Matthew Ritchie (plaintiff) v the Nominal Defendant (defendant)

Judgment, orders and directions: Friday, 5 November 2021

1. I grant leave for the compensation matter application to be made to the Court pursuant to s26(3) of the *Personal Injury Commission Act 2020 (NSW)*.
2. I remit the minor injury dispute (and any consequential review rights provided for in the *Personal Injury Commission Act 2020 (NSW)*) for determination commencing with a fresh determination of the minor injury dispute by a usual decision-maker at the Personal Injury Commission other than any decision maker who had previously had any involvement (including in that exclusion the decision-maker who issued a certificate on 30 March 2021).
3. I direct that the Personal Injury Commission determine the minor injury dispute in accordance with its usual rules and practices.
4. I direct both parties to participate in the minor injury dispute in accordance with the usual rules and practices of the Personal Injury Commission.
5. I direct the Personal Injury Commission to report to the District Court on the Commission's determination of the minor injury dispute in accordance with the usual rules and practices of the Personal Injury Commission
6. I grant leave to the parties joint and several to file any motion appropriate for the adoption (whether with or without variation), or refusal to adopt, the decision/determination of the Personal Injury Commission.
7. I give the parties jointly and severally liberty to restore the matter to the District Court's general list on three (3) days' notice.
8. I stand the matter into the District Court's "not ready" list, subject to a listing for mention before the List Judge on Thursday, 7 July 2022 if the matter has not otherwise been restored to the list.
9. I grant liberty to apply so far is appropriate to secure appropriate mechanical orders
10. Pursuant to s8.6(1) of the *Motor Accident Injuries Act 2017 (NSW)*, I order that the defendant:
    - pay the plaintiff's costs on a party/party basis as agreed or assessed, and
    - is permitted to pay its own legal representatives on a solicitor/client basis.
11. I grant liberty to apply generally so far is appropriate to secure appropriate mechanical or ancillary orders.

Orders entered forthwith

S J Gibb DCJ

Matthew Ritchie (plaintiff) v the Nominal Defendant (defendant)
Reasons

Introduction

The plaintiff, Mr Ritchie, is a Queensland resident. He was in NSW for work purposes when he was involved in a motor vehicle accident on NSW on 7 December 2018. The parties are agreed that: (i) the accident is subject to the *Motor Accident Injuries Act 2017 (NSW);* (ii) the plaintiff was not at fault; (iii) the other vehicle was at fault; (iv) the vehicle at fault was not identified; and (iv) in the ordinary course of events the correct respondent/defendant to any claim or proceedings is the Nominal Defendant.

A claim was lodged with the (then) Dispute Resolution Service (MFI 1; exhibit A/CB90) in the days before the Personal Injury Commission Act 2020 (NSW) entered into force. That claim is now within the command of the Personal Injury Commission. As the defendant submitted:

> 5 The plaintiff initially lodged an application for determination of that dispute with SIRA [the State Insurance Regulatory Authority constituted under the *State Insurance and Care Governance Act 2015 (NSW)*] which (at the time) was responsible for arranging for medical assessment of those disputes.
>
> 6 However, since 1 March 2021, the function of determination of such disputes under the MAI Act is vested in the *Personal Injury Commission of New South Wales* ("the Commission") pursuant to the *Personal Injury Commission Act 2020* (NSW) ("the PIC Act").
>
> …
>
> 22 The Personal Injury Commission was established by the PIC Act. From 1 March 2021, all of the functions of dispute resolution that were previously carried out by SIRA, are now carried out by the Commission. This includes determination of medical assessment matters and claims assessment matters.
>
> 23 All medical assessment matter disputes must be assessed by the Commission, unless an issue of federal jurisdiction arises.

The parties are agreed that the claim was made within the meaning of *Motor Accident Injuries Act 2017 (NSW*). The parties are further agreed that:

- the claim properly is treated as an application first made to Personal Injury Commission within the meaning of s26(3)(a) of the *Personal Injury Commission Act 2020 (NSW)*;
- an application was completed in the form and manner required (see MFI 1) and filed with the District Court in accordance with of s26(4) of the *Personal Injury Commission Act 2020 (NSW);* and
- in the ordinary course of events, the usual decision-maker would otherwise have had jurisdiction enabling the decision-maker to determine the application the meaning of s26(3)(c) of the *Personal Injury Commission Act 2020 (NSW).*

The Nominal Defendant, the defendant on this summons, is the State Insurance Regulatory Authority constituted under the *State Insurance and Care Governance Act 2015 (NSW)* and appearing through an (insurer) agent, where that agency is part of the scheme administered by the State Insurance Regulatory Authority. As the defendant submitted:

> 2 The vehicle that the plaintiff claims caused the subject accident is unidentified. Accordingly, the plaintiff's claim is brought against the Nominal Defendant. IAG Limited t/as NRMA Insurance ("NRMAI") is acting as agent for the Nominal Defendant.
>
> 3 Pursuant to section 2.27 of the *Motor Accident Injuries Act 2017* (NSW) ("MAI Act"), the State Insurance Regulatory Authority ("SIRA") is the Nominal Defendant for purposes of a claim under that Act. Accordingly, for all intents and purposes, the plaintiff's claim is brought against SIRA.

It is the nature and quality of the State Insurance Regulatory Authority which raises the only issue in the circumstances. As the defendant submitted:

8 It is common ground between the parties here that the Commission lacks jurisdiction to determine matters that involve an exercise of federal jurisdiction, which is defined in section 25 of the PIC Act to be "*jurisdiction of a kind referred to in section 75 or 76 of the Commonwealth Constitution"*.

9 The significant question that arises for determination in these proceedings is whether the plaintiff's claim falls within the scope of section 75 of the Commonwealth *Constitution,* thereby involving an exercise of federal jurisdiction.

10 The plaintiff is a resident of Queensland. If the SIRA is a "State" for the purposes of section 75(iv) of the Commonwealth Constitution, it is accepted that there would be dispute between a resident of another State and a State, and that there would be an issue of federal jurisdiction in this case.

11 However, the defendant contends that SIRA is not "a State", for the purposes of section 75(iv) of the *Constitution*, and therefore no issue of federal jurisdiction arises in this matter.

The status of the defendant in this context is a little complex. In a letter to the plaintiff's solicitor on 19 July 2021 (exhibit C) the State Insurance Regulatory Authority said *via* its employee the Executive Director, Motor Accidents Insurance Regulation:

> SIRA takes no issue with, and does not object to, NRMA Insurance taking the position (since filed in written submissions) that SIRA is not the State of NSW (for the purposes of section 75 of the Constitution).

The plaintiff's summons (and amended summons) was filed after issue arose in the Personal Injury Commission as to jurisdiction. The plaintiff submitted that:

1 The sole contested issue for determination on this application is whether the State Insurance Regulatory Authority (*"SIRA")* is part of the State of New South Wales for the purposes of Section 75(iv) of the Commonwealth Constitution.

2. The plaintiff is personally indifferent to the answer to this question. The plaintiff has no particular interest in being involved in a test case. All the plaintiff seeks is a fair and proper medical assessment as to whether he has more than a "*minor injury"* for the purposes of the *Motor Accident Injuries Act* 2017 ("the MAI Act").

3. The plaintiff's legal advisers accept that it would be administratively convenient and arguably in the interests of all of the motor accident scheme stakeholders to excise SIRA from the government structure of the State of New South Wales so as to allow disputes in motor accident claims between interstate residents and the NSW Nominal Defendant to be determined by the Personal Injury Commission (PIC).

There is an academic tone where the plaintiff's amended summons seeks (*inter alia*) that:

2 A grant of leave for the plaintiff to bring this compensation application before the District Court.

…

3 Remitter of the minor injury dispute (and any consequential review rights provided for in the PIC Act) for determination …

4 A direction to the PIC to determine the minor injury dispute in accordance with its usual rules and practices.

5 A direction to both parties to participate in the minor injury dispute in accordance with the usual rules and practices of the PIC.

There is a dispute in a constitutional sense only because this Court's power to remit arises under s26 of the *Personal Injury Commission Act 2020 (NSW)* and the defendant denies that there is any federal jurisdiction involved. Section 26 provides relevantly that:

(1) A person with standing to apply to the President or the Commission for a matter concerning a compensation claim to be determined by the usual decision-maker (a "*compensation matter application*") may, with the leave of the District Court, make the application to the Court instead of the President or Commission.

(2) The regulations may make provision for or with respect to— …

(3) The District Court may grant leave for a compensation matter application to be made to the Court only if it is satisfied that—

  (a) an application was first made to the President or Commission, and

  (b) the determination of the matter by the usual decision-maker would involve an exercise of federal jurisdiction, and

  (c) the usual decision-maker would otherwise have had jurisdiction enabling the decision-maker to determine the application.

(4) An application for leave must be—

  (a) filed with the District Court along with—

    (i) an application that has been completed in the form and manner required under this Act or enabling legislation for the kind of compensation matter application concerned, and

(ii) if the parties to the compensation matter application have reached a settlement before leave is sought using a resolution process provided under this Act or enabling legislation—a copy of the terms of settlement, and

(b) accompanied by the applicable fee (if any) payable for the compensation matter application unless it has already been paid.

(5) The District Court may—

(a) remit a compensation matter application for determination by the usual decision-maker if the Court is satisfied that the usual decision-maker has jurisdiction to determine it, and

(b) do so instead of granting leave or after granting leave.

(6) If the District Court remits a compensation matter application to be dealt with by the usual decision-maker, the Court may make such orders that it considers appropriate to facilitate the determination of the application by the decision-maker.

(7) The usual decision-maker is to determine any compensation matter application that is remitted to the decision-maker in accordance with any orders made by the District Court.

It is open to remit the matter under s26(5) of the *Personal Injury Commission Act 2020 (NSW)* if the usual decision-maker has jurisdiction to determine it; or under s26(3) if determination of the matter by the usual decision-maker would involve an exercise of federal jurisdiction. As the defendant submitted, the nature of the statutory structure is that:

24 All claims assessment matter disputes must be assessed by the Commission unless exempted from having to do so (by s92 of the MAC Act or s7.34 of the MAI Act), or unless an issue of federal jurisdiction arises. Exemptions can only be granted on very limited grounds.

The plaintiff sought an order to the effect that the lodging of the application for review is a precursor to lodging this Summons as required by section 26(3)(a) of the *Personal Injury Commission Act 2020 (NSW)*. That is the case as a matter of fact. It does not appear to require any form of declaratory order to that effect.

The parties are agreed that this application is brought properly and the question is open for determination by the District Court. There are no relevant regulations for the purposes of s26 (2) of the *Personal Injury Commission Act 2020 (NSW)*; and there is no particular form prescribed for the purposes of s26, such that both parties are agreed that a summons is an appropriate instrument; and the relevant fees have been paid.

The sole question is issue is thus framed by s26(3)(b) of the *Personal Injury Commission Act 2020 (NSW)*, relevantly whether the determination of the matter by the usual decision-maker would involve an exercise of federal jurisdiction as defined in s25 of that Act:

"*federal jurisdiction*" means jurisdiction of a kind referred to in section 75 or 76 of the Commonwealth Constitution.

That depends upon the nature of the State Insurance Regulatory Authority, relevantly whether it is part of the "State" of NSW, where the amended summons pleads that:

(h) The claim by the plaintiff against the Nominal Defendant Insurer falls within the scope of Section 75 of the Commonwealth Constitution.

(i) The claim by the plaintiff against the Nominal Defendant Insurer falls within the scope of the definition of Federal Jurisdiction as set out in Section 25 of the *Personal Injury Commission Act* 2020 ("the PIC Act").

(j) In accordance with the provisions of Division 3.2 of the PIC Act, it is necessary for the plaintiff to bring an application ("a compensation matter application") before the District Court in order to pursue his claim against the Nominal Defendant Insurer .

Perhaps somewhat unusually, the defendant (*i.e.*, the State Insurance Regulatory Authority *via* its agent) says that it is not part of the State of NSW; and the plaintiff contends to the contrary. The defendant submitted that:

11 … SIRA is not "a State", for the purposes of section 75(iv) of the *Constitution*, and therefore no issue of federal jurisdiction arises in this matter.

12 The consequence of that is the District Court of NSW has no jurisdiction to deal with the plaintiff's case and it must be dismissed.

The State Insurance Regulatory Authority

The State Insurance Regulatory Authority is a body corporate created by s17 of the *State Insurance and Care Governance Act 2015 (NSW)*, which is "for the purposes of any Act, a NSW Government agency." Its status is illuminated by s13A of the *Interpretation Act 1987 (NSW)*:

> 13A NSW Government agencies and statutory bodies representing the Crown
>
> (1) If an Act provides that a body is—
>
> (a) a NSW Government agency, or
>
> (b) a statutory body representing the Crown,
>
> the body has the status, privileges and immunities of the Crown.
>
> (2) If an Act provides that a body—
>
> (a) is not or does not represent the Crown, or
>
> (b) is not a NSW Government agency or a statutory body representing the Crown,
>
> the body does not have the status, privileges and immunities of the Crown.
>
> (3) This section extends (without limiting its operation)—
>
> (a) to a provision that is expressed to be made for the purposes of any Act or more generally, and
>
> (b) to privileges and immunities conferred by law expressly or as a matter of construction.
>
> (4) In any Act or instrument—
>
> (a) a reference to a NSW Government agency includes a reference to a body that is declared to be a statutory body representing the Crown, or
>
> (b) a reference to a statutory body representing the Crown includes a reference to a body that is declared to be a NSW Government agency.
>
> (5) In this section, the "***Crown***" includes the State and the Government of the State.

There is no relevant exclusion within the meaning of s13A(2) of the *Interpretation Act 1987 (NSW)*. Accordingly State Insurance Regulatory Authority has the status, privileges and immunities of the Crown.

The State Insurance Regulatory Authority was described in the second reading speech for the *State Insurance and Care Governance Act 2015 (NSW)* which created it as a "new, independent regulator of New South Wales government insurance schemes," with it role described thus:

> Part 3 of the bill establishes the new State Insurance Regulatory Authority, which will also be a statutory corporation with a board and a chief executive. The SIRA board will have up to five members, including the chief executive. SIRA will independently assume the regulatory functions of WorkCover in relation to workers compensation insurance and related activities, the Motor Accidents Authority in relation to compulsory third party [CTP] insurance, and NSW Fair Trading in relation to home building insurance. SIRA will focus on ensuring that key public policy outcomes are being achieved in relation to service delivery to injured people, affordability, and the effective management and sustainability of the insurance schemes. Consolidating regulatory responsibility for State insurance into one regulator will enable a consistent and robust approach to the monitoring and enforcement of insurance and compensation legislation in this State. [emphasis added]

The State Insurance Regulatory Authority is an integral statutory component of the complex legislative structural scheme. Its role is expressly regulatory role across three areas for which insurance is made compulsory by the State: worker's compensation; motor vehicle accidents; and home building. As the defendant submitted, in this context, it is intended to ensure that all claims in respect of motor vehicle accidents are assessed by the Personal Injury Commission. The second reading speech for the *Motor Accident Injuries Act 2017 (NSW)* articulated the governmental significance of the scheme thus:

> … The bill introduces a new New South Wales compulsory third-party [NCTP] insurance scheme for people who are injured or lose their life as a result of a motor accident. It represents a major reform for the Berejiklian-Barilaro Government. As a result of the NCTP, the owners of the 5.3 million registered vehicles across New South Wales will see a significant reduction in their premiums. The people injured on our roads will benefit from broader coverage and greater benefits.
>
> …

> …The bill establishes a hybrid scheme. It delivers statutory benefits for injured road users with injuries other than soft tissue or minor psychological injuries, regardless of fault, while retaining the right to claim modified common law damages for those able to establish fault.
>
> …
>
> The CTP reform contained in this new bill has many fathers and many mothers and without their contribution the Government and I would not be in a position today to deliver this monumental win for the motorists of New South Wales. The reforms contained in this bill represent an authentic victory. It will be a success for the people of New South Wales

The immediate peculiarity concerns the status of the monies held by the State Insurance Regulatory Authority. The statutory structure contemplates and creates several funds, which derive their monies from levies upon industry participants, in the manner colloquially described as "user pays." There are several different funds. The two immediately pertinent to road related matters are:

- the Nominal Defendant's fund, created by s2.38 of the *Motor Accident Injuries Act 2017 (NSW), primarily* sourced from monies collected under statute - *i.e.*, monies "collected from such persons or fund, and in accordance with such arrangements, as may be prescribed by the regulations" in accordance with s2.39 of the Act; and
- the motor accident operational fund (also known as the SIRA Fund), created by s10.12 of the *Motor Accident Injuries Act 2017 (NSW)* with funds primarily sourced from levies on premiums (*i.e.*, the "appropriate proportion of the money contributed by third-party policy holders").

There are other funds, as the defendant identified in its reply submissions:

> 4 The plaintiff complains that the defendant has not considered the other roles of SIRA acting as a regulator in New South Wales. The provisions of the *State Insurance and Care Governance Act 2015* ("**the SICG Act")** that are relied upon by the defendant are the same in relation to its other duties as well. It does not provide insurance but it regulates a number of schemes. Its finances and structure are as set out in the Act as completely separate from the State of New South Wales.
>
> 5 As far as Workers Compensation is concerned, Part 6 (sections 34-40) of the *Work Injury Management and Workers Compensation Act 1998* (NSW) requires the Authority to establish and maintain a Workers Compensation Operational Fund.
>
> 6 A similar fund is required to be established and maintained pursuant to section 103EF of the *Home Building Act 1989* (NSW).

The evidence does not reveal where these funds are actually held. For present purposes it seems unlikely that they form part of the Consolidated Fund, sometimes called the general revenue of the State of NSW created under s39 of the *NSW Constitution Act 1902 (NSW).*

The defendant submitted in reply that:

> 24 Pursuant to section 39 of the *Constitution Act 1902* (NSW), all public monies including revenue that is collected or received or held by any person for or on behalf of the State of New South Wales, shall form one consolidated fund.
>
> 25 The fact that the monies received by SIRA do not go into the Consolidated Fund, but are held and managed by the Authority, weigh heavily in favour of its status as an entity that is not the State of New South Wales. If it was the State of New South Wales, the funds would ordinarily go into the Consolidated Fund

The mere existence of separate or separated accounting and funds does not mean that the State Insurance Regulatory Authority is not part of the State of NSW. The same is true of the NSW municipal/local councils, also creatures created by NSW statute (being bodies politic, but not bodies corporate, created by the *Local Government Act 1993 (NSW),* although expressly not vested with status, privileges and immunities of the Crown by s220). Their funds are expressly vested (by Part 3) in council consolidated fund and trust funds. The defendant conceded that councils are nonetheless part of the State of NSW:

> HER HONOUR: Isn't it much the same as a local council?
>
> ROBINSON: In a sense, yes, your Honour, because the local councils depend on a grant from the Commonwealth and the state.

HER HONOUR: They also raise moneys. They raise by rates.

ROBINSON: They raise their own by taxes but that's only a percentage of their income.

HER HONOUR: But it doesn't really matter. That which they raise they keep separately, do they not?

ROBINSON: Yes, indeed, your Honour. That which they raise by their rates is kept by them, but they survive on grants from the Commonwealth and the states.

HER HONOUR: It doesn't stop them from being state instrumentalities though.

ROBINSON: No. They've been accepted by the High Court as being state instrumentalities for the purposes of 114 of the Constitution. I don't cavil with that. …

As the defendant submitted in reply:

7 Importantly, in all three areas of regulation, none of the fund money is or is to be remitted to the Consolidated Fund of the State.

That is true. To that extent the State Insurance Regulatory Authority does not add to the general revenue/Consolidated Fund any more than it draws from it. But it provides a largely "off budget" (user pays) source of funds for a series of functions of a governmental nature, which are essentially regulatory, although extended to including roles such as that of the Nominal Defendant. (I say largely off budget rather than entirely so because it is staffed by public servants, whose salary rights and entitlements are likely to place some, if only slight, weight on the Consolidated Fund.

Absent the user pays structure, the legislatively created (and largely regulatory) functions discharged by the State Insurance Regulatory Authority would fall to be funded through general revenue/Consolidated Fund. Again analogy lies to local councils, which are, in part, user funded (with the addition of grant monies). The creation of a user pays scheme that removes a burden from the general revenue/Consolidated Fund does not change the character of the governmental function performed. It merely shifts a cost burden from all taxpayers to a nominated subset.

Here the funds maintained by the State Insurance Regulatory Authority manifest the power of this statutory corporation to "collect money" from various participants in the motor vehicle accident scheme: a power to tax by any other name. That is in its core a preeminently governmental function, albeit one that is specific in its target group in the mode of user pays schemes. In the second reading speech for *Personal Injury Commission Act 2020 (NSW)* the Minister said that:

… The bill establishes the Personal Injury Commission of New South Wales. The Government's focus is to improve the customer experience for all users of the system and reduce any process trauma for injured people navigating disputes in the workers compensation and motor vehicle accidents schemes.

,..

This bill creates an independent Personal Injury Commission headed by a judicial officer with the jurisdiction of the existing Workers Compensation Commission and the State Insurance Regulatory Authority's motor accident dispute resolution services, delivered by specialist and expert workers compensation and motor accident divisions. The consolidated and modern tribunal will replicate the success of Service NSW. With Service NSW we were able to shift dimensions, transforming a legacy of paperwork, long wait times and bureaucracy into an empathetic agency known for exceptional customer experience. We will take the same journey with the Personal Injury Commission, bringing the Service NSW ethos to the management of personal injury disputes.

That is entirely consonant with the express purpose of the legislative structure. As the defendant submitted:

14 The Long title of the *State Insurance and Care Governance Act 2015 (NSW)* reads as follows:

> "An Act relating to the governance of State insurance and care schemes; to constitute Insurance and Care NSW and the State Insurance Regulatory Authority; and for other purposes."

...

18 Section 23 provides for the principal objectives of SIRA. These including promoting the efficiency and viability of the scheme, minimising the cost to the community arising from accidents, promoting injury prevention and return to work, ensuring injured persons have access to treatment, providing supervision of claims handling and disputes, and promoting compliance with the legislation.

Quite so. But the objectives are not limited to the motor vehicle accident scheme. Section 23 of the *State Insurance and Care Governance Act 2015 (NSW)* provides that the principal objectives of State Insurance Regulatory Authority are thus:

> The principal objectives of SIRA in exercising its functions are as follows:
>
> (a) to promote the efficiency and viability of the insurance and compensation schemes established under the workers compensation and motor accidents legislation and the *Home Building Act 1989* and the other Acts under which SIRA exercises functions,
>
> (b) to minimise the cost to the community of workplace injuries and injuries arising from motor accidents and to minimise the risks associated with such injuries,
>
> (c) to promote workplace injury prevention, effective injury management and return to work measures and programs,
>
> (d) to ensure that persons injured in the workplace or in motor accidents have access to treatment that will assist with their recovery,
>
> (e) to provide for the effective supervision of claims handling and disputes under the workers compensation and motor accidents legislation and the *Home Building Act 1989,*
>
> (f) to promote compliance with the workers compensation and motor accidents legislation and the *Home Building Act 1989.*

The objectives are quintessentially executive/governmental in their nature, directed to the implementation of legislative schemes regulating employment, road usage and residential building. None of these might have been seen as "governmental" functions in the eighteenth century. But the world moves on. In the twenty-first century these are matters at the heart of the executive/governmental role, created and managed though complex governmental schemes.

The defendant sought to identify particular subgroups of people whose particular interests were immediately served by the State Insurance Regulatory Authority, such as the purchasers of CTP, worker compensation, and Home Building insurance policies, and people injured in motor vehicle or work accidents. It is always possible to parse out particular groups as being the immediate beneficiaries of particular governmental functions. That does not make good the submission that:

> 47(e) The SIRA does not only have to have regard to the interests of the State of New South Wales. Quite to the contrary, it is required to have regard to the interests of motor accident victims injured or killed in NSW (which may include interstate or even international visitors) as well as the interests of numerous private licensed insurers who provide insurance under the Scheme.

Applying the label "stakeholder" to separate particular sub-groups from the state as a whole is a semantic sleight of hand to shift the focus from the large picture to minutiae of immediate delivery at the cost of the overall picture, where the peace, welfare, and good government of NSW is the sum of governmental and legislative schemes and systems designed to benefit the state as whole and particular sub-groups in the composite. Simple illustrations lie in the New South Wales Land and Housing Corporation, and the Legal Aid Commission of New South Wales also statutory bodies corporate. Their respective services are focused upon particular groups of the State's citizens; but equally contribute to the peace, welfare, and good government of NSW. (I appreciate that both the latter are expressly statutory bodies representing the Crown; but statutory assertions do not overcome the need for consideration of function.)

The whole of the state of NSW is affected by the regulation of the various parts of the system and the government. Ultimately, the governmental function involves the whole orchestra, where the whole of the governmental function colours each of the individual components viewed in context rather than viewed in isolation with each element is parsed into a separated component isolated by its immediate financial components. That which is separately funded simultaneously relieves a burden that otherwise would fall on all, and so serves the interests of all as much as the interest of the individual/individual segments.

The point is made by the *Motor Accident Injuries Act 2017 (NSW)*, which constitutes the State Insurance Regulatory Authority as the Nominal Defendant for the purposes of that Act. As the defendant submitted:

> 21 The MAI Act applies to all motor accident occurring in New South Wales on or after 1 December 2017. The following provisions are relevant.
>
> (a) Long Title: "An Act to establish a new scheme of compulsory third-party insurance and provision of benefits and support relating to the death of or injury to persons as a consequence of motor accidents; and for other purposes."
>
> (b) Section 1.3: objects of the Act. The objects range from providing treatment and care to injured people, to keeping the price of CTP premiums affordable.
>
> (c) Part 2: Third-party insurance. In particular, section 2.19 provides that the SIRA guidelines (issued pursuant to s 10.2) may make provision for the determination of premiums.
>
> (d) Section 2.27: provisions relating to the Nominal Defendant (cf s 32 MAC Act). Importantly, pursuant to subsection (1), SIRA is, for the purposes of this Act, the Nominal Defendant and pursuant to subsection (2) any action or proceeding by or against the Nominal Defendant is to be taken in the name of the "Nominal Defendant".
>
> (e) Division 9.1: Licensing of insurers. Applications for licenses are to be made to SIRA (s 9.1). SIRA has the power to impose civil penalties or censure on insurers (s 9.10) and to cancel licenses (s 9.11). There is administrative review of licensing by the Civil and Administrative Tribunal (s 9.14).
>
> (f) Division 9.2: SIRA has the power to supervise the insurers.
>
> (g) Section 10.1: Functions of the Authority. SIRA has a number of functions including monitoring the operation of the scheme, advising the Minister as to the administration, efficacy and effectiveness of the scheme, monitoring insurers, providing an advisory service to claimants, and to monitor provision of services to injured people.
>
> (h) Section 10.12: There is a Motor Accidents Operational Fund that operates much the same way as the fund under MAC Act.
>
> (i) Section 10.16: Contributions to Fund by persons to whom third-party policies issued ("the Fund Levy").

Being a statutory corporation, the State Insurance Regulatory Authority has a corporate board. The (corporate) Board of the State Insurance Regulatory Authority comprises people appointed by the relevant Minister (the Minister for Customer Service pursuant to the 2021 Allocation of the Administration of Acts) under s18 of the *State Insurance and Care Governance Act 2015 (NSW)*. Sections 18 requires that the Board members must include:

- the chief executive, being an employee of the Department of Finance, Services and Innovation, which, by virtue s7 of the *Administrative Arrangements (Administrative Changes—Public Service Agencies) Order 2019 (NSW)*, is now the Department of Customer Service;
- the secretary of the Department of Finance, Services and Innovation, *i.e.*, now the secretary of the Department of Customer Service; and
- up to 5 other members appointed by the Minister, who are not subject to the provisions of the *Government Sector Employment Act 2013 (NSW)* relating to the employment of public service employees (by reason of s7 of schedule 3 to the *State Insurance and Care Governance Act 2015 (NSW)*).

However, by virtue of s21 of the *State Insurance and Care Governance Act 2015 (NSW)*, the staff of the State Insurance Regulatory Authority are employed in the Public Service under the *Government Sector Employment Act 2013 (NSW)*. The State Insurance Regulatory Authority advised the plaintiff by letter dated 19 July 2021 (exhibit C) that:

> Question 1: This question concerns the legal basis upon which persons are employed as "SIRA staff'. These arrangements are governed by legislation and are evident on the face of SIRA's governing legislation and government employment legislation.
>
> Question 2: The employer name on SIRA staff payslips is the Department of Customer Service (ABN 81913830179).
>
> Question 3: The employer listed on SIRA staff group certificates is the Department of Customer Service (ABN 81913830179).

Question 4: Aware Super (formerly known as First State Super) is the default superannuation fund for SIRA staff.

Question 5: Upon its establishment, SIRA formed part of the Better Regulation Division in the former Department of Finance Innovation and Services. SIRA became a standalone agency with its own Chief Executive in March 2017. The SIRA Chief Executive and SIRA Executive Directors have not had other assignments in the cluster while they held their SIRA position.

…

Question 8: SIRA makes use of the Department of Customer Service's centralised corporate services.

Question 9: SIRA has a dedicated Chief Finance and Risk Officer that reports to the SIRA Chief Executive. SIRA uses the centralised internal audit services of the Department of Customer Service.

…

Question 11: … factual matters only.

(i) SIRA staff are employed by the Department of Customer Service and the SIRA Chief Executive reports to the Secretary of the cluster.

(ii) The SIRA Chief Executive meets with the cluster Secretary regularly.

(iii) Yes, the cluster's executive leadership team meets weekly. The SIRA Chief Executive has a standing invitation.

(iv) The SIRA Chief Executive is appointed by the Secretary of the principal department. However, SIRA is an independent agency within the Customer Service Cluster. A Department of Customer Service organisational chart is at Tab A. The affairs of SIRA are managed and controlled by the Chief Executive in accordance with the general policies and strategic direction determined by the SIRA Board.

As the plaintiff submitted:

8(vii) SIRA relies on extensive ancillary services from the NSW Government (from auditing through payroll) as might be expected of an agency that is part of the NSW Government.

There is a degree of speculation in the plaintiff's submission that:

50 The plaintiff is in no doubt that if SIRA were dissolved tomorrow the monies held by SIRA for CTP and workers compensation regulatory purposes would be re-allocated to whatever new State entities took over those regulatory roles, as occurred upon dissolution of the MAA. In the improbable event the State abandoned any role in regulating CTP or workers compensation, then no doubt the computers, desks, chairs and stationery from the SIRA offices would be returned to the Department of Customer Service and the SIRA staff would be re-assigned to other positions within the State public service.

Although that veers towards speculation, it has some force. If the State Insurance Regulatory Authority were to cease to exist, the governmental functions it discharges, including in the regulation of schemes for insurance and compensation in respect of motor vehicle accidents, worker compensation and residential building still would need to be discharged. There is no conjecture in the assumption that in the twenty-first century state governments will not simply walk away from the regulation of road use, motor vehicle accident injury insurance, or schemes for insurance for workers compensation or residential building work. As the plaintiff submitted (footnotes omitted):

56 The defendant's submission [at 47(a)] that *"SIRA is an entity that merely manages a third-party insurance scheme"* is a remarkable understatement that is also factually incorrect.

57 It might also be said that the State Rail Authority (or whatever the government instrumentality responsible for running the trains is called this week) merely manages a transport system. The Health Department merely manages some hospitals. The Coroner merely investigates deaths. Putting the word *"merely"* in front of a government function does not minimise its importance or indicate that it is anything other than part of the State. Nor does it constitute a persuasive legal argument.

58 The reality is that SIRA not only manages (and regulates) a comprehensive and compulsory third-party insurance scheme for motor accidents. It also regulates and oversees the State's workers compensation system and a home building insurance scheme. As the long title to the *State Insurance and Care Governance Act* 2015 prescribes, SIRA is responsible for the *"governance of State insurance and care schemes."* Governance is what governments do. The creation, operation and regulation of various insurance schemes is an act of governance on the part of the State of New South Wales undertaken through a State government entity

59 For constitutional purposes, size does not matter. Whether the State is running a state-wide schooling system or controlling prickly pears, both are governmental function, mere or otherwise.

The (governing) Board of the State Insurance Regulatory Authority has some formal independence from the NSW State Government, although by virtue of s18 of the *State Insurance and Care Governance Act 2015 (NSW)* the Board (*inter alia*) must:

- inform the Minister about the SIRA's activities upon request, and
- keep the Minister informed of the general conduct of SIRA's activities and of any significant development in SIRA's activities.

As the plaintiff submitted:

> 67 It would take a remarkable degree of political naivety to believe that the Minister was being kept informed about SIRA's activities merely as a courtesy or some form of benign curiosity.

There was some skirmishing about the Ministerial degree of control over the State Insurance Regulatory Authority. The test cannot be as simple as whether there is an immediate power to direct. The Independent Commission Against Corruption for example is plainly part of the State of NSW for the purposes of the Commonwealth Constitution.

The power of immediate direction over the State Insurance Regulatory Authority is rather limited, although there is express power for written directions. But, as the plaintiff submitted:

> 63 The plaintiff challenges the defendant's assertion that Ministerial control of SIRA is limited to serious matters that must be in the public interest. The Minister exercises control over SIRA and its activities.
>
> 64 The Minister appoints the board. The Minister can fire the board. The Secretary of the NSW Department of Finance, Services and Innovation (or their nominee) is a member of the board.
>
> 65 The head of the Minister's Department appoints the SIRA Chief Executive. The SIRA Chief Executive is part of the "*team*" under the head of the Secretary of the Department

The State Insurance Regulatory Authority's functions are conferred by statute, as set out in s24 of the *State Insurance and Care Governance Act 2015 (NSW)*. They are functions expressly conferred by NSW statute:

> (1) SIRA has such functions as are conferred or imposed on it by or under this or any other Act (including under the workers compensation and motor accidents legislation and the *Home Building Act 1989*).
>
> (2) The functions of SIRA also include the following:
>
> (a) to collect and analyse information on prudential matters in relation to insurers under the workers compensation and motor accidents legislation and the *Home Building Act 1989*,
>
> (b) to encourage and promote the carrying out of sound prudential practices by insurers under that legislation and the *Home Building Act 1989*,
>
> (c) to evaluate the effectiveness and carrying out of those practices.
>
> (3) In this section, a reference to an "***insurer***" under the *Home Building Act 1989* includes a reference to the provider of an alternative indemnity product under that Act.

At least one of the "other Acts" there invoked is the *Motor Accident Injuries Act 2017 (NSW)* under which the State Insurance Regulatory Authority is constituted the Nominal Defendant as well as being vested (in part 10) with the management of the operation of the motor accidents scheme.

The State Insurance Regulatory Authority's function and powers with respect of that motor accidents scheme are wide ranging and include:

- monitoring the scheme and advising the Minister:
- creating, issuing, and promulgating Motor Accident Guidelines, which, *inter alia,* determine insurance premiums (under s2.19 of the *Motor Accident Injuries Act 2017 (NSW)*);
- regulating and/or rejecting insurance premiums for third-party motor vehicle accident insurance policies (under s2.21-2.22 of the *Motor Accident Injuries Act 2017 (NSW)*);
- balancing and equalising risks as between insurers Fund (under s2.24 of the *Motor Accident Injuries Act 2017 (NSW)*);
- adjusting premiums and levies for the Motor Accidents Operational Fund (under s2.25 and Division 1.4 of the *Motor Accident Injuries Act 2017 (NSW)*); and

- complying with any written direction issued by the Minister with respect to the functions of SIRA if the Minister is satisfied that it is necessary so to direct in the public interest (per s20 of the *State Insurance and Care Governance Act 2015 (NSW).*

The ministerial power of direction has been used sparingly; only the once (exhibit 1). But that direction was significant, being couched as a request but in statutory terms being a direction on 3 May 2018 (exhibit 1) to alter the imposts imposed by the State Insurance Regulatory Authority in respect of third-party insurance premiums:

> Pursuant to s 20(1) of the State Insurance and Care Governance Act 2015, I request that SIRA reduce the amount of the Fund levy collected from persons to whom third party policies are issued for vehicles classed as taxis (class 7) to match the amount of Fund levy collected for a class 1 vehicle, effective from 1 July 2018.
>
> This determination should remain in force until 30 June 2019, or such time as SIRA has sufficient data regarding the relative claims frequency and usage (fare-paying kilometres) among point to point transport operators (taxis, rideshare and hire cars) to update Fund levy rates.
>
> This will ensure that the premium (and levy) rates for taxis and rideshare are properly reflective of their current risk profile.

As the defendant submitted:

> 18 Section 23 of the *State Insurance and Care Governance Act 2015 (NSW)*] provides for the principal objectives of SIRA. These including promoting the efficiency and viability of the scheme, minimising the cost to the community arising from accidents, promoting injury prevention and return to work, ensuring injured persons have access to treatment, providing supervision of claims handling and disputes, and promoting compliance with the legislation.
>
> 19 Section 24 provides for SIRA's functions. The functions are primary conferred under the relevant legislation (such as the MAI Act) but also include prudential matters as set out at s 24(2).

At one point the State Insurance Regulatory Authority had a role in the resolution of disputes about motor vehicle accidents. But that role has since been re-allocated. As the defendant submitted:

> 22 The Personal Injury Commission was established by the PIC Act. From 1 March 2021, all of the functions of dispute resolution that were previously carried out by SIRA, are now carried out by the Commission. This includes determination of medical assessment matters and claims assessment matters.
>
> 23 All medical assessment matter disputes must be assessed by the Commission, unless an issue of federal jurisdiction arises.

The defendant invoked that as part of the reason why the State Insurance Regulatory Authority should not be characterised as being part of the State of NSW, in effect saying that so to do would be inefficient in the light of the objects of the statutory structure:

> 27 The MAI Act continued with essentially the same "outside of court" system that had been introduced by the MAC Act. The disputes continued to be determined within the dispute resolution services run by the Authority until the introduction of the PIC Act.
>
> 28 In the Second Reading Speech for the *Personal Injury Commission Bill 2020*, the Minister (the Hon. Victor Dominello) referred to the Commission as a "one-stop shop". Simplifying and streamlining dispute resolution processes was a key feature of the Commission, according to the Minister, who said:
>
> > "SIRA engages CTP stakeholders in CTP dispute resolution. One commission will reach out to all these stakeholders. This includes those who represent people injured on our roads and in our workplaces, the legal profession and insurers. Stakeholders will benefit from the reduced time and complexity of dealing with a single commission."
>
> 29 Efficiency and cost were also important considerations of the Commission, and the Minister referred to the fact that the Commission had been costed by independent actuaries and that it would have minimal impact on green slip premiums.
>
> 30 It is plain that the intention of Parliament in the introduction of the motor accidents claims legislation (dating back to 1999) and the PIC Act was that, where possible, disputes are to be determined in the quickest, cheapest and most efficient way, outside of Court.
>
> 31 However, matters involving federal jurisdiction fall outside of the jurisdiction of the Commission.

That is a superficially tempting approach. If the defendant eschews its status as part of the NSW Government, and it is not a part of the NSW Government, the scheme would operate efficiently. But the ineluctable response to that temptation lies in the plaintiff's riposte:

> 7 However, judicial determinations as to the proper construction of provisions of the Commonwealth Constitution are not based on what is popular, administratively desirable or least expensive. Ultimately, judicial decision making must be based on an objective analysis and proper application of facts to legal principles.

In any event the statutory structure explicitly recognises the potential for this issue to arise in s25 and s23(3)(b) of the *Personal Injury Commission Act 2020 (NSW),* in the identification of federal jurisdiction as being jurisdiction within section 75 or 76 of the Commonwealth Constitution.

In the practical circumstance of motor vehicle accidents in NSW, that is likely to be confined to disputes about motor vehicle accidents involving:

- consuls or other representatives of other countries (s75(ii));
- the Commonwealth, or a person suing or being sued on behalf of the Commonwealth (s75(ii)); or
- between residents of different States, or between NSW and a resident of another State (s75(iii)).

The State Insurance Regulatory Authority is a (statutory) corporation. As was said in *Crouch v Commissioner for Railways (Qld)*:

> 2 … The basis of the decision in [*Australasian Temperance and General Mutual Life Assurance Society Ltd v] Howe* [[1922] HCA 50; (1922) 31 CLR 290] 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 CJ and Gavan Duffy J. at pp.294ff. and per Higgins J. at pp.325ff.).[1]

In the circumstances, issues as to federal jurisdiction are likely to arise relatively rarely in respect of motor vehicle accidents – unless representatives of other countries or the Commonwealth are particularly apt to be involved in motor vehicle accidents.

The State Insurance Regulatory Authority is part of the State of NSW

There is no simple or definitive test *per se* as to whether the State Insurance Regulatory Authority is part of the State of NSW so as to enliven federal jurisdiction. The defendant submitted that:

> 45 … the central test for identifying whether an entity is properly considered the State for the purposes of section 75 of the Constitution is whether there is direct control by the State and the "governmentality" of its functions.
>
> 46 Other factors are also relevant, such as the interests that the entity must have regard to, whether it is funded by Consolidated Revenue and whether its funds go back into Consolidated Revenue, and the limitations placed on the power of the State to control the entity.

There is some tension in that in the twenty-first century. The "governmentality" of a body's functions is not necessarily a product of the directness of the immediate control or funding. Consider, for example, the position of the Independent Commission Against Corruption, a statutory corporation generally immune from direct or immediate governmental control, or the Director of Public Prosecutions, an officer appointed under the *Director of Public Prosecutions Act 1986 (NSW)* and responsible to the Attorney General for the due exercise of the Director's functions, but not subject to control or direction in respect of the preparation, institution and conduct of any proceedings other than indirectly through budgetary considerations.

The establishment of user pay systems is entirely consistent with the protection of the State's Consolidated Fund or general revenue. That which is "off budget" because of user pays style of revenue raising nonetheless maybe a crucial governmental function, as indeed is a tolled road or user pays mode of public transport.

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[1] *Crouch v Commissioner for Railways (Qld)* [1985] HCA 69; (5 November 1985).

The focus, as was identified in *Crouch v Commissioner for Railways (Qld)* is upon the quality/nature of the functions performed. As the High Court then said:

> 10 Examination of the provisions of the Act discloses that the Commissioner is an instrumentality of the State of Queensland through which the Executive Government of the State discharges an important part of its governmental functions …. the intention of the Parliament of Queensland as evidenced by the Act was "to transmute a part" of the Government of the State "into the outward form of a corporation as a convenient means of carrying on" a traditional government activity with the result that when the Commissioner is sued, as in the present case, he is "sued as being the emanation by which" the State of Queensland discharges its governmental activities in relation to railways.[2]

As the plaintiff submitted:

> 9 It is accepted that it is a matter for judicial determination on a case by case basis as to whether a state operated corporation, authority, agency or instrumentality is part of the State for the purposes of Section 75.
>
> 10 When there is no single definition or test for what is or is not part of a State within the scope of Section 75, then the courts look at a range of identified criteria and applies the best fit. This is a form of abductive reasoning. A well-known example of abductive reasoning is the duck test: *"If it looks like a duck, swims like a duck and quacks like a duck, then it probably is a duck."*
>
> 11 Despite the great temptation to meet the needs of CTP scheme stakeholders for administrative simplicity and cost-effective dispute resolution by calling SIRA something else, the objective reality of SIRA's operations leads to the conclusion that SIRA is a state government duck rather than a non-government turkey or a goose.
>
> …
>
> 18 The defendant's submissions set out [at 20 and 21] various powers and roles conferred on SIRA under the Motor Accidents Compensation Act 1999 ("the MAC Act") and under the MAI Act. The submissions then address some of SIRA's powers under the MAI Act. Those powers include the capacity to licence, regulate and discipline insurers operating in the CTP scheme.
>
> 19 What has been presented by the defendant is very much a limited selection of SIRA's activities and powers. To give just one example, the defendant's submissions make little mention of SIRA's powers and role in developing and promulgating regulations and guidelines of critical significance to the operation of the motor accidents scheme. [see Section 10.6 of the MAI Act]
>
> 20 Given the arguments put by the defendant as to SIRA not being part of the State, it is worth noting that Section 10.6 of the MAI Act requires that the Motor Accident Guidelines be published on the NSW Parliament website and permits the parliament to disallow those guidelines.
>
> 21 The defendant's submissions make little reference to SIRA's powers to supervise, permit and reject premium filings for CTP insurers and to claw back excess insurer profits [Sections 2.21, 2.22 and 2.25 of the MAI Act].
>
> …
>
> 24 In summary, SIRA is staffed by public servants, with the Chief Executive of SIRA appointed by a higher-ranking public servant rather than the SIRA Board (and with all of the Board being appointed by the Minister). The SIRA Chief Executive is part of a Departmental *"Executive Leadership Team"*. SIRA staff belong to the Government superannuation fund. SIRA uses a series of government *"centralised corporate services"*. SIRA very much looks, swims and quacks like a government duck.
>
> 25 In its day-to-day operations, SIRA is indistinguishable from any other part of the Department of Customer Service and is highly interwoven with the NSW State Government bureaucracy.
>
> …
>
> 82 … the management of SIRA is closely enmeshed with the NSW government. SIRA implements NSW government policy. SIRA regulates the private CTP insurers, the government operated workers compensation insurer (icare) and its scheme agents and the home building insurance scheme for the NSW government

If there were a simple analogy, it would lie to *Sweedman v Transport Accident Commission.*[3] That involved the Victorian Transport Accident Commission, which is close to being the Victorian counter-part of the State Insurance Regulatory Authority, although limited, as is obvious from its name, to transportation matters. All parties accepted without any real discussion that the Victorian Transport Accident Commission was part of the State of Victoria. The High Court said that:

> 12 … The Commission is established by Pt 2 (ss 10-33) of the Victorian Act with characteristics which bring it within the constitutional description of the State of Victoria for the purposes of s 75(iv) of the Constitution[2]. That has not been disputed. …[4]

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2 *Crouch v Commissioner for Railways (Qld)* [1985] HCA 69 (5 November 1985).
3 *Sweedman v Transport Accident Commission* [2006] HCA 8 (9 March 2006).
4 *Sweedman v Transport Accident Commission* [2006] HCA 8 (9 March 2006).

As the plaintiff submitted:

> 30 The High Court accepted that the TAC, the Victorian motor accident regulator (and SIRA equivalent), fitted squarely within the constitutional description of the State of Victoria for the purposes of Section 75.
>
> 31 Section 10 of the *Transport Accident Act (Victoria)* 1986 establishes the commission as a body corporate with perpetual succession and provides that it may sue and be sued in its corporate name. It is difficult to understand how the defendant in this case maintains that SIRA is not a part of the State of NSW when the High Court has already accepted that the comparable agency in Victoria is a part of the State of Victoria.

There are some differences between the State Insurance Regulatory Authority and Victorian Transport Accident Commission. As the defendant submitted in reply:

> 13 … TAC is the sole insurer and regulator in Victoria, whereas SIRA is not an insurer and only regulates a private insurance scheme. TAC is the sole provider of CTP insurance in Victoria. It is a statutory monopoly. Its structure and functions are not comparable to SIRA.
>
> 14 For example, unlike SIRA, the TAC is subject to the general direction and control of the Minister: *Transport Accident Act 1986* (VIC) (section 14(1)(a)), and TAC is also required to repay capital and dividends to the State as determined by the Victorian Treasurer: *Transport Accident Act 1986* (VIC) ss 29A and 29B.

A function is not less governmental because it is less of a monopoly. By analogy railways did not cease to be part of core governmental function when some were privatised. Likewise the provision of hospital and education services, plainly core governmental services, are not deprived of that character because of the existence of private service providers. However the power to control premiums and to levy (or "collect") contributions is classically governmental in its nature even without regard to Boston style tea parties.

Characterisation of the State Insurance Regulatory Authority starts with its name and status as the plaintiff submitted:

> 14 … Section 17 of the *State Insurance and Care Governance Act* 2015 (NSW) provides that SIRA is both a "*body corporate"* and "*a NSW Government agency"*. The latter designation, along with the first word in SIRA's name are important considerations in determining whether SIRA is in fact a part of the State of New South Wales.
>
> 15 One significant deficiency in the defendant's submissions is that the consideration of SIRA's role is largely confined to SIRA's activities in the motor accidents field. The question for determination before the Court is not whether SIRA when acting as CTP regulator is part of the State of New South Wales. The question is whether SIRA itself is part of the State of New South Wales.
>
> 16 When the question is properly framed, it is necessary not only to look at SIRA as motor accident regulator, but also as regulator of the State's workers compensation scheme and regulator of the State's home building insurance scheme.

The defendant pointed to the plaintiff's reliance on the name in the reply submission that:

> 3 The plaintiff makes much of the name of the State Insurance Regulatory Authority ("SIRA" or "the Authority") (at [8], [14]). However, the inclusion of the word "State" in the name of the Authority is equally explained by the fact that the Authority administers a scheme that covers the State of New South Wales. It may also be equally explained as an adjective to describe the type of insurance that SIRA is to regulate i.e. "State Insurance" being insurance made compulsory by the State Parliament. It is not an admission that the Authority is, for Constitutional purposes, the State of New South Wales.

The nomenclature is no admission – although it may be something of an assertion and incorporation. The point is really made by the above quoted reply submission: the Authority administers a series insurance schemes that cover whole of the State of New South Wales. The State Insurance Regulatory Authority (*inter alia*) manages, administers and levies funding for a scheme of insurance that covers the whole of the State of NSW, entirely consonant with an executive/governmental function; and appears as the *de facto* defendant where third-party insurance in not available. That is to the benefit the whole of the State in various ways; both immediately and directly (in the case of Mr Ritchie) and sometime indirectly (e.g., where the taxpayer at large/the Consolidated Fund is relived of the burden of the cost of the provision of health services *via* the public hospital because of the default defendant).

The traditional starting point is with *Crouch v Commissioner for Railways (Qld)*:

> 10 Examination of the provisions of the Act discloses that the Commissioner is an instrumentality of the State of Queensland through which the Executive Government of the State discharges an important part of its

> governmental functions. It has long been recognized in this Court, as indeed it was recognized by the Constitution itself (see, e.g., s.51(xxxii), (xxxiii) and (xxxiv) and s.102), that the conduct of railways is, as a matter of history, an established and "very large and important part" of government in this country …. Under the Act, the Commissioner is an instrumentality, agent or authority of the Crown in right of Queensland …. While the Act "does of course leave the Commissioner with some discretionary powers, ... in many important respects it subjects him to direct control either by the legislature (e.g., ss.33-35), the Governor in Council (e.g., ss.38, 42A, 71, 75A, 75B and 128) or the Minister (e.g., ss.94, 95, 97)" …All moneys payable to the Commissioner "shall be collected and received by him on account of and shall be paid into the Consolidated Revenue" (s.99). The contracts of the Commissioner are of no force or effect unless and until ratified by the Minister (s.95(1)). The funds of the Commissioner must be appropriated by Parliament from Consolidated Revenue (see, e.g., ss.93,94) and the *Financial Administration and Audit Act 1977 (*Q.) and any other Queensland Act relating to the collection and payment of public moneys and the audit of the public accounts are made generally applicable to the Commissioner and to all employees under the Act (s.99). … , the intention of the Parliament of Queensland as evidenced by the Act was "to transmute a part" of the Government of the State "into the outward form of a corporation as a convenient means of carrying on" a traditional government activity with the result that when the Commissioner is sued, as in the present case, he is "sued as being the emanation by which" the State of Queensland discharges its governmental activities in relation to railways.
>
> 11 As Dixon J pointed out in the *Banking Case* (at p.363), the Constitution sweeps aside the difficulties which might arise in a federation from the traditional distinction between the position of the Sovereign as the representative of the State in a monarchy and the State as a legal person in other forms of government and goes directly to the conceptions of ordinary life. "From beginning to end", his Honour remarked, "(the Constitution) treats the Commonwealth and the States as organizations or institutions of government possessing distinct individualities. Formally they may not be juristic persons, but they are conceived as politically organized bodies having mutual legal relations and amenable to the jurisdiction of courts upon which the responsibility of enforcing the Constitution rests". If, as it must be, the interpretation of s.75 of the Constitution is approached from this point of view, it becomes apparent that the whole subject matter of the proceedings between the plaintiff and the Commissioner in the present case is properly to be seen, for the purposes of s.75(iv), as a matter "between" the plaintiff and the State of Queensland. That subject matter is a claim by the plaintiff against an instrumentality or emanation of the State which is sued in its capacity as such. It arises from the discharge of traditional governmental functions of the State. The burden of any judgment, if the plaintiff's claim should succeed, will fall upon the Consolidated Revenue of the State. The funds involved in resisting the claim must come from that same source. That being so, the legal proceeding by the plaintiff against the Commissioner lies within the original jurisdiction conferred upon the Court by s.75(iv) of the Constitution.[5]

This entity (the State Insurance Regulatory Authority) is both the match and the mirror for the Commissioner for Railways. The management and regulation of road, road usage and the costs of accident incidental to road usage is a core a governmental function as is the provision and management of railways. But over decades the funding for the costs of accidents incidental to road usage has moved from the Consolidate Fund/general revenue (to which it otherwise would default though the (state) hospital system) to a form of user pays or insurance levy. As the plaintiff submitted:

> 60 The plaintiff acknowledges that SIRA is funded through a levy on CTP premiums (and workers compensation premiums and home building activity). However, the cost recovery model of governance is now well established across a variety of fields of government activity.
>
> 61 If the patent office, copyright authorities or the land titles regulators across a variety of Commonwealth and State jurisdictions recovered their costs of operations solely through fees and charges on a user pays basis, then that in no way derogates from the fact that governance and regulation of patents, copyright and land titles remain regulatory activities of government.
>
> 62 s noted above, on the one occasion where the finances of the Nominal Defendant were tested (with the collapse of HIH/FAI/CIC), the NSW Treasury stood behind and financially supported the Nominal Defendant scheme. At the time, the MAA was the Nominal Defendant. Under the MAI Act, SIRA is now the Nominal Defendant.
>
> …
>
> 75 The reality is that SIRA implements NSW government policy. If the government decides that premiums are too high, then SIRA responds by restructuring the motor accidents scheme and cutting benefits. If the government decides that workers compensation premiums are too high or the scheme deficit too large, then SIRA responds by preparing legislation to cut benefits to workers.

The State Insurance Regulatory Authority is funded “off budget” by the scheme to which it is central, manages and regulates, in this context through the third-party insurance premiums. But

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[5] *Crouch v Commissioner for Railways (Qld)* [1985] HCA 69; (5 November 1985) per Mason, Wilson, Brennan, Deane and Dawson JJ.

taking a specific charge off the general revenue is as relevant to the overall revenue/Consolidated Fund as is adding a charge or allowing for a liability to fall by default. The exhibit 1 ministerial direction on 3 May 2018 about third-party insurance premiums highlight the inter-relationship with the public revenue in its express reservation about further determinations:

> The impact of this determination on overall Fund levy collections should be assessed in the half yearly budget review in November 2018, and may be extended by subsequent Ministerial direction.

To that extent, the scheme administered by the State Insurance Regulatory Authority has a direct bearing upon the revenue in the negative; though the establishment of an alternative source of funding which itself is reviewed in the light of the budgetary expectations. There is a clear and direct impact upon the State's general revenue, albeit in the negative, by the sourcing of operational fund from the users of particular system.

The same is true of the dispute resolution service, which removes the cost of litigation (through the courts) from the revenue and brings it within a self-funded administrative system managed by and through the system that the State Insurance Regulatory Authority manages (along with the Personal Injury Commission in various respects).

Absent the legislative and governmental structure managed by the State Insurance Regulatory Authority, the cost would fall directly to the general revenue/State Consolidated Fund, unless of course the Sate vacated the field and left it to private interests alone, which the State expressly has not done. The contribution is in the negative by relieving a part of the burden otherwise upon the Consolidated Fund. But it remains an integral part of the State's governmental function and budgetary structure; and in so doing makes a direct contribution to the State's operations, budgetary and overall revenue position. I reject the defendant's submission that:

> 52 The management of an agency of the NSW government that is largely separate from government, does not contribute to Consolidated Revenue and which performs a function that could be left to a private body or the courts (which used to be the case) is not sufficiently governmental so as to constitute the Nominal Defendant here as being "a State" for Constitutional purposes.

The same governmental function and quality is express in the overlay upon the assessment of compensation though the motor accident guidelines which the State Insurance Regulatory Authority promulgates. They have a direct effect upon quantification and stand as statutory rules under s10.6 of the *Motor Accident Injuries Act 2017 (NSW)*:

> (1) Motor Accident Guidelines are to be published on the NSW legislation website and take effect on the day of that publication or, if a later day is specified in the Guidelines for that purpose, on the day so specified.
>
> (2) Sections 40 (Notice of statutory rules to be tabled) and 41 (Disallowance of statutory rules) of the *Interpretation Act 1987* apply to Motor Accident Guidelines in the same way as those sections apply to statutory rules.

As the plaintiff submitted:

> 20 … section 10.6 of the MAI Act requires that the Motor Accident Guidelines be published on the NSW Parliament website and permits the parliament to disallow those guidelines.

The creation of (quasi-)statutory rules, whatever they may be called or particular status they hold, is governmental function, not a mere private act. In many ways the direct analogy is to a workers' compensation system – quintessentially part of the State of NSW. The defendant, however, is correct in the reply submission that:

> 10 SIRA does make Guidelines pursuant to sections 10.2-10.8 of the MAI Act and various provisions of the MAC Act. Guidelines are not delegated legislation. They are guidelines (*Ali v AAI Limited* (2016) 75 MVR 502 at [85]).
>
> …
>
> … there's no question that the guidelines are not automatically delegated legislation or have the same force and operation as delegated legislation. The fact that they are laid somewhere else or they go somewhere else doesn't change the nature of what we do. …

Quite so. These guidelines are at the pointy end of executive governmental function - not legislative function. They are nonetheless governmental in their nature.

The *Deputy Federal Commissioner of Taxation v State Bank of NSW* is a slightly different class of case, being concerned with s114 of the Constitution. But the principle is the same:

> 3 The parties have agreed upon a statement of facts which may be shortly stated. The State Bank is, and at all material times was, the State of New South Wales for the purposes of s.38(d) of the Judiciary Act 1903 (Cth). However, as will appear, the plaintiff contends that the State Bank is not the State of New South Wales for the purposes of s114 of the Constitution. The State Bank is constituted a corporation pursuant to the State Bank Act 1981 (NSW). It carries on the business of banking in New South Wales and elsewhere. For use in its banking business the State Bank has, for approximately thirty-five years and at all material times, printed various documents, forms and material required for the purposes of its business ("the printed matter"). The printed matter was, after coming into existence, used at all material times by the State Bank in the course of and for the purpose of its business and remained its property. At no time during the relevant periods was any of the printed matter sold to any person, nor did title to it pass to anyone except in so far as some of the printed matter was supplied to the State Building Society Limited and some State Government instrumentalities. The assessments were made on the basis that the printed matter was "goods", that the printing of the matter by the State Bank constituted "manufacture" and that the "goods" so "manufactured" were applied by the State Bank to its own use within the meaning and for the purposes of s17 of the Assessment Act.
>
> ….
>
> 17 … The question is whether the State Bank is a State for the purposes of the section, and there can be no doubt that s114 refers to the polity which is a State within the Australian federation. The constitutional conception of "a State" was explained by Dixon J. in this way. *Bank of NSW v The Commonwealth* [1948] HCA 7; (1948) 76 CLR 1, at p 363, cited with evident approval in *Crouch v Commissioner for Railways (Q)* [1985] HCA 69; (1985) 159 CLR 22, per Gibbs CJ at pp 28-29: …
>
> Although his Honour made these comments in the context of elucidating s.75(iii) and (iv) of the Constitution, they apply with equal force to s114.
>
> …
>
> 19 … The "shield of the Crown" doctrine has evolved as a means of ascertaining whether an agency or instrumentality "represents" the Crown for the purpose of determining whether that agency or instrumentality is bound by a statute enacted by the legislature. The doctrine is in essence an aid to the process of statutory interpretation whereby the courts seek to ascertain the legislative intent of Parliament. Hence it has been said that an agency or instrumentality may be endowed with the attributes of the Crown for one purpose but not for others. Indeed, the legislature could explicitly endow a private corporation carrying on business for private purposes with the privileges and immunities of the Crown, yet that private corporation would not answer the description of "a State" for constitutional purposes. The question which arises here is not to be answered by reference to a doctrine which has evolved with the object of answering questions of a different kind. The question here "depends upon the meaning and operation of an unalterable constitutional provision which the intention of the legislature cannot affect" *Bank of NSW v The Commonwealth* (1948) 76 CLR per Dixon J at p 359.
>
> 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. Such activities have, since the nineteenth century, included the supply on commercial terms of certain types of goods and services by government owned and controlled instrumentalities with independent corporate personalities. Railways are a notable example. As early as 1906, in *The Federated Amalgamated Government Railway and Tramway Service Association v. The New South Wales Railway Traffic Employes Association ("the Railway Servants Case")* (1906) 4 CLR 488, this Court recognized that the railway undertakings of the colonial governments carried on by incorporated Railway Commissioners were instrumentalities of those governments, ibid., per Griffith C.J. at p 535, Likewise, banking activities were conducted by corporations under legislation enacted by the colonial legislatures before federation and the Constitution expressly exempted "State banking", i.e., "banks established and conducted by a State or by an authority established under State law and representing a State": *Melbourne Corporation v. The Commonwealth* [1947] HCA 26; (1947) 74 CLR 31, per Latham CJ at p 52, from the reach of the legislative power with respect to banking conferred by s.51(xiii).
>
> …
>
> 23 In *Inglis v Commonwealth Trading Bank of Australia* [1969] HCA 44; (1969) 119 CLR 334, there was a difference of opinion on the question whether the Commonwealth Trading Bank was "the Commonwealth" or "a person ... being sued on behalf of the Commonwealth" within the meaning of s.75(iii). See the discussion by Gibbs CJ in *Crouch v Commissioner for Railways (Q.)* (1985) 159 CLR at pp 30-31. However, later, in *Maguire v Simpson* [1977] HCA 63; (1977) 139 CLR 362, the Court decided that the Trading Bank was "the Commonwealth" for the purposes of s.64 of the Judiciary Act. That decision established that, in an appropriate

> context, the words "the Commonwealth" are wide enough to include a corporation which is an agency or instrumentality of the Commonwealth. By a like process of reasoning, the words "a State" have a similarly wide meaning. And in *Crouch*, this Court held unanimously that the Commissioner for Railways was an instrumentality of the State of Queensland for the purposes of s.75(iv). The Commissioner was an instrumentality "through which the executive government of the State discharges an important part of its governmental functions", the conduct of railways being, as a matter of history, a "very large and important part" of government in this country, a fact recognized in the Constitution itself (1985) 159 CLR per Mason, Wilson, Brennan, Deane and Dawson JJ. at p 38.
>
> …
>
> 25 There is no reason for drawing a distinction between the reference to "a State" in s.75(iv) and similar references elsewhere in the Constitution where the reference is to a State as a polity and not as a geographical area *Crouc*h, ibid., per Gibbs CJ at p 32. Indeed, the decision in *The Municipal Council of Sydney v The Commonwealth* is direct authority for the proposition that a corporation exercising governmental functions is "a State" for the purposes of s.114. In that case the municipal council, a body corporate, which levied local government rates on property, was held to be the State and its rates were held to be a tax on property for the purposes of that section.
>
> 26 The question then is whether the State Bank is discharging governmental functions for the State or, to put it another way, is the State carrying on banking through its statutory corporation, the State Bank. The unanimous decision in *State Bank of NSW v Commonwealth Savings Bank of Australia* [1986] HCA 62; (1986) 161 CLR 639 is decisive of that question. There the Court held that an action by the State Bank was a suit by "a State" for the purposes of s.38(d) of the Judiciary Act. In the course of reasoning to that conclusion, the Court, after considering in detail the relevant provisions of the State Bank Act, which have not been amended in any substantial respect, held that "the State carries on banking through its statutory corporation, the Bank, and that it necessarily follows that the Bank is for this purpose the State of New South Wales" ibid., at p 652.[6]

Applying analogous reasoning here the question then is whether the State Insurance Regulatory Authority is discharging governmental functions for the State or, to put it another way, is the State carrying on management and regulation of motor vehicle accident and building scheme and insurance (particular third-party insurance) and accident compensatory functions through its statutory corporation, the State Insurance Regulatory Authority. Framed that way, the question must produce a resoundingly affirmative answer.

The plaintiff submitted that:

> 43 … the ratio of both *Crouch* and the *State Bank* case is that the State can carry out its governance function through a variety of instruments including through traditional Departments of State, corporations, authorities and agencies. The concept of *"the State"* extends to governmental instrumentalities in all their varied forms.
>
> 44 Further, there is not to be any restriction or division between instrumentalities carrying out the business of government as between *"traditional and inalienable functions"* and any other activities undertaken by the State as part of the executive functions of government. If a state government entity is engaged in carrying out the executive functions of government, whether longstanding or newly adopted, then it is, for the purposes of Section 75 of the Constitution, part of the State.
>
> 45 The plaintiff submits that SIRA is carrying out the executive functions of government. The defendant is challenged to produce and rely upon an affidavit from the Minister or the Chair of the SIRA Board or the SIRA CEO stating that SIRA is not engaged in carrying out executive functions of the NSW government.

It is difficult to resist the logic of that submission. The range of government functions has changed over the centuries, as has the way in which government is delivered. But change its dress as it may, a government function or service is still that when it is delivered though a corporate structure with a user pays element rather than a general call upon the public revenue.

It is largely irrelevant that motor vehicle accident insurance schemes are relatively recent in the scale of governmental functions. The same is true of motor vehicles themselves if one takes the longer view and recalls the emergence of first mass production vehicles with the model T Ford. As the plaintiff submitted:

> 79 Although mandatory CTP insurance was *"only"* established in 1945, the Government Insurance Office was set up in 1927 by the *Government Insurance Act* to provide workers compensation insurance and to take over workers compensation activities previously carried out by the NSW Treasury Insurance Branch.

The internet is an infant in governmental terms. But that does not make its supply or regulation any less of a governmental function. The world moves on and the range of matters properly

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[6] *Deputy Federal Commissioner of Taxation v State Bank of NSW* [1992] HCA 6 (25 February 1992)

within the scope of government changes. The question is whether the function is governmental – not its antiquity. As the plaintiff submitted:

> 86 The NSW Parliament has determined (as have governments in every other state and territory in Australia and various governments across the world) to introduce a mandatory and regulated system of workers compensation insurance and a mandatory and regulated system of compulsory third party insurance. The State of New South Wales sets comprehensive rules and regulations in relation to the operation of these mandatory schemes. The State effectively sets the premiums for CTP greenslips (through approval of insurer premium filings) and regularly adjusts the benefits available to motor accident victims in order to deliver the premiums that the State determines acceptable.
>
> 87 The statutory CTP and workers compensation schemes are government created and controlled schemes. The regulation of these schemes is a function of governance.

That was so self-evident when the Victorian Transport Accident Commission came before the High Court in *Sweedman v Transport Accident Commission* that it effectively passed without the need for consideration.[7]

The defendant relied upon *SGH Ltd v Commissioner of Taxation* to negate the contention that the State Insurance Regulatory Authority was part of the government of NSW.[8] There are some significant points of differentiation. In that case the structure was very different, although again the case was about property. As the High Court then said:

> 9 Section 114 speaks of one polity (in this case the Commonwealth) imposing "any tax on property of any kind belonging to" another polity (here, the State). At least three kinds of issue may arise. First, what is meant by "tax on property"? That requires consideration of what constitutes a tax and what constitutes a tax *on* property. Secondly, what is meant by "property ... belonging to" a State? Thirdly, how is "State" to be understood? The question, whether SGH is the "State" for the purposes of s 114, focuses upon the third of the issues we have identified. Nevertheless, it is essential to bear in mind the context in which the question arises - a context which requires identification of a connection between a tax and property (a tax *on* property) and a connection between the property and a "State" (property *belonging to* a State).
>
> 10 The property which was said to be taxed in this case was money received by SGH. That is, the property in question was property received by, and held in the name of, SGH. Is SGH to be treated as the relevant polity (the State of Queensland), or an "emanation" of the State, or an "agency" or "instrumentality" of the State? (It is not necessary, in this case, to consider whether, or when, it is apt to use these last three terms.)
>
> …
>
> 16 In considering whether an entity, in whose name property said to belong to a State is held, falls within the description "the State" in s114, it is, no doubt, relevant to consider the activities undertaken by that entity. Similarly, it will be relevant, and usually very important, to identify the legal relationship between the entity and the executive government of the State and to identify what rights or powers the executive government of the State has over the use and disposal of the property in question. Not only will those inquiries be necessary for the purpose of deciding whether the property *belongs* to "the State", they will also bear upon whether the entity in whose name the property stands is properly regarded as the State. Adopting what was said in the *State Bank Case*:
>
> > "[t]he question then is whether [in this case, SGH] is discharging governmental functions for the State or, to put it another way, is the State carrying on [the relevant business] through its statutory corporation".
>
> It is convenient to begin the examination of the relationship between SGH and the State by considering the circumstances in which SGH was formed.
>
> …
>
> 22 …whether SGH was "the State" requires demonstration of more than government policy favouring or facilitating the creation of the entity in pursuit of some aspect of the public interest. No doubt it requires consideration of the circumstances and purposes of the entity's creation, but it also requires consideration of every feature of the entity which bears upon its relationship with the polity. That is why cases about s114 have focused upon the ownership and management of the entity and the purposes the entity was required to pursue. It is those features which will most often reveal the relationship the entity has with the State, and if it is revealed by examination of them that the entity is wholly owned and controlled by the State concerned, and must act solely in the interests of the State, the conclusion that it is the State or, as was said in *Inglis v Commonwealth Trading Bank of Australia*, an "emanation" of the State will readily follow. We turn, therefore, to consider the ownership and management of SGH.
>
> Ownership and management

[7] *Sweedman v Transport Accident Commission* [2006] HCA 8 (9 March 2006).
[8] *SGH Ltd v Commissioner of Taxation* [2002] HCA 18 (1 May 2002).

> 23 To understand the structure of the ownership and management of SGH, it is necessary to say something about the State Government Insurance Office (Queensland). That entity was established as a statutory corporation under *The State Government Insurance Office (Queensland) Act 1960* (Q). The Act provided that the corporation represented the Crown and that due performance by the corporation of all contracts entered into by it, or on its behalf, was deemed to be guaranteed by the Crown. By s7 of the *Suncorp Insurance and Finance Act 1985* (Q), the corporation was continued in existence under the name "Suncorp Insurance and Finance" ("Suncorp"). This Act provides that Suncorp represents the Crown and has all the immunities, rights and privileges of the Crown. The parties agreed that Suncorp "is the State for the purposes of s 114" of the Constitution.
>
> 24 Suncorp controlled the organs of management of SGH. It appointed three of the six directors and could nominate both the Chairman and the Deputy Chairman of the board. The rules governing voting at directors' meetings enabled Suncorp's nominees to carry any motion they proposed.[9]

In this context, State Insurance Regulatory Authority is analogous to State Government Insurance Office (Queensland) which was part of the State of Queensland:

> ROBINSON: At the top of p 53, Suncorp started out life as the State Government Insurance Office, SGIO. Do you see the top line on p 53 - and then SGIO represented the Crown and so on.
>
> HER HONOUR: That's the statutory corporation.
>
> ROBINSON: Yes, and it was continued in existence under the Suncorp Insurance and Finance Act 1985 under the name Suncorp Insurance and Finance.
>
> HER HONOUR: That is the thing that in para 23 is the state.
>
> ROBINSON: That's is the state and it is the owner of the entity that the High Court determined was not the state.

The State Insurance Regulatory Authority is analogous to the SGIO/Suncorp rather than to the lesser entity that the SGIO created and controlled (SGH). If anything, SGH is analogous to one of the non-state entities (such as the insurers) regulated and licensed by the SIRA. As the plaintiff submitted:

> 71 ….the whole ratio of the High Court determination in the *SGH* case was that the board were obliged to act to protect depositors above and beyond any obligations to the Queensland government. The board truly had independent obligations. There are no comparable mandatory obligations on the SIRA Board to protect any interests other than the State's.

I find nothing in the reasoning in *SGH Ltd v Commissioner of Taxation* to negate the contention that the State Insurance Regulatory Authority was part of the government of NSW.[10] That case concerned a very different factual situation with virtually no analogy to the entity in issue here.

Despite the user pays structure applied to the collection and management of the compulsory "contributions" under the statutory structure, the structure, function and ownership and management of the State Insurance Regulatory Authority and the purposes it is required to pursue reveal its integral relationship with the State of NSW. Putting aside that a compulsory contribution is a tax by another name (albeit one focussed specifically), the State Insurance Regulatory Authority is effectively wholly owned and controlled by the State of NSW and set upon functions that are exclusively governmental in nature (and in large part regulatory).

Although the State Insurance Regulatory Authority collects its funds ("contributions") from elsewhere, those who pay gain no particular interest; no control and no paramountcy over the State. Although the State Insurance Regulatory Authority has specific duties to particular classes of people in the discharge of particular functions; they also gain no particular interest; no control; and no paramountcy over the State. The State Insurance Regulatory Authority is an instrumentality through which the NSW executive government discharges an important part of its governmental functions. The overall picture is of an entity that must act solely in the interests of the State of NSW, such that it is an "emanation" of the State.

I find that the State Insurance Regulatory Authority is part of the State of NSW.

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[9] *SGH Ltd v Commissioner of Taxation* [2002] HCA 18 (1 May 2002) footnotes omitted.
[10] *SGH Ltd v Commissioner of Taxation* [2002] HCA 18 (1 May 2002).

Grant of leave

The only relevant issue concerns s26(3)(b) of the *Personal Injury Commission Act 2020 (NSW)*:

> HER HONOUR: Can we just deal with it in terms of the jurisdiction of this Court, which is not abstracted and not declaratory? I am required to either be satisfied or not be satisfied that the elements of 26(3)(a), (b) and (c) are made out; is that right?
>
> ROBINSON: Yes, your Honour. Correct.
>
> HER HONOUR: Where there's no controversy about (a) and (c). Is that correct?
>
> ROBINSON: None at all.
>
> …
>
> HER HONOUR: If I'm not satisfied that 26(3)(b) obtains, what would the defendant have me do?
>
> ROBINSON: Dismiss the proceedings, your Honour. If it's not satisfied, it would be appropriate for an order instead to be made under 26(5)(a), which is just to remit it.

I find for the purposes of s26(3) of the *Personal Injury Commission Act 2020 (NSW)* that the determination of the matter by the usual decision-maker would involve an exercise of federal jurisdiction.

That being so, where the parties are otherwise agreed on the criteria in s26(3)(a) and (c) of the *Personal Injury Commission Act 2020 (NSW)*, I am satisfied, that all the three criteria in s26(3) of the *Personal Injury Commission Act 2020 (NSW)* are met.

That being so the Court's discretion is enlivened under s26(3) of the *Personal Injury Commission Act 2020 (NSW)* and it is appropriate to grant the leave sought by the plaintiff.

I grant leave under s26 of the *Personal Injury Commission Act 2020 (NSW)* for the compensation matter application to be made to the Court.

Orders

Section 27 of the *Personal Injury Commission Act 2020 (NSW)* provides that:

> (1) If the District Court grants leave for a compensation matter application to be made to it instead of the President or Commission—
>
> (a) proceedings for the determination of the application ("***substituted proceedings***") are taken to have been commenced in the Court on the day on which the application was first made, and
>
> (b) the Court may make such orders (including in relation to the usual decision-maker) as it considers appropriate to facilitate its determination of the application.
>
> (2) Subsection (1) applies despite any limitation period under the *Limitation Act 1969* or any enabling legislation that applies to the application concerned provided it was first lodged for exercise by the usual decision-maker before the expiry of the period.
>
> (3) The District Court has, and may exercise, all of the jurisdiction and functions in relation to the substituted proceedings that the usual decision-maker would have had if they could exercise federal jurisdiction, including jurisdiction and functions conferred or imposed by or under this Act, enabling legislation or any other legislation.
>
> (4) Without limiting subsection (3), the District Court may—
>
> (a) order that a medical assessment or merit review required by or under enabling legislation (or a review or appeal against the assessment or merit review) be carried out for the Court by a medical assessor, merit reviewer or panel specified by the Court, and
>
> (b) make any other orders it thinks fit to facilitate the carrying out of the medical assessment, merit review or the review or appeal before the panel (including with respect to the issuing of certificates), and
>
> (c) adopt (whether with or without variation), or refuse to adopt, the decision of the medical assessor, merit reviewer or panel as the Court sees fit.
>
> (5) A decision adopted by the Court (whether with or without variation) has effect as a decision of the Court in respect of the matter concerned.
>
> (6) This section has effect subject to the provisions specified by section 28.

Notwithstanding the rather strange use/placement of the word "instead" in s 27(1) of the *Personal Injury Commission Act 2020 (NSW)*, the parties are agreed on the orders in the event

of my finding that the State Insurance Regulatory Authority is part of the State of NSW so as to trigger federal jurisdiction.

There are some difficulties with the content of the certificate already issued by the Personal Injury Commission that go beyond the mere matter of jurisdiction. The parties are agreed (if there be a jurisdictional issue) that the process should start afresh.

> ROBINSON: We don't cavil with the fact that it has to go, and the PIC when it is referred back, if your Honour finds federal jurisdiction is invoked, will also fall on its sword as it were, because it would have a fresh referral from the District Court. …

I make the following further orders:

1. I remit the minor injury dispute (and any consequential review rights provided for in the *Personal Injury Commission Act 2020 (NSW)*) for determination commencing with a fresh determination of the minor injury dispute by a usual decision-maker at the Personal Injury Commission other than any decision maker who had previously had any involvement (including in that exclusion the decision-maker who issued a certificate on 30 March 2021).
2. I direct that the Personal Injury Commission determine the minor injury dispute in accordance with its usual rules and practices.
3. I direct both parties to participate in the minor injury dispute in accordance with the usual rules and practices of the Personal Injury Commission.
4. I direct the Personal Injury Commission to report to the District Court on the Commission's determination of the minor injury dispute in accordance with the usual rules and practices of the Personal Injury Commission
5. I grant leave to the parties joint and several to file any motion appropriate for the adoption (whether with or without variation), or refusal to adopt, the decision/determination of the Personal Injury Commission.
6. I give the parties jointly and severally liberty to restore the matter to the District Court's general list on three (3) days' notice.
7. I stand the matter into the District Court's "not ready" list, subject to a listing for mention before the List Judge on Thursday, 7 July 2022 if the matter has not otherwise been restored to the list.

The absence of the Personal Injury Commission from this litigation

The Personal Injury Commission was not named on the summons or amended summons; and is not a party to these proceedings.

The plaintiff informed the Personal Injury Commission of the litigation. The Personal Injury Commission advised the plaintiff's solicitor on 25 October 2021 that the Personal Injury Commission did "not seek to take a role in the determination of the summons" (exhibit B); and it did not.

The position of the Personal Injury Commission in this litigation is complex. The Personal Injury Commission is not joined; and it not a party. That raises complexity given the above orders.

The defendant hedged its bets in that respect, saying both that the Personal Injury Commission should have been joined and that it did not greatly matter:

> HER HONOUR: You [the plaintiff] obviously don't think they have to be here, but does the defendant say they have to be here?
>
> ROBINSON: Yes, we do, your Honour, but we're content with the process that's been--
>
> HER HONOUR: They've been served and chosen not to play. That's fine, isn't it?

ROBINSON: Indeed. It's only if we go somewhere else and they say, "Why didn't you join the PIC?"

…

ROBINSON: They can't be bound by orders that this Court sends to them to say, "You are bound to make a decision of minor injury," and in some cases it's envisaged by the diversity jurisdiction provisions of the PIC Act for the Court to say, "You must do what you do in a particular way."

It remains an open question as to whether this judgment is of any significance to the non-party.

No other state or entity intervened in the proceedings although the defendant by email served a notice pursuant to s78B of the *Judiciary Act 1903 (Cth)* in respect of this matter upon each of the Attorneys-General of the States, the Commonwealth and Territories (exhibit 2).

Costs

The parties are agreed on the costs orders and the agreed basis that the nature of the matter is exceptional, and it would result in substantial injustice if the regulated costs were applied.

Pursuant to s8.6(1) of the *Motor Accident Injuries Act 2017 (NSW),* I order that the defendant:

- pay the plaintiff's costs on a party/party basis as agreed or assessed, and
- is permitted to pay its own legal representatives on a solicitor/client basis.

I grant liberty to apply generally so far is appropriate to secure appropriate mechanical or ancillary orders.

I return exhibits.

I publish my reasons.

S J Gibb DCJ

Summons filed 27 April 2021. Amended Summons filed 29 April 2021. The defendant appeared on 6 May 2021
Heard in Sydney: on 17 October 2021 - JMT 16B
Both parties provided written submission, with joint submission on costs.

Counsel for the plaintiff/cross-defendant	Mr AJ Stone SC with Mr GJ Young
Instructed by:	Slater & Gordon Lawyers (Ms G Henderson/Mr Lopes)
Counsel for the defendant/cross-claimant	Mr M Robinson SC with Ms J Gumbert
Instructed by:	McCabe Curwood (Mr P Hunt)

I certify that this and the preceding 24 pages are a true copy of the reasons for judgment herein of Her Honour Judge Gibb

associate to Judge Gibb, Friday, 5 November 2021