled to make common-sense findings, provided these are "*within the realm of common knowledge or experience*": *Tubemakers of Australia Ltd v Fernandez* [1976] 50 ALJR 720, applied in *Hevi Lift (PNG) Ltd v Etherington* [2005] NSWCA 42. Further, in *Harrison and Siepen v Craig* [2014] NSWWCCPD 48 Keating P, applying *Strinic v Singh* [2009] NSWCA 15, said:

It is a fundamental judicial obligation to make findings of fact on proved evidence (not being matters of common knowledge or judicial knowledge [*Strinic v Singh*]). Her Honour added (at [64]) that even if a judge is experienced in adjudicating in medical matters '*that experience does not replace the requirement to base findings on the evidence*'. For a judge to base a decision in such circumstances on his or her personal knowledge involves an error of law. Her Honour added '*underlying that error is a fundamental breach of procedural fairness'*. A party is not afforded procedural fairness where a trial judge makes a finding of fact based on the judge's own purported knowledge, or understanding of matters that do not form part of the evidence.

Snell DP stated that it may be that calcification in a disc is inconsistent with relevant damage being caused by recent trauma. This is not something that is self-evident, it is not "*within the realm of common knowledge or experience*" and proof of such a matter requires expert medical evidence. It follows that references by Dr Coughlan and Dr Steel to matters such as calcification, in describing the appearances of radiological investigations, do not of themselves prove that the appearances were inconsistent with recent trauma. The appellant submits that the reports of Dr Coughlan and Dr Steel are to the same effect as those of Associate Professor Fearnside on this point. They are not. Drs Coughlan and Steel have not expressed the same view regarding the significance of what they observed in the radiology. He found that Associate Professor Fearnside commented on the MRI scan dated 7/06/2017, one month after the fall at IKEA, and expressed the view that the appearance of the T12/L1 disc would not be considered acute and would have occurred earlier than one month before. This was evidence that was potentially inconsistent with the disc injury at T12/L1 having resulted from the fall at IKEA. This was not inconsistent with the views of Dr Coughlan and Dr Steel and Associate Professor Fearnside accepted that there was possibly an aggravation due to that fall. He held that despite Associate Professor Fearnside's opinion, it cannot be concluded that the evidence compels a result in the appellant's favour and there is no appealable error.

Snell DP also rejected ground (6). He stated, relevantly (citations excluded):

153. The appellant was aware of the evidence on which the allegations of inconsistency were based, these being part of the evidence in the appellant's own case. The respondent's written submissions were lodged on 16 June 2021 and the appellant's submissions in reply were lodged on 21 June 2021 (see [8] above). By the time the appellant lodged his written submissions in reply, he was in possession of the respondent's submissions in their entirety and all of the evidence. I will not attempt to set the respondent's submissions out at length. Issues raised in those submissions included:

(a) the appellant did not suffer any neurological signs of symptoms in his lower limbs or any bladder dysfunction related to pathology in his lumbar spine prior to the fall on 7 May 2017;

(b) the onset of such symptoms was caused by the fall on 7 May 2017, which was a novus actus interveniens;

(c) the main issue was whether the pathology at T12/L1, and the onset of neurological symptoms, was causally related to the incident in June 2016;

(d) the objective medical evidence does not support the conclusion reached by the appellant's doctors that the cause of the appellant's neurological symptoms was the incident in June 2016;

(e) the medical opinions in the appellant's case are based on an inaccurate history of the onset of neurological symptoms; its inaccuracy is demonstrated by contemporary medical records, and

(f) it is implicit that the respondent challenges the appellant's statement evidence.

154. These issues were expanded on in the 17 pages of the respondent's detailed written submissions. These included reference to the appellant's statement as "carefully tailored to implicate the fall in the incident at work as the major contributor to the major effects on his back and to the symptoms in [the] legs and the bladder symptoms indicative of the pathology in the

[appellant's] lumbar spine identified by the doctors as causative of his disability and his need for surgery". I cannot see a basis on which there was a breach of the rules of procedural fairness in the circumstances. This aspect of the submissions in support of Ground No. 6 is without merit.

Accordingly, Snell DP confirmed the COD.

***Section 11A(1) WCA – reasonable action with respect to discipline – having regard not only to the end result but the manner in which disciplinary action was effected – test of reasonableness is objective – employer confined to matters raised in dispute notices***

**Brickworks Ltd v Wright [2022] NSWPICPD 21 – Deputy President Wood – 7/06/2022**

The worker held a heavy vehicle licence. He worked for RH Giles delivering concrete pipes in semi-trailers from 7/02/2005 to 14/09/2011. In 2008, he was involved in a fatal accident in the course of that employment and suffered significant injuries, including head injuries and third-degree burns. He was in an induced coma for 2 weeks and was diagnosed with PTSD and received "psychological interventions" over about 2 years. He felt that he made a complete recovery.

The worker started working with the appellant from about 13/01/2013. He worker was elected as a union delegate in around 2017 and there was a change of management about 6 months later, after which he considered that safety standards slipped. He felt that he was being marginalised by management when he raised safety issues and he identified a number of areas of concern that he raised with management.

On 16/08/2014, a truck was blocking one of 2 loading bays and 10 trucks were lined up waiting to be loaded because of the blocked bay. He stated that a panel, that was waiting to be loaded onto the truck in the blocked bay, required certification before loading. However, he felt that the manager in charge (Mr Elston) was attempting to have the uncertified panel loaded, which was "unsafe and unlawful". While he was "assisting with the congested loading bay," his truck was given a load, under the instruction of Mr Elston, that was 3 [metres] over the legal length. He refused to take the load out as it was and it was replaced with another load that was "the exact same size". He again made his position known and Mr Elston said "If you don't like it fuck off and go home."

The load was removed from his truck and he remained at work, but his attempts to have others rectify the situation in the blocked loading dock failed. He said that Mr Elston attempted to have another driver take out the load that he had declined, but he told that driver not to take the load and Mr Elston mockingly laughed in his face. He said to Mr Elston "You've laughed at me one too many times. If I took you out the front and tapped you out, who would be laughing then?" This was "by no means a threatening comment or situation". Another worker eventually cleared the backup of trucks.

On 23/08/2019, Mr Barton (the State Manager) spoke to him and said he had threatened and intimidated Mr Elston, he worker denied. He was sent on two weeks' leave. On 30/08/2019 he was called to a meeting with Mr Coutts and Mr Barton and he was told that he should attend an anger management seminar and that he was being reprimanded by way of a first and final warning. He said that he would attend the seminar but he would not accept the first and final warning. He left the building and went home. He stated subsequently moved out of his matrimonial home, lived with his brother, lived out of his car for periods, and found himself "being treated at St John of God – North Richmond", where he had "a few admission periods since August 2019".

The worker lodged a claim form dated 11 March 2020, asserting that on 6/08/2019 he suffered a "Psychological injury, PTSD, aggravation of underlying PTSD." However, the appellant issued a dispute notice dated 14 May 2020, which raised ss 4, 9A, 11A, 36, 37, 59 and 60 *WCA*.

***Member Young*** conducted an arbitration on 12/08/2021. On 23/08/2021, he issued a COD and awarded the worker weekly payments from 23/09/2019 to 23/12/2019 @ $1,944.22 per week under s 36 *WCA* and continuing from 24/12/2019 @ $1,637.24 per week under s 37 *WCA*. He noted a concession that the worker that he had received compensation from another source (EML) for various periods (identified in a schedule prepared by the worker's solicitors).

The Member held that there was a prior psychological injury associated with the 2008 MVA with a different employer, but noted that the worker stated that as a union delegate, he was "bullied and marginalised" by the appellant when he raised safety and compliance issues. This caused an aggravation his previous PTSD condition. He noted that EML (the insurer for the 2008 injury) had paid weekly payments since 23/09/2019 and that that it was argued that this would prevent the worker from recovering the weekly compensation from the appellant under ss 36 and 37 *WCA*. It was argued that the GP's certificates attributed incapacity to the 2008 injury, which was inconsistent with events in 2019 being the 'main contributing factor', and that the worker's threats and language were consistent with misconduct. Therefore, the appellant was entitled to discipline him "in accordance with its various policies". The appellant argued that the incapacity was due to the 2008 incident and/or psychosocial factors including marital breakdown and the worker's marijuana use.

The Member noted that the parties agreed that no order for apportionment was sought under s 22 *WCA*. He referred to the decision of Roche DP in *Cordina Chicken Farms Pty Ltd v Le* and described that decision as authority that in some circumstances, where there are 2 separate and distinct incapacities, a worker may be entitled to 2 awards. He noted that, in cases where the weekly entitlement was governed by the provisions of ss 36 and 37 (as introduced by the 2012 amendments), the discretion to reduce weekly payments had been removed.

Further, cl 6(1) of Sch 3 *WCA*, as amended, provides that 'earnings' is income received by a worker "for work performed in any employment during the week." He held that payments received from EML were not 'earnings' and were not part of the calculation required under ss 36 and 37 *WCA*. He stated that the worker did not allege there were 2 separate incapacities or an entitlement to 2 awards and as the employer from the 2008 injury was not joined as a party, s 22 *WCA* was not in issue. The evidence indicated that the worker was able to work without restriction prior to the events giving rise to the current claim and the medical evidence generally accepted that the current incapacity resulted from that aggravation. It was therefore unnecessary to consider the principles in *Cordina*.

The Member held that the opinion of Dr Roberts (qualified by the appellant) was that there was a disproportionate response to the events with the appellant because of the 2008 incident and that the 2008 incident was the "substantial factor". However, this did not assist the appellant's case as Dr Roberts' opinion was consistent with the worker having an "eggshell skull psyche", an underlying susceptibility to mental deterioration due to such events.

The Member considered the s 11A defence and held that the appellant had no medical evidence to establish that the aggravation was wholly or predominantly a result of 'reasonable action' in respect of one of the purposes identified in s 11A(1). He referred to the decision in *Hamad v Q Catering Ltd and to the* evidence of Mr Soares. He noted that at the disciplinary meeting on 30/08/2019, no HR representative attended, the meeting was poorly organised and run, and it was very tense with no minutes being taken. One of the managers claimed that there had been an exhaustive investigation, and they had viewed the CCTV footage, but they failed to respond when the worker asked to see the statements and the CCTV footage. The appellant did not produce the CCTV footage for the purposes of the proceedings and there was evidence from Mr Pritchard, who was present during the incident on 6/08/2019, that the incident was "pretty tame". He held that whatever words were used, it was incumbent on the appellant to investigate and retrieve all relevant information, to pre-warn the worker of the nature of the meeting and to give him an opportunity to explain his behaviour. There should not have been a pre-determined decision until the processes were followed. Therefore the defence failed.

On appeal, the appellant asserted that the Member erred as follows: (1) in failing to have regard to evidence of words said to Mr Elston which constituted a threat and grounds for discipline; (2) in failing to refer to evidence of policy documents, that reflected its obligation to provide a safe workplace, and the worker's obligation to behave in accordance with the 'Code of Conduct'; (3) in failing to refer to the fact that the worker was not incapacitated until after disciplinary action was instituted in respect of the words said to Mr Elston; (4) in awarding compensation on the basis that the worker had no work capacity despite being awarded compensation at rates of $858.56 to $888.96 per week; (5) by noting the receipt of compensation from another source where there was no provision in *WCA* for a reduction

under ss 36 and 37 *WCA*, and no joinder of the prior employer under s 22 was made; (6) in awarding compensation where the effect of this was that, with the receipt of compensation from other sources, the worker would receive compensation in excess of his PIAWE, offending the principle against double compensation; and (7) failed to provide adequate reasons for awarding compensation pursuant to ss 36 and 37 when the worker had already recovered compensation for the same total incapacity from another insurer and for another injury.

***Deputy President Snell*** dismissed the appeal for reasons that are summarised below.

- In *Minahan* Foster AJA, referring to the decision of Geraghty CCJ in *Irwin*, said that his Honour also referred to the decision of Truss CCJ in *Ivanisevic v Laudet Pty Ltd*, where her Honour said:

  > In my view when considering the concept of reasonable action the Court is required to have regard not only to the end result but to the manner in which it was effected.

- Foster AJA (Sheller and Santow JJA agreeing), in *Minahan* at [42], referred with approval to the passages quoted above from the unreported decisions in *Irwin* and *Ivanisevic*.

- In *Heggie* Sackville AJA, after referring to the facts in *Minahan,* said of that decision:

  > The case is therefore not authority for the proposition that disciplinary action, short of dismissal of an employee or a finding of misconduct, is reasonable only if the decision is based on a consideration of all the circumstances bearing on the truth or otherwise of allegations made against the employee.

- In *Jeffery v Lintipal Pty Ltd*, dealing with the construction of s 11A(1) *WCA* in the context of 'transfer', Basten JA said:

  > There is a clear distinction to be drawn between a statutory test which requires an objective assessment by the Commission of the reasonableness of the action of the employer and a test by which it is sufficient for the employer to demonstrate to the Commission that, in all the circumstances, the action appeared to it to be reasonable. In my view, the present statutory provision engages the former test ... If it were sufficient that the employer took action because it appeared to the employer, on grounds upon which it was reasonable to rely, to be reasonable action, the legislature could have said so. However, it did not. In my view, if, in the view of the Commission, the action taken by the employer in transferring an employee is not reasonable in all the circumstances, the employer cannot rely upon s 11A because it held a genuine belief, based on reasonable grounds, that its action was reasonable.

- In Heggie Sackville AJA said:

  > The test of reasonableness is objective. It is not enough that the employer believed in good faith that the action with respect to discipline that caused psychological injury was reasonable. Nor is it necessarily enough that the employer believed that it was compelled to act as it did in the interests of discipline.
  >
  > Where the psychological injury sustained by the worker is wholly or predominantly caused by action with respect to discipline taken by the employer, it is the reasonableness of **that action** that must be assessed. Thus, for example, if an employee is suspended on full pay and suspension causes the relevant psychological injury, it is the reasonableness of the suspension that must be assessed, not the reasonableness of other disciplinary action taken by the employer that is not causally related to the psychological injury." (emphasis in original)

- In *Department of Education & Training v Sinclair* Spigelman CJ, considering a defence pursuant to s 11A(1) based on 'discipline', said:

  > Such actions usually involve a series of steps which cumulatively can have psychological effects. More often than not it will not be possible to isolate the effect of a single step. In such a context the 'whole or predominant cause' is the entirety of the conduct with respect to, relevantly, discipline.

- Snell DP rejected grounds (1) and (2) and he stated that the primary contest, and the basis on which the s 11A defence failed, does not turn on whether the appellant was entitled to conduct an investigation. It involves the deficiencies identified by the Member in the investigation that occurred. In considering 'reasonableness' it was appropriate that the Member consider "the entirety of the conduct" with respect to discipline. It was not in issue that the worker's injury was a 'psychological injury' or that the appellant's relevant actions were with respect to 'discipline'. The Member gave the following assessment of what the appellant's obligations were in the circumstances for its actions to be 'reasonable':

  > Regardless of the words used, it was incumbent upon [Brickworks], in exercising reasonable discipline, to take reasonable action and that in my view includes fairly retrieving by investigation all relevant information, pre-warning the [worker] concerning the nature of the meeting, providing the [worker] with an opportunity to explain any behaviour he concedes and not making any predetermined decision until those processes have been followed.

- The passage of *Irwin*, quoted in *Minahan* and also in the appellant's submissions on appeal, says "*[w]hether an action is reasonable should be attended, in all the circumstances, by a question of fairness*". It is also appropriate to note the statement of Truss CCJ in *Ivanisevic*, that in assessing whether an employer's actions are reasonable regard should be had to the manner in which the actions were effected (see [44] above). The appellant's submissions deal at some length with its policies and whether breach of these, by an employee making a threat, justified investigation. The fundamental basis on which its defence failed was that the Member found that its actions were not reasonable, for reasons which were spelled out. In response, it refers to the fact that "further investigations were not taken by way of speaking to witnesses or reviewing CCTV footage or letting the [worker] view CCTV footage". The Member did refer to matters relating to deficiencies in its gathering of evidence and these relate essentially to whether the worker was treated fairly.
- The fact that the Member did not quote the words said to Mr Elston does not indicate that he failed to consider the words. The words formed the starting point for the consideration of the reasonableness of the disciplinary process that was carried out. The Member, at [26] to [28] of the reasons, discussed deficiencies in the appellant's conduct of the disciplinary process, leading to his conclusion that its disciplinary action was "not reasonable" within the meaning of s 11A(1) of the 1987 Act. Therefore, it has failed to identify error in the Member's consideration of whether its relevant actions were 'reasonable'.
- Snell DP rejected ground (3) because the appellant failed to establish the s 11A defence, as the Member rejected the argument that its actions were reasonable. The Member did not engage with the causation issue as he found that if the aggravation etc. was caused wholly or predominantly by action taken on the part of the appellant, that action was not reasonable action within the meaning of s 11A.
- Snell DP rejected ground (4) and he stated that there is no legitimate basis on which it can be argued that the receipt of weekly compensation is inconsistent with a finding that a worker has no current work capacity. The receipt of compensation from EML is simply irrelevant to that issue.
- He noted that the worker objected to the appellant raising the issue of a second award as this was not raised in the dispute notices and he stated, relevantly:

  > 91. …The need for an employer to clearly raise issues on which it relies, and the consequences of a failure to do so, were discussed in *Mateus v Zodune Pty Ltd t/as Tempo Cleaning Services*, a decision with which I agree and which has been regularly applied over many years. The worker's counsel made it clear during the hearing that he relied on the absence of appropriate notice of the additional issue and objected to it being raised. He did not acquiesce in Brickworks' attempts to raise the issue without appropriate notice.

92. The Member dealt with Brickworks' submissions on the topic relatively briefly in the reasons at [13] to [14]. The effect of this consideration was that, to the extent to which the Member permitted Brickworks to raise an unnotified matter, this did not affect the outcome and did not constitute appealable error.

- Snell DP rejected ground (5) and he stated, relevantly:

  93. Ground No. 5 alleges error in noting the receipt of compensation from EML, where there was no provision in the 1987 Act for a reduction under ss 36 and 37 of the 1987 Act, and no joinder of the prior employer under s 22 was made. It submits the notation at [31] of the reasons was "meaningless and an error of law". The worker submits this did not constitute appealable error. The worker rhetorically asks what relief Brickworks seeks in respect of this alleged error. Brickworks gives no meaningful response to this question.

  94. The worker's argument on this ground is correct. On Brickworks' submission, the effect of this alleged error was to include a notation that was meaningless. This was not dispositive and does not constitute appealable error

- Snell DP rejected ground (6) and he stated, relevantly:

  115. In short, ss 22 and 22A of the 1987 Act permit apportionment of liability where a liability to pay compensation results from more than one injury. Section 22(5) provides for an application to be made by "any insurer or employer concerned or of the Authority". Section 22(7) provides that compensation is not to be reduced on account of the liability of a person who is not a party to the proceedings. It would have been open to Brickworks to bring an application for apportionment against EML or its insured, which it did not do. It then relied on the absence of EML or its insured, as a party to these proceedings, to submit that s 22(7) prevents the making of "some sort of apportionment order". It submits on this appeal that "the matter does not involve a question of apportionment under s 22 of the 1987 Act". Against that background, Brickworks then identifies a number of what it describes as "absurdities" set out at [67] above. Brickworks should by now have satisfied the weekly award made against it. It is open to Brickworks to bring an application pursuant to s 22 to seek apportionment orders should it wish.

  116. The only orders for the payment of moneys were in respect of the claim based on the 2019 injury. Whatever moneys have been paid by EML in respect of the 2008 injury, they are not the subject of orders of the Commission. If Brickworks utilises the machinery in s 22 of the 1987 Act, there is no reason to anticipate any over-compensation. The approach suggested by Mr Stockley in the running of the case (see [109] to [111] above) would have avoided any risk of over-compensation.

- Snell DP also rejected ground (7) and he stated, relevantly:

  122. In my view the reasons given by the Member satisfied his obligation to furnish adequate reasons in dealing with the issues that were before him. The orders were, of course, made only against Brickworks, it being the only employer that was a party to the proceedings. It is open to Brickworks to seek apportionment orders pursuant to s 22 of the 1987 Act, should it wish.

## PIC – Member Decisions

### Workers Compensation

***Gig Economy – First Respondent conceded that the deceased was employed by it as a food delivery driver***

**Wei v Hungry Panda Au Pty Ltd & Ors [2022] NSWPIC 264 – Principal Member Bamber – 2/06/2022**

On 29/09/2020, the deceased work died as a result of an accident that occurred when his bicycle was hit by a bus.

As the First respondent admitted liability for death benefits, it was not necessary for the Principal Member to summarise the details of his injury and death in her reasons. Therefore, her decision dealt with issues of dependency, apportionment and payment of benefits to the Public Trustee.

***Whether the PIC would be exercising federal jurisdiction if it determined the dispute – Held: Federal jurisdiction would not be exercised as the respondent is neither a State nor a resident of a State***

**Lee v Fletcher International Exports Pty Ltd [2022] NSWPIC 271**

In relation to this issue, the Member stated, relevantly:

> **Whether the Commission would be exercising federal jurisdiction (in accordance with Division 3.2 of the Personal Injury Commission Act 2020) if it determined the dispute**
>
> 129. I posit an opinion that the Commission would not be exercising federal jurisdiction in determining the dispute, and I therefore intend to determine it.
>
> 130. The respondent submits that after positing my opinion, I am still required to refer the dispute to the District Court. It can however point to no authority in this regard, and if the respondent was correct in its submission, then not only would the positing of an opinion seem to be irrelevant, but it would mean that any application where a party raised the possibility of the Commission exercising federal jurisdiction (however spuriously) would need to be referred to the District Court. Such a situation is clearly contrary to the stated guiding principle of the Commission in section 42 of the Personal Injury Commission Act 2020, regarding facilitating the just, quick, and cost effective resolution of the real (emphasis added) issues in the dispute. My view is that once the Commission has opined that it has jurisdiction to determine a dispute, it should proceed to determine the dispute.
>
> 131. In positing my opinion, I have also opined that the respondent is neither a state nor a resident of a state. Therefore, the fact that the applicant is now a resident of Queensland does not deprive the Commission of jurisdiction to determine her dispute. For the Commission to be exercising federal jurisdiction, in accordance with section 75 (iv) of the Constitution, the dispute would need to be considered to be a matter between states, or between residents of different states, or between a state and a resident of another state. The High Court is given original jurisdiction in those matters. Section 77 of the Constitution then allows the federal Parliament to invest state courts with the High Court's original jurisdiction under section 75 (iv), and the federal Parliament invested that jurisdiction in state courts (such as the District Court) to determine matters between residents of different states or between a state and a resident of another state, when it enacted section 39(2) of the Judiciary Act 1903 (Cth).
>
> 132. However, in my opinion, the Commission is not a court of a state. I refer to and agree with the reasoning of Principal Member Harris in *Ritson*:
>
> > 13. The Workers Compensation Commission is not a court: *Orellana-Fuentes v Standard Knitting Mills Pty Ltd* [2003] NSWCA 146; *Mahal v State of New South Wales (No 5)* [2019] NSWWCCPD 42.

> 14. It was properly accepted that the Commission is not a court of a State. Despite the substantive changes introduced by the PIC Act, the nature of the appointment of members of the Commission is a substantial reason why no other conclusion is reasonably open.
>
> 15. As was accepted by the Chief Justice in *Attorney General for New South Wales v Gatsby* [2018] NSWCA 254 when referring to the observations of Kenny J in *Commonwealth of Australia v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85, the 'absence of security of tenure' was an important matter in the characterisation of whether a member was a judge and whether the relevant tribunal was properly characterised as a Court. Whilst members of the Commission exercise an independent decision-making function, they have limited tenure in accordance with their appointment by the Minister.
>
> 16. Whilst further reasons are unnecessary, s 26 of the PIC Act shows a clear intention by Parliament that matters of federal jurisdiction should be heard by the District Court. The obvious reason for that section is that the District Court has the power to hear matters arising under s 75(iv) of the Constitution, whereas the Commission does not."

133. Therefore, in my opinion, the Commission does not have jurisdiction to determine a dispute between a resident of Queensland (the applicant) and either a resident of another state or another state. The respondent's objection to the jurisdiction of the Commission is that it is either a resident of New South Wales or a state (presumably New South Wales).

134. In *Howe* the majority of the High Court found that corporations (such as the respondent) were not residents within the meaning of section 75 (iv) of the Constitution. In Crouch, I refer to the judgment of Mason, Wilson, Brennan, Deane and Dawson JJ:

> 2. The plaintiff's contention that the Commissioner is, for the purposes of s.75(iv), a resident of the State of Queensland is effectively answered by the decision of the Court in *Australasian Temperance and General Mutual Life Assurance Society Ltd. v. Howe* [1922] HCA 50; (1922) 31 CLR 290. As the dissenting judgments of Isaacs J. and Starke J. demonstrated, the reasoning of the majority in that case might well be thought to be less than compelling (see also Quick & Garran, The Annotated Constitution of the Australian Commonwealth (1901), p.777). The decision has however stood for over sixty years and the Court unanimously refused over fifty years ago to reopen it (see *Cox v. Journeaux* [1934] HCA 72; (1934) 52 CLR 282). In the course of argument in the present case an application was made on the plaintiff's behalf that the decision be reconsidered, but the Court, again unanimously, refused to reopen it. The basis of the decision in Howe is correctly stated in the headnote to the report (at p.290): 'the words 'residents' and 'resident' in sec.75(iv) refer to natural persons only and not to artificial persons or corporations' (see per Knox C.J. and Gavan Duffy J. at pp.294ff. and per Higgins J. at pp.325ff.)."

135. In my opinion, I am bound by this authority of the High Court. The respondent is a corporation and therefore not a resident of a state within the meaning of section 75 (iv) of the Constitution. In my opinion, the respondent's submission that it must be a resident of New South Wales to be licensed as a self-insurer in New South Wales carries no force when considering the High Court authority.

136. I also fail to see the link between the respondent's self-insurance licensing arrangements and its submission that it is effectively a state within the meaning of section 75 (iv) of the Constitution. Its submissions in this regard relied upon the assumption that it should be considered to be similar to the NSW Self Insurance Corporation, which was opined to be a state in *Ritson*.

137. In my opinion however, as pointed out in the applicant's submissions, the position of the NSW Self Insurance Corporation is quite different to the position of the respondent, in that by section 4 (2) of the NSW Self Insurance Corporation Act 2004, the Corporation is specifically said to be constituted as a statutory body representing the Crown. The respondent is not in the same position, in my opinion.

138. The fact that the respondent has been provided with a particular licence by the State Insurance Regulatory Authority pursuant to section 210 of the 1987 Act does not in my opinion make it a state for the purpose of section 75 (iv) of the Constitution.

139. In *Deputy Federal Commissioner of Taxation v State Bank of NSW* [1992] HCA 6, the High Court stated:

> 20. Once it is accepted that the Constitution refers to the Commonwealth and the States as organizations or institutions of government in accordance with the conceptions of ordinary life, it must follow that these references are wide enough to denote a corporation which is an agency or instrumentality of the Commonwealth or a State as the case may be. The activities of government are carried on not only through the departments of government but also through corporations which are agencies or instrumentalities of government.

140. In *Ritson* [at 53], Principal Member Harris stated:

> Several States within the Commonwealth require compulsory insurance for workers compensation and motor vehicle injuries which are controlled by a corporation properly characterised as the Crown.
>
> The controlling corporation in my opinion is a state for the purpose of section 75 (iv) of the Constitution, but there is no logical reason why the insurers which it controls would also be a state for that purpose. Those insurers (including the respondent) in my opinion are not "agencies or instrumentalities of government", but corporations with their own constitution determined by their individual articles of association and such.

141. My opinion in this regard is I believe supported by the decision in *Stanton* (a decision of the District Court published on 11 April 2022). The decision was published after the two decisions referred to in the respondent's submissions of the Commission's Motor Accidents Division Head Johns, and I intend to follow it.

142. In *Stanton*, Priestley SC, DCJ considered the position of NRMA as an insurer licensed by the State Insurance Regulatory Authority in relation to the compensation scheme set up by the Motor Accidents Compensation Act 1999. I consider the respondent to be in a similar position to NRMA in this regard.

143. After considering the unreported decision of Gibb DCJ on 5 November 2021 in *Ritchie v Nominal Defendant* (in which her Honour found the defendant to be a state), Priestley SC, DCJ stated:

> 14 The characteristics of SIRA which Gibb DCJ found resulted in the conclusion that it was part of the state of NSW are not present with NRMA. In my view NRMA is not a part of the state of NSW for that reason. It is a public company with shareholders carrying out the commercial activity of insurance. It is also a company taking part in the scheme established by MACA, but that is simply an example of private enterprise taking part in opportunities established by government, and a participant in the relevant scheme here does not thereby become the state.

Accordingly, the Member was satisfied that he had jurisdiction to determine the dispute and he issued a COD.

***Worker suffered a compensable left wrist injury – Pleadings stated that the parties were residents of different states when the ARD was filed – Held: Matter dismissed due to absence of jurisdiction to determine the dispute under s 75(iv) of the Constitution Act 1900 (Cth)***

**Johnson v Arandale [2022] NSWPIC 309 – Principal Member Harris – 20/06/2022**

In this matter, the Principal Member noted that the worker resides in far north Queensland and that the respondent resides in Glen Innes. There was no dispute between the parties that they each resided in different states when the ARD was filed.

***Principal Member Harris*** dismissed the matter on the basis that the PIC lacked jurisdiction to determine the dispute under s 75(iv) of the Constitution Act 1900 (Cth). His reasons are summarised below:

**LEGISLATIVE BACKGROUND AND JUDICIAL AUTHORITY**

7. Section 71 of the Constitution provides that the judicial power of the Commonwealth shall be vested in the High Court, such other federal courts created by Parliament and in such other courts invested with federal jurisdiction.

8. Section 75 of the Constitution is headed "Original Jurisdiction of the High Court" and relevantly provides:

> In all matters:
>
> ....
>
> (iv) between States, or between residents of different States, or between a State and
>
> a resident of another State;
>
> ....
>
> the High Court shall have original jurisdiction.

9. Section 77 of the Constitution provides:

> With respect to any of the matters mentioned in the last two sections the Parliament may make laws:
>
> (i) defining the jurisdiction of any federal court other than the High Court;
>
> (ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;
>
> (iii) investing any court of a State with federal jurisdiction.

10. Section 39(2) of the Judiciary Act 1903 (the Judiciary Act) provides that courts of a State are invested with federal jurisdiction in some matters in which the High Court has exclusive jurisdiction. The matters in which the High Court retains exclusive jurisdiction is not relevant to the facts of this case. By reason of s 39(2) of the Judiciary Act, courts of a State may determine matters between residents of different States.

**REASONS**

11. For the reasons expressed in *Ritson v State of New South Wales*, at the date of filing of the application the parties were residents of different States arguably contesting a matter involving the exercise of judicial power. Accordingly, it is necessary that the matter be heard by a Court of a State.