

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. M52 of 2013

BETWEEN:

WINGFOOT AUSTRALIA PARTNERS PTY
LTD and GOODYEAR TYRES PTY LTD

Appellants

-and-

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EYUP KOCAK

First Respondent

-and-

DR PETER LOWTHIAN (as
Convenor of Medical Panels pursuant
to the provisions of the *Accident Compensation
Act 1985*)

Second Respondent

-and-

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MEDICAL PANEL (Constituted by
Dr Stephen Jensen, Mr. Kevin Siu and
Mr. John Bourke)

Third Respondent

SECOND AND THIRD RESPONDENTS' SUBMISSIONS

Part I: Certification for publication on the internet

1. The second and third respondents certify that these submissions are in a form suitable for publication on the internet.

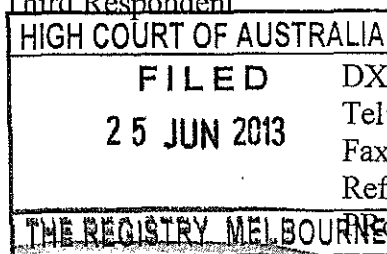
Part II: Concise statement of the issues the appeal presents

30 2. The second and third respondents make no substantive argument. They submit to any order the court should make save as to costs.

3. They appear to inform the Court, only should the need arise, as to

Filed on behalf of the Second & Third Respondent

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the powers and procedures of the Medical Panel¹, *R v Australian Broadcasting Tribunal; Ex parte Hardiman*².

Part III: Section 78B of the *Judiciary Act* 1903

4. The second and third respondents do not consider that a notice should be given under s. 78B of the *Judiciary Act* 1903 (Cwth).

Part IV: Relevant facts:

5. The matters set out in Part V of the appellant's submission adequately state the relevant facts.

Part V: Applicable statute

- 10 6. In addition to the legislative materials set out in Annexures A to C of the applicants' submission the further material set out in the Annexure attached is relevant.

Part VI: Argument

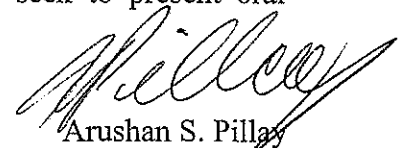
7. The second and third respondents repeat the matters set out at paragraphs 2 and 3 above.

Part VII: Notice of Contention or Cross Appeal

8. Not applicable.

Part VIII: Oral argument

- 20 9. The second and third respondents do not seek to present oral argument.



Arushan S. Pillay
Joan Rosanove Chambers

Tel (03) 9225 6911

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Dated: 25 June 2013

¹ Convenor's Directions as to the Arrangement of Business and as to the Procedures of Medical Panels *Accident Compensation Act* 1985 2008.

² *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 35-36.

Annexure to the Second and Third Respondents' Submission

Convenor's Directions As To The Arrangement Of Business And As To The Procedures Of Medical Panels *Accident Compensation Act 1985 2008*.

**CONVENOR'S DIRECTIONS AS TO THE
ARRANGEMENT OF BUSINESS AND AS TO THE
PROCEDURES OF MEDICAL PANELS
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(These Convenor's Directions replace the previous Convenor's Directions that were issued on 1 September 2006)

Introduction

1. These are directions as to the arrangement of the business, and as to the procedures, of Medical Panels established under Division 3 of Part III of the *Accident Compensation Act* 1985. They are given under section 65(7) and section 65(9) of the Act.
2. Sub-sections (7), (8), (8A) & (9) of section 65 provide as follows:

"65. Procedures and powers

- (7) The Convenor may give directions as to the arrangement of the business of the Panels.
- (8) The Minister may for the purposes of-
 - (a) ensuring procedural fairness in the procedures of the Medical Panels; and
 - (b) facilitating the proper administration of the Medical Panels-issue guidelines as to the procedures of Medical Panels.
- (8A) The Minister must consult with the Attorney-General before issuing any guidelines under this section.

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- (9) The Convenor may give directions as to the procedures of the Panels but may not give directions inconsistent with any guidelines issued by the Minister.”
3. At the date of these directions, no guidelines have been issued by the Minister under section 65(8).

Purpose and objectives

4. The purpose of these directions is to define the procedures to ensure Medical Panels provide opinions on medical questions that are of real assistance in the resolution of medical questions arising in relation to WorkCover claims.
5. To fulfil this purpose, these directions aim to facilitate:-
- (a) referrals on questions that are clear “medical questions” as defined in section 5(1) of the Act;
 - (b) opinions of Medical Panels that are responsive and pertinent as answers to the questions referred; and
 - (c) a process by which opinions are produced in a manner that is efficient and transparently thorough and fair.

Convenor and Convenor's office

6. Sub-sections (2) & (3) of sections 63 provide:-

“63. *Establishment and constitution*

- (2) For the purpose of constituting Panels, there is to be a list of members consisting of medical practitioners appointed by the Governor in Council.
- (3) From the list of members under sub-section(2) the Minister-
 - (a) must appoint a Convenor; and
 - (b) may appoint a Deputy Convenor.”

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7. Sub-section (10) of section 63 of the Act provides:-

“(10) The [Victorian WorkCover] Authority must appoint such officers and employees as are necessary for the proper functioning of Medical Panels.”

Receipt of referrals

8. The Convenor will examine each referral and if a question is not clear in its meaning or is not a statutory medical question appropriate to be determined by a Medical Panel, the Convenor will not convene a Panel to address the question, until he consults the person or body making the referral with a view to that person or body clarifying or amending the question/s.
9. The Convenor will endeavour to ensure that all parties concerned have been or will be provided with a copy of the referral and all supporting documents received from the referring body.

Information and documents relating to the medical question

10. Sub-sections (6A) & (6B) of section 65 provide:-

“65. Procedures and powers

(6A) A person or body referring a medical question to a Medical Panel must submit a document to the Medical Panel specifying –

- (a) the injury or alleged injury to, or in respect of, which the medical question relates;
- (b) the facts or questions of fact relevant to the medical question which the person or body is satisfied have been agreed and those facts or questions that are in dispute.

(6B) A person or body referring a medical question to a Medical Panel must submit copies of all documents relating to the medical question in the possession of that person or body to the Medical Panel.”

11. If the document referred to in section 65(6A) is not received with the referral the Convenor will request the document from the referring party or body and will not convene a Medical Panel until the document is received.

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12. If a party advises the Convenor that he/she or it considers the person or body referring a medical question to a Medical Panel has not submitted copies of particular documents relating to the medical question which are in the referring party's or body's possession, the Convenor may, but is not obliged to obtain copies of such documents, but will if the nominated Medical Panel decides that the particular documents are necessary for its deliberations. (See clause 31)

Further information

13. The Convenor may, before convening a Panel in relation to a particular referral, seek such further information and/or advice that the Convenor considers necessary or desirable for the proper consideration of the medical question by a Medical Panel.
14. The Convenor will advise all parties in writing of the further information and/or advice that he receives in relation to that particular referral.

Convening a Medical Panel

15. On receipt of a valid referral, the Convenor will convene a Medical Panel that he considers appropriate in specialty and number for the consideration of the nature of the medical issues raised by the referral and if there be more than one member, he will nominate one as a presiding member.
16. The Convenor will comply with the "Medical Panels Conflict of Interest Policy" and the "Procedures for Managing Conflict of Interest in the Appointment of Medical Panels" which include the following:
- A procedure for ensuring that any proposed member of a particular Medical Panel or consultant has never treated or examined the claimant or been engaged to treat or examine the claimant (otherwise than in his or her capacity as a member of a Medical Panel or as a consultant to a Medical Panel).¹
 - A requirement for a proposed member of a particular Medical Panel or consultant to make a "Statement of Interest" (which includes provision for a statement of no interest) in relation to the parties to a particular referral.
 - A procedure for the replacement of a panellist or consultant when a statement of an interest is made and for the appropriate notification of the parties.

¹ Section 63(5) ACA 1985

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- A procedure for the replacement of a panellist or consultant if the Convenor or the Deputy Convenor agree there is a reasonably perceived conflict of interest or a reasonable apprehension of bias regarding a particular panellist or consultant, when a complaint of a perception of a conflict of interest or an apprehension of bias is received from a party to a particular referral and for the appropriate notification of the parties.
 - A provision for the parties to a referral to agree that a particular eligible panellist can be a member of a particular Medical Panel when he/she has a perceived or potential conflict of interest, because there is no other suitably qualified eligible panellist without a perceived or potential conflict of interest.
17. The Convenor will send to each proposed member of a particular Panel a notice of appointment and a copy of the referral and all supporting documents, including any additional information obtained by the Convenor and, where appropriate, details of any preliminary advice obtained in relation to the referral.

Medical Panel procedures

18. The Act provides –
- that a Medical Panel must act informally and may inform itself on any relevant matter in any way it thinks fit;²
 - that a Medical Panel may ask the worker to meet with the Panel in order to submit to an examination and/or a medical examination/s to answer questions, and to supply copies of all relevant documents in the worker's possession;³ and
 - that a Medical Panel may, if the worker consents, request the provider of any "medical service" who has examined the worker to meet with the Panel to answer questions, and to supply relevant documents to the Panel;⁴ However, the worker must be advised that he/she is not obliged to consent. ("medical service" is defined in the Act, and includes services by medical practitioners, psychologists, physiotherapists, optometrists, dentists, chiropractors, osteopaths and chiropodists.)⁵ and

² Section 65(1)&(2)

³ Section 65(5)

⁴ Section 65(6)

⁵ Section 3(1)

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- that a Medical Panel must act as speedily as a proper consideration of the matter allows;⁶ and that a Medical Panel must form its opinion within 60 days of the referral, unless an extension of time is agreed by the referrer⁷ and provide a written opinion within 7 days of forming its opinion.⁸
19. The presiding member of a nominated Medical Panel will facilitate consultation between the members with a view to establishing:-
- the number of examinations that are necessary, and which members of the Panel should be present;
 - whether or not the Panel needs any clarification, or further clarification, of the meaning of a medical question contained in the referral;
 - generally whether any further information, or advice, is needed; and
 - when, and by what means, the Panel will confer to form its opinion --
- and the presiding member should advise the Convenor of the outcome of this consultation.
20. The Convenor will, at the request of the Medical Panel, arrange such examinations as are considered appropriate by the Panel. The Convenor will also arrange for professional interpreter services when required or requested by the worker.
21. The Convenor will notify the worker of the examination appointments, and will ensure that the notification is accompanied by:-
- an information booklet relating to Medical Panels (which explains, amongst other things, the procedures of Medical Panels and the legal status of opinions);
 - a list of all relevant documents in the Panel's possession;
 - a request (except in relation to a referral received from a Court) that the worker supply to the Convenor, for distribution to the Medical Panel, copies of any additional documents in the worker's possession (including documents in the possession of the worker's legal representative) that relate to the medical question(s) referred; and
 - advice as to the possible implications of a failure to attend a Medical Panel appointment or a failure to supply documents or answer questions.

⁶ Section 65(2)

⁷ Section 68(1)

⁸ Section 68(3)

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22. The Convenor will advise the referring party and the other parties of the examination appointments and send confirmation of all appointments to each member of the Medical Panel.
23. The Act provides that a worker's attendance for examination must be in private, unless the Panel considers that it is necessary for another person to be present.⁹ However, unless the examination involves only a psychiatric examination, a Panel may allow a family member or friend to attend during an examination to support or assist the worker to undress/dress, but any such person will not be allowed to speak on the worker's behalf or act as an interpreter. The Panel can require that person to leave the examination if the Panel considers he/she is intruding into the examination.
24. If a surveillance videotape or DVD has been provided, the Panel will view the videotape or DVD in the presence of the worker and seek comments of the worker in relation to the content. If the worker has previously seen the videotape or DVD, then the Panel may note the worker's comment and it is not required to view the videotape or DVD in the presence of the worker unless it considers clarification is required. The Panel may request the Convenor to arrange for a worker to view a videotape or DVD prior to the examination.
25. Where a member/s of a Medical Panel examining a worker is aware or becomes aware of any information, circumstance or consideration, that is contrary to anything the worker says to the member/s, the member/s should inform the worker of the matter and invite the worker to make any desired comment on it within a specified time and, subject to statutory time-limits, the Medical Panel's opinion should not be concluded until such comment has been received or the specified time has expired, as the case may be. The worker's comment should be taken into consideration by the member/s.
26. Each member of the Medical Panel should make and retain such notes of the history taken from the worker, of the findings on clinical examination and of any test results obtained that he or she, in consultation with any other Panel members, considers desirable for the purpose of addressing the medical question.
27. If the Medical Panel considers a worksite inspection is necessary, it will only be undertaken with the consent of the employer. The Panel will invite the worker to attend. The Panel may proceed with the inspection whether or not the worker attends.

⁹ Section 65(4)

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28. During a worksite inspection, the Panel should not converse with any person other than the worker, save and except for matters relevant to the inspection, and should only converse with other persons in the presence of the worker, if he/she is present at the worksite inspection. Where the worker does not attend the inspection or declines to be present for any relevant conversation and where any statement or information adverse to the worker's position relevant to the medical question(s) is made or provided to the Panel in the course of the worksite inspection, the Panel should communicate the statement or information to the worker and the worker should be invited to make any desired comment on it within a specified time and, subject to statutory time-limits, the Medical Panel's opinion should not be concluded until such comment has been received or the specified time has expired, as the case may be.
29. If a party to the referral submits copies of a written submission and/or further documents after receipt of the initial referral, the Panel will record receipt of those documents and provide copies to the other parties, except in the case of a referral from a Court, where the submission and/or documents will not be recorded or viewed by the Panel unless approved by the Court. If a videotape or DVD is submitted after receipt of the initial referral it will be managed in accordance with the procedure set out in clause 24, except in the case of a referral from a Court, where the videotape or DVD will not be viewed or recorded by the Panel unless approved by the Court.
30. If a written submission is received from a party to the referral after receipt of the initial referral, the Panel will request the Convenor to forward a copy to the other parties requesting any comment or submission in response be provided to the Panel within 14 days.
31. If a worker advises the Medical Panel that he/she considers the person or body referring the medical question to the Medical Panel (except in the case of a referral from a Court) has not submitted copies of particular documents relating to the medical question which are in the referring party's or body's possession, the Medical Panel must decide whether such documents are necessary for its deliberations and, if so, request the Convenor to obtain copies of such documents from the referring party or body within a specified time frame and the Panel will not issue its Certificate of Opinion until after the copies of the documents are received or notification is received that the documents do not exist.

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32. The Medical Panel may, where necessary, obtain advice from a suitably qualified and experienced person who is engaged as a consultant –(for example: from a further medical practitioner, where the Panel already consists of the statutory maximum number of members; or, in an appropriate case, from an allied health professional, vocational or industrial psychologist or a provider of occupational rehabilitation services).¹⁰
33. If the Panel considers a consultant should examine the worker, then the Panel should arrange for the consultant to examine the worker with a Panel member, where possible.
34. Advice received from a consultant will be considered by the Panel, in reaching its opinion and noted in the Reasons for Opinion.
35. If, during the course of its examination/s, the Panel becomes aware of a matter which has not been canvassed in the referral documents or submissions and the matter is integral to the Panel's deliberations, the Panel will inform the worker of this fact and request the Convenor to write to the parties informing them of the matter and request them to respond within a specified time limit. The Medical Panel's opinion should not be concluded until all responses have been received or the time limit has expired.
36. Where a worker unreasonably does not attend an examination by the Medical Panel or a medical examination by a member/s of the Panel, or hinders an examination or refuses to answer questions, the presiding member will notify the Convenor. The Convenor may write to the worker seeking an explanation of his/her actions and give him/her the opportunity to rectify his/her failure to attend and/or answer questions or of his/her hindrance to the Panel's examination.¹¹ If the worker continues to unreasonably fail to attend and/or answer questions and/or hinder the Panel's examination, the Panel will issue a Certificate of Opinion that it is unable to give an opinion in answer to the medical questions.

Certificate of Opinion and Reasons for Opinion

37. Where there is more than one member of the Medical Panel, the members should confer or consult with each other to form the Panel's opinion on each medical question contained in the referral. The presiding member should coordinate the process of conferring or consulting. If there is a disagreement between the members of the Panel on the answer to a medical question, the Panel shall decide how it resolves the deadlock.

¹⁰ Section 65(1)

¹¹ Section 67(4)

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38. In reaching its opinion, the Panel may seek any advice as it deems fit from the advisers or legal advisers appointed by the Convenor for its assistance.
39. After the Medical Panel has formed its opinion on each medical question, the presiding member should prepare, and circulate to any other Panel members, a draft certificate of opinion and draft written reasons, in the form similar to that set out in SCHEDULE 1 and SCHEDULE 2 respectively, for settling. Once so settled by the Panel, the Certificate of Opinion and Reasons for Opinion are to be forwarded to the Convenor for sending to the referrer. The Panel should also forward to the Convenor copies of any relevant documents obtained or received by the Panel additional to those provided to it by the Convenor.
40. The Convenor will ensure that the Certificate of Opinion and the Reasons for Opinion are in the appropriate form and that the medical questions have been answered. In performance of this task, the Convenor will commonly seek advice from the advisers or legal advisers he has appointed for the Panel's assistance.
41. If the Convenor believes there is any deficiency in relation to the form of the answers to the Medical Questions on the face of the Certificate of Opinion or the Reasons for Opinion are not clear then he will communicate his concerns to the presiding member of the Medical Panel.
42. On receiving details of the concerns of the Convenor, the presiding member will communicate with the other Panel members with a view to deciding whether or not to take any further action in relation to the opinion and the reasons, and to redrafting Certificate of Opinion and/or Reasons for Opinion.
43. After the Panel resolves the concerns over the form of the Certificate of Opinion and/or the clarity of the Reasons for Opinion, the presiding member will forward the final signed documents to the Convenor.
44. On receiving the final signed Certificate of Opinion and final signed Reasons for Opinion from a Medical Panel, the Convenor will forward the Certificate of Opinion to the referrer. Where the referral was received from the Victorian WorkCover Authority, a WorkCover Agent or a Self-Insurer, a copy of the Certificate of Opinion will also be forwarded to the worker.

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45. On written request from a relevant party made within the timeframe set out in the Administrative Law Act 1978, the Convenor will also provide a copy of the written Reasons for Opinion.

**DR PETER LOWTHIAN
MBBS(Hons), FRACP, FAFRM**

CONVENOR OF MEDICAL PANELS

Date: 1 March 2008

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Schedule 1

CERTIFICATE OF OPINION

Re: [Worker's Name]

Medical Panel Ref. No: M / .

The Medical Panel formed its opinion in response to a referral from Judge/ Magistrate/ Conciliation Officer/ WorkCover Agent/ VWA/ Self-Insurer on [date], pursuant to s.45(1)(b) (court), s.56(6) (conciliation), s.104B(9) (VWA / WorkCover Agent/ Self-Insurer), s.93CD(4)(b) (VWA / WorkCover Agent / Self-Insurer) of the *Accident Compensation Act 1985*.

The Panel comprised the following members:

Dr One
Dr Two
Dr Three

[The Panel consulted with Dr..... (specialty) prior to forming its opinion.]

As Presiding Member of this Panel, I have discussed the answers herein with the other Panel Member(s) and this is the opinion of the Panel on the medical questions set out below.

1. Text of question one?

Answer to question one.

2. Text of question two?

Answer to question two.

Dr. One (Presiding Member)
For and on behalf of the Medical Panel

Date:

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Schedule 2.

REASONS FOR OPINION

Re: [worker's name]

Medical Panel Ref. No: M /

1. The referral to the Medical Panel was received on [date]. The documents considered by the Panel are described in Enclosure A.
2. The worker was examined by the Panel members [and Consultant/s] on the following dates:

Member:	Specialty:	Examination:
Dr. One	Specialty One	date month year
Dr. Two	Specialty Two	date month year
Dr. Three	Specialty Three	date month year
Consultant:	Specialty:	Examination:
Dr/Mr/Ms	Specialty	date month year

3. The Panel formed its opinion by reference to –
 - (a) the documents and information referred to in Enclosure A; and
 - (b) the history provided by the worker and the examination findings elicited by the Panel at the abovementioned examination(s) of the worker.
 - [(c) the guidance provided by the Consultant(s)]
4. The reasons for the Panel's opinion are as follows:

(Reasons should be written succinctly and in plain language. They should clearly reveal the Panel's reasoning. They should include the core clinical and other findings. In the case of a multi-member Panel, the reasons (including the core clinical and other findings) should be those of the Panel as a whole arising from the consultative process.)

Dr. One (Presiding Member)
For and on behalf of the Medical Panel

Date:

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Enclosure A

[Worker's name]

Medical Panel Ref: M /

SCHEDULE OF ATTACHMENTS

I refer to the Medical Panel convened in this matter of which I am a member and acknowledge receipt of the medical and other material listed in this schedule and confirm that the Panel took this information into consideration in forming the opinion.

	<i>DOCUMENT PREPARED BY:</i>	<i>DATE:</i>	<i>PAGES:</i>
1.	<u>Referral and Medical Questions</u>		
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Dr. One (Presiding Member)
For and on behalf of the Medical Panel

Date: