[2012] WASC 1

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	**:**	SEDDON -v- MEDICAL ASSESSMENT PANEL [No 2] [2012] WASC 1
CORAM	**:**	EDELMAN J
HEARD	**:**	15 DECEMBER 2011
DELIVERED	**:**	10 JANUARY 2012
FILE NO/S	**:**	CIV 2010 of 2011
MATTER	**:**	In the matter of an application for a writ of certiorari against Dr Alexeeff, Dr La Bianca and Dr Brown, members of a Medical Assessment Panel under the *Workers' Compensation and Injury Management Act 1981* (WA)
BETWEEN	**:**	RAOUL THOMAS SEDDON Applicant AND MEDICAL ASSESSMENT PANEL First Respondent SHANE MELVILLE, ACTING DIRECTOR OF DISPUTE RESOLUTION DIRECTORATE Second Respondent MIRVAC (WA) PTY LTD Intervenor

Catchwords:

Administrative law - Application for order absolute - Jurisdictional error - Whether jurisdictional errors arise from reasons given by the Medical Assessment Panel - Whether the Medical Assessment Panel failed to take into account relevant evidence - Whether the Medical Assessment Panel acted beyond jurisdiction by making an impermissible determination of causation - Whether the Medical Assessment Panel failed to give adequate reasons for decision

Administrative law - Privative clause - Section 145E of the *Workers' Compensation and Injury Management Act 1981* (WA) provides that a 'decision' of a medical assessment panel 'is not amenable to judicial review' - Whether s 145E excludes judicial review for jurisdictional error in the making of a purported decision

Legislation:

Workers' Compensation and Injuries Management Act 1981 (WA), s 93D, s 145A, s 145C, s 145D, s 145E, s 145F, s 175, s 210, s 240, sch 2

Result:

Jurisdictional errors established
Decision quashed

Category: B

Representation:

Counsel:

Applicant	:	Mr R E Lindsay
First Respondent	:	No appearance
Second Respondent	:	No appearance
Intervenor	:	Mr C P Shanahan SC

Solicitors:

Applicant	:	S C Nigam & Co
First Respondent	:	No appearance
Second Respondent	:	No appearance
Intervenor	:	Rankin Nathan Lawyers

Case(s) referred to in judgment(s):

Andreassen v Rural West Pty Ltd [2007] WASCA 265
Andrews v Styrap (1872) 26 LT (NS) 704
Attorney-General (Vic) v Commonwealth [1945] HCA 30; (1945) 71 CLR 237
Beale v Government Insurance Office of New South Wales (1997) 48 NSWLR 430
Bennett v Carruthers [2010] WASCA 131
Bloomfield v Liebherr Australia Pty Ltd [2007] WASCA 154
Button v Evans (No 2) [1984] 3 NSWLR 191
Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs [1992] HCA 64; (1992) 176 CLR 1
Donges v Ratcliffe [1975] 1 NSWLR 501
Ex parte Hopwood (1850) 15 QB 121; (1850) 117 ER 404
Hockey v Yelland [1984] HCA 72; (1984) 157 CLR 124
Kirk v Industrial Relations Commission of New South Wales [2010] HCA 1; (2010) 239 CLR 531
Maurice Blackburn Cashman v Brown [2011] HCA 22; (2011) 242 CLR 647
Minister for Immigration and Multicultural Affairs v Bhardwaj [2002] HCA 11; (2002) 209 CLR 597
Pallot v Harrison (Unreported, WASC, Library No 950261, 12 May 1995)
Plaintiff S157/2002 v Commonwealth of Australia [2003] HCA 2; (2003) 211 CLR 476
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355
Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia [2011] HCA Trans 149
R v Justices of Derbyshire (1759) 2 Keny 299, (1759) 96 ER 1189
R v Nat Bell Liquors Ltd [1922] 2 AC 128
Re McBain; Ex parte Australian Catholic Bishops Conference [2002] HCA 16; (2002) 209 CLR 372
Re The Medical Assessment Panel; Ex parte Ansett Australia Ltd v The Medical Assessment Panel (1998) 19 WAR 395
Seddon v Medical Assessment Panel [2011] WASC 237
The Commonwealth v Baume [1905] HCA 11; (1905) 2 CLR 405

EDELMAN J:

Introduction and history of these proceedings

1 The issue in this case concerns a determination made by a medical assessment panel (the Medical Assessment Panel) on 10 September 2010 and a purported further consideration by that Panel on 13 December 2010. Both assessments considered sch 2 of the *Workers Compensation and Injuries Management Act 1981* (WA) (the Workers' Compensation Act).

2 On 8 September 2011, I made orders that the respondents show cause why the determination and purported further consideration should not be removed to this court to be quashed due to jurisdictional errors.

3 The applicant, Mr Seddon, submits that the Medical Assessment Panel made three jurisdictional errors in its determination that Mr Seddon retained a zero degree permanent loss of use of his right arm.

4 The first alleged jurisdictional error is a failure to take into account relevant evidence. The second is that the Medical Assessment Panel acted beyond jurisdiction by making an impermissible determination of causation. The third is that the Medical Assessment Panel failed to give adequate reasons.

5 The Medical Assessment Panel and the Acting Director of the Dispute Resolution Directorate did not take any active part in the proceedings. Both filed notices of intention to abide by the decision of the court.

6 At the hearing of this application for a final order I granted leave to Mr Seddon's employer, Mirvac (WA) Pty Ltd (Mirvac), to appear as a contradictor. Mirvac is the deemed employer of Mr Seddon under s 175 of the Workers' Compensation Act. It is defending proceedings in the District Court which are brought by Mr Seddon arising from his injuries.

7 Some of the background discussion in these reasons draws from my decision in Mr Seddon's 'show cause' application: ***Seddon v Medical Assessment Panel*** [2011] WASC 237.

8 The conclusion reached in these reasons is that the second of the three asserted jurisdictional errors has been established: the Medical Assessment Panel acted beyond jurisdiction by relying upon causation issues in an impermissible way.

Background

9 This background is based upon affidavit evidence, and accompanying documents, filed on behalf of Mr Seddon. Most of the facts were common ground.

Mr Seddon's accident

10 On 17 March 2001, Mr Seddon was injured after falling 6.2 m from a cherry picker to a concrete floor. He was treated in hospital for 10 days.

11 Mr Seddon's affidavit evidence describes his injuries. They include an injury to his cervical spine, an injury to his chest, a perforated right lung, a fracture to his right ribs, a fracture to his right elbow, a fracture to his L1 vertebrae, a fracture to his pelvis, a fracture to his right femur, and psychiatric injury. He has been receiving medical treatment since the accident.

Mr Seddon's claim

12 For the purposes of the Workers' Compensation Act, Mr Seddon's employer is deemed to be Mirvac.

13 In 2007, Mr Seddon's solicitors wrote to the solicitors for Mirvac. Mr Seddon's solicitors sought agreement from Mirvac that Mr Seddon's injuries were not less than the 30% threshold for the purposes of a claim under the Workers' Compensation Act: s 93D of the Workers' Compensation Act. Mr Seddon's solicitors provided the solicitors for Mirvac with reports from Mr Seddon's medical specialists. Mr Seddon's solicitors asserted that the reports assessed the total disability of Mr Seddon's whole body at 42.75%. Mirvac did not agree with this assessment. Nor did it agree that the injuries were not less than the 30% threshold.

14 On 7 May 2007, Mr Seddon filed with the Dispute Resolution Directorate a 'Form 22' for the Referral of Question of Degree of Disability for not less than 30%. Subsequently, Mr Seddon's solicitors sent Mr Seddon's witness statement and a book of documents containing his medical reports and the accident report to the Dispute Resolution Directorate. The solicitors for Mirvac subsequently sent to the Dispute Resolution Directorate a book of documents and a list of disputed issues.

15 In its submission to the Dispute Resolution Directorate, Mirvac assessed Mr Seddon's degree of disability at 23.8% of the whole body, which is less than the 30% threshold. Mirvac therefore submitted that

Mr Seddon's claim under the Workers' Compensation Act should be dismissed.

16 In the Form 22 which Mr Seddon filed with the Dispute Resolution Directorate, and in the reports of his medical practitioners, Mr Seddon's description of his disability had included an injury to his right arm (Item 13). Amongst the issues which Mirvac disputed were:

(1) the extent to which Mr Seddon has any impairment of his right upper limb;

(2) the extent to which such impairment (if any) is permanent; and

(3) causation in respect to the nominated right upper limb injury.

17 On 11 October 2007, Arbitrator Spivey from the Dispute Resolution Directorate referred to the Medical Assessment Panel the question of the degree of disability suffered by Mr Seddon. The Panel was constituted under s 145C of the Workers' Compensation Act. The Panel was comprised of Dr Alexeeff (Chairman), Dr Brown, and Dr La Bianca.

18 On 19 August 2010, the second respondent, Mr Melville, wrote to Mr Seddon. Mr Melville was the Acting Director of the Dispute Resolution Directorate. He explained that Dr Alexeeff had requested that Mr Seddon produce any recent medical reports which Mr Seddon considered to be relevant.

19 On 10 September 2010, the Medical Assessment Panel met in Dr Alexeeff's rooms for a hearing of the questions referred to it by the Dispute Resolution Directorate. One question (question 4) which had been referred to the Panel was '[i]n percentage terms what, if any, is [Mr Seddon's] permanent degree of loss of use of his right arm pursuant to Schedule 2 of the [Workers' Compensation Act]?'. Item 13 of sch 2 of the Workers' Compensation Act refers to '[l]oss of arm at or above elbow'.

20 The Medical Assessment Panel asked Mr Seddon a number of questions. Mr Seddon was then examined by members of the Medical Assessment Panel. Mr Seddon was subsequently asked further questions by members of the Panel. Those questions included enquiries by Dr Alexeeff about Mr Seddon's right shoulder. Mr Seddon was asked by Dr Alexeeff if he had a family history of arthritis. Mr Seddon replied that his mother suffered from rheumatoid arthritis.

The reports available to the Medical Assessment Panel on 10 September 2010

21 It is common ground that the Medical Assessment Panel had the following reports before it on 10 September 2010.

1. Landsdale Gardens Medical Centre, Workers' Compensation Progress Medical Certificate dated 3 April 2001.

2. Fremantle Hospital, Workers' Compensation First Medical Certificate dated 6 April 2001.

3. Landsdale Gardens Medical Centre, Workers' Compensation Progress Medical Certificate dated 28 April 2001.

4. Landsdale Gardens Medical Centre, Workers' Compensation Progress Medical Certificate dated 31 October 2002.

5. Dr Alan Home, Occupational Medicine, Medical Report dated 27 May 2002.

6. Mr Ratan C Edibam, Orthopaedic Surgeon, Medical Report dated 20 June 2002.

7. Dr Alan Home, Occupational Medicine, Medical Report dated 9 October 2002.

8. Mr Ratan C Edibam, Orthopaedic Surgeon, Supplementary Medical Report dated 15 October 2002.

9. Dr Frederick K F Ng, Psychiatrist, Medical Report dated 28 November 2006.

10. Dr Murray Nixon, Sexual Health, Medical Report dated 6 December 2006.

11. Dr Ross S Goodheart, Neurologist, Medical Report dated 5 January 2007.

12. Dr Ross S Goodheart, Neurologist, Medical Report dated 27 March 2007.

13. Various - requirements for medical evidence in support of a referral pursuant to s 93D dated 8 May 2007.

14. Dr Lawrence D Terace, Psychiatrist, Medical Report dated 11 August 2007.

15. Dr Chris Rowling, Urologist, Medical Report dated 14 August 2007.

16. Dr Ross S Goodheart, Neurologist, Medical Report dated 30 July 2009.

17. Dr Murray Nixon, Sexual Health, Medical Report dated 7 August 2009.

22 On 19 August 2010, the Acting Director of the Dispute Resolution Directorate wrote to Mr Seddon. He enclosed documents which included the list of medical reports which had been sent to the Medical Assessment Panel. In his letter, the Acting Director said that the Chairman of the Medical Assessment Panel had requested that Mr Seddon produce at the hearing any medical reports that Mr Seddon considered to be relevant.

23 At the hearing on 10 September 2010 Mr Seddon told the Chairman that he (Mr Seddon) had brought with him all his medical reports and x-rays as requested. The Chairman replied that he had with him the necessary medical reports and that he did not need to see any reports from Mr Seddon except the x-rays which Mr Seddon had with him.

The 10 September 2010 determination by the Medical Assessment Panel

24 On 10 September 2010, the Medical Assessment Panel provided its determination on the questions referred. The determination is contained in a four page report which is very detailed in parts. Although the percentages in the assessment by the Medical Assessment Panel were not expressed in terms of Mr Seddon's whole body, the effect of the determination was that the Panel assessed Mr Seddon's total permanent disability at 27%.

25 Following the hearing, at my request both counsel helpfully provided a summary of the 10 September 2010 determination. In this summary it was agreed that the effect of the Medical Assessment Panel's reasons on 10 September 2010, in percentage terms across Mr Seddon's whole body, was as follows below. References to item numbers are to sch 2 of the Workers' Compensation Act:

(a)	Item 36A: Permanent loss of the full efficient use of the back (including thoracic and lumbar spine):	6% of whole body
(b)	Item 28: Loss of leg at or above knee:	3.5% of whole body
(c)	Item 13: Loss of arm at or above elbow:	0% of whole body
(d)	Item 37: Loss of genitals:	2.5% of whole body
(e)	Social Security Impairment Rating Scale, 1st edition, Assessment of Disability Guide 1994: Permanent psychiatric disability:	15% of whole body

26 The total permanent disability to Mr Seddon's whole body was therefore 6% + 3.5% + 2.5% + 15% = 27%.

27 I consider this determination in detail below.

Mr Seddon's letter of complaint about the 10 September 2010 determination

28 On 16 September 2010, Mr Seddon's solicitors wrote to the Director of the Dispute Resolution Directorate. The solicitors said that the determination of the Medical Assessment Panel had been based on the issue of causation and that the Panel had acted outside its jurisdiction.

29 The argument in the letter from Mr Seddon's solicitors was that it is not within the jurisdiction of the Medical Assessment Panel to determine questions of causation. They referred to ***Re The Medical Assessment Panel; Ex parte Ansett Australia Ltd v The Medical Assessment Panel*** (1998) 19 WAR 395.

30 It seems, although it is not explicit, that the point being made by Mr Seddon's solicitors was that the Medical Assessment Panel had acted beyond jurisdiction by considering whether symptoms shown by Mr Seddon in relation to his right shoulder were related to the accident. Those symptoms were right shoulder symptoms and signs consistent with the presence of rotator cuff disease/subacromial bursitis.

31 Mr Seddon's solicitors requested that the Director make a determination that the Medical Assessment Panel had acted outside its

jurisdiction. They sought to have the answer to question 4 (Item 13) severed from the Panel's determination. Mr Seddon's solicitors also requested that this question of the Item 13 degree of permanent disability be referred back to the Medical Assessment Panel to be addressed on the papers.

The Medical Assessment Panel's further consideration on 13 December 2010

32 On 10 November 2010, Arbitrator Spivey wrote to Dr Alexeeff raising two issues arising from the reasons for the Panel's 10 September 2010 determination. One of those issues was the complaint made by Mr Seddon's solicitors. The arbitrator referred to the comment by the Medical Assessment Panel that 'the presence of rotator cuff disease / subacromial bursitis which was unrelated to the accident'. The arbitrator said the following:

> [I]n the reasons the panel has commented about the presence of right shoulder symptoms and demonstrated signs consistent with the presence of rotator cuff disease / subacromial bursitis which was unrelated to the accident.
>
> From the above it would seem [Mr Seddon] could have a percentage loss of use of the right shoulder.

33 On 13 December 2010 the Medical Assessment Panel replied to the arbitrator. The Panel said this in relation to the right shoulder:

> In regard to the first matter, specifically, the response to Question 4, [Mr Seddon] was found to have evidence of low grade right shoulder rotator cuff disease / subacromial bursitis. No history of right shoulder injury was obtained. The panel did note a family history of Rheumatoid arthritis (mother). Whilst [Mr Seddon] did display some anterior soft tissue swelling and positive impingement signs, the panel was unanimously of the view that there was no evidence of a permanent loss of the use of the right arm pursuant to Schedule 2 of the Act. On this basis, a zero (0) degree permanent loss of use of the right arm assessment, referable to Item 13 of Schedule 2, was provided. Indeed, [Mr Seddon] was not particularly aware of any right shoulder pathology.

The privative clause does not exclude judicial review for jurisdictional error

34 There is a preliminary question concerning the effect of the privative clause in s 145E(9) of the Workers' Compensation Act. This privative clause is the first hurdle for Mr Seddon in his submissions that the

determinations of the Medical Assessment Panel should be quashed for jurisdictional error.

35 Section 145E(6) of the Workers' Compensation Act provides that a determination by the Medical Assessment Panel is final and binding on the worker. Section 145E(9) then provides that:

> A decision of a medical assessment panel or anything done under this Act in the process of coming to a decision of a medical assessment panel is not amenable to judicial review.

36 At the hearing of the order absolute Mr Seddon relied only on the arguments which he raised at the show cause hearing concerning the construction of s 145E(9), including the argument that the clause should be construed consistently with the Commonwealth Constitution. Notices had been issued under s 78B of the *Judiciary Act 1903* (Cth).

37 Mirvac did not seek leave to make any submissions on this point. There was, therefore, no contradictor on this issue.

38 The provisions of the Workers' Compensation Act which existed prior to 14 November 2005 did not prevent a worker from asserting a claim for judicial review for jurisdictional error. Those provisions said that determinations of a medical assessment panel are 'final and binding'. But they did not exclude judicial review: ***Andreassen v Rural West Pty Ltd*** [2007] WASCA 265 [14] (Wheeler & Pullin JJA, Le Miere AJA); ***Hockey v Yelland*** [1984] HCA 72; (1984) 157 CLR 124, 130 (Gibbs CJ).

39 Section 145E(6) and s 145E(9) were introduced on 14 November 2005 by the *Workers' Compensation Reform Act 2004* (WA), s 108. The effect of these two provisions was to create an additional preliminary hurdle for a worker. A decision of a medical assessment panel was not merely final and binding. It also was made not amenable to judicial review.

40 Mr Seddon submitted that this further constraint that a decision of a medical assessment panel is not amenable to judicial review did not preclude judicial review *for jurisdictional error* of a purported decision which is, in law, no decision at all. There were three steps to the argument:

(1) the words 'a decision' should be read as meaning 'a decision within jurisdiction' and not a decision made without jurisdiction;

(2) the words 'anything done under this Act' should be read to mean anything *validly* done under this Act; and

(3) the words 'not amenable to judicial review' should be read as 'not amenable to judicial review for non-jurisdictional error'.

41 As to (1), the term 'decision', and even the term 'purported decision', have been held by the High Court not to exclude judicial review for jurisdictional error: ***Kirk v Industrial Relations Commission of New South Wales*** [2010] HCA 1; (2010) 239 CLR 531, 582 - 583 [103] - [105] (French CJ, Gummow, Hayne Crennan, Kiefel & Bell JJ). See also ***Plaintiff S157/2002 v Commonwealth of Australia*** [2003] HCA 2; (2003) 211 CLR 476, 506 [76] (Gaudron, McHugh, Gummow, Kirby & Hayne JJ).

42 As to (2), in the context of common law causes of action, the High Court has recently held that these do not arise 'under' the *Accident Compensation Act 1985* (Vic). They are external to that Act: ***Maurice Blackburn Cashman v Brown*** [2011] HCA 22; (2011) 242 CLR 647, 660 - 661 [36] (French CJ, Hayne, Crennan, Kiefel & Bell JJ). There must, at least, be a strong argument that jurisdictional errors are not errors 'under' the Workers' Compensation Act: compare ***Plaintiff S157/2002 v Commonwealth of Australia*** (506) [76] (Gaudron, McHugh, Gummow, Kirby & Hayne JJ).

43 The construction of the words in (3) is more difficult. In ***Andreassen v Rural West*** [23], the Full Court of this court appeared to consider that those words excluded all prerogative relief. However, that issue was not argued before the Full Court. Nor did the Full Court express a concluded view. Nor was a view necessary for the decision in that case.

44 The proper construction of the words in (3) above should exclude only judicial review for non-jurisdictional error for three reasons.

45 First, in Australia there is a clear conceptual distinction between judicial review of a decision for a non-jurisdictional error of law, and judicial review of a *purported* decision for jurisdictional error: ***Kirk v Industrial Relations Commission of New South Wales*** (576, 581) [80], [100]; ***Plaintiff S157/2002 v Commonwealth of Australia*** (506) [76].

46 The consequence of confining the words in (1), 'a decision', to decisions made within jurisdiction must necessarily mean that it is only those decisions within jurisdiction for which judicial review is excluded.

47 Secondly, and in any event, the construction of 'not amenable to judicial review' as including only judicial review for non-jurisdictional error is consistent with the established approach of the High Court of Australia, to which I have referred, of reading down provisions containing words such as 'decision' and 'done under this Act' to mean only valid decisions and acts validly done.

48 In ***R v Nat Bell Liquors Ltd*** [1922] 2 AC 128, 162, Lord Sumner, delivering the advice of the Privy Council, said that clauses limiting the power of a court to grant certiorari in order to quash a decision should be read in that way only if 'explicit language is used' so that if certiorari were to be taken away it is done 'explicitly and unmistakeably'.

49 This approach has long historical antecedents. Since the mid-eighteenth century, courts have construed narrowly 'no certiorari' statutory provisions which limited the power of judges to quash decisions; those clauses were held not to apply to jurisdictional error: ***R v Justices of Derbyshire*** (1759) 2 Keny 299, (1759) 96 ER 1189; and ***Ex parte Hopwood*** (1850) 15 QB 121; (1850) 117 ER 404 (where certiorari was available because the error was not jurisdictional).

50 Thirdly, all other things remaining equal, a construction of legislation which produces the result that the legislation is constitutional should be preferred to one that would not: ***Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs*** [1992] HCA 64; (1992) 176 CLR 1, 14 (Mason CJ); ***Attorney-General (Vic) v Commonwealth*** [1945] HCA 30; (1945) 71 CLR 237, 267 (Dixon J).

51 If the privative clause were construed to exclude judicial review for jurisdictional error then it would not be constitutional. In a considered obiter dictum in ***Kirk v Industrial Relations Commission of New South Wales*** (581) [100], French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said that the distinction between jurisdictional and non-jurisdictional error marks the relevant limit on State legislative power:

> Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power.

52 The extent of this obiter dictum has recently been referred for the consideration of the Full Court of the High Court of Australia: ***Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia*** [2011] HCA Trans 149.

Section 206 of the South Australian legislation in that case, the *Fair Work Act 1994* (SA), excepts from the privative clause the judicial review of determinations by the Industrial Relations Commission of South Australia which are in 'excess or want of jurisdiction'.

53 For these reasons, the privative clause in s 145E(9) of the Workers' Compensation Act does not exclude prerogative relief sought on the basis of jurisdictional error.

Are the alleged errors jurisdictional?

54 In my reasons in relation to the show cause order, I explained in some detail the approach to be taken in relation to when a jurisdictional error arises.

55 It was common ground at the hearing of Mr Seddon's application for this order absolute that, if proved, each of the three errors alleged would be jurisdictional errors (ts 106). This concession of Mirvac was appropriate and correct.

The first alleged jurisdictional error: failure to take into account relevant considerations

56 The first jurisdictional error alleged by Mr Seddon is a failure by the Medical Assessment Panel to take into account relevant considerations.

57 Mr Seddon says that the Medical Assessment Panel failed to take into account relevant considerations in one of two ways:

(1) failing to consider any of the reports which it possessed which suggested some permanent degree of loss of use of Mr Seddon's right arm; or

(2) failing to consider reports which were proffered by Mr Seddon and which suggested some permanent degree of loss of use of Mr Seddon's right arm.

58 Submission (1) should be rejected. The opening words of the determination of the Medical Assessment Panel included the following:

> The determination took place at West Perth and the worker was/~~was not~~ in attendance, did/~~did not~~ have questions put to him/~~her~~ and was/~~was not~~ submitted to a medical examination by the Medical Assessment Panel.

59 At the commencement of the 'Reasons' section of the 10 September 2010 determination, the Medical Assessment Panel said this:

> This man was examined by a medical Panel consisting of Drs La Bianca, Brown and Alexeeff. A full history and clinical examination was performed. All the available medical reports and x-rays were reviewed.

60 Although there was no specific reference to any of the medical reports in the four page determination of the Medical Assessment Panel, there was nothing in those pages which could suggest that this opening statement was a misrepresentation. To the contrary, the reasons referred to the Panel having consulted the 'documentation' provided, which was primarily the medical reports, to ascertain the absence of a history of injury to the cervical spine.

61 I consider separately below the question of whether the reasons that the Medical Assessment Panel provided were adequate. But it is clear from their 10 September 2010 determination that the members of the Panel did not fail to have regard to any relevant material in their possession.

62 Mr Seddon's second submission concerning a failure to take into account relevant considerations was that the Medical Assessment Panel failed to have regard to the reports which Mr Seddon had brought to the 10 September 2010 hearing. It is necessary to set out precisely the events which occurred at that hearing.

63 On 19 August 2010, the Acting Director of the Dispute Resolution Directorate wrote to Mr Seddon. He enclosed documents which included the list of medical reports which had been sent to the Medical Assessment Panel. In his letter, the Acting Director said this:

> Please note that pursuant to s145D(2) of the [Workers' Compensation] Act, Dr Michael Alexeeff has requested that you produce at the time of the panel [sic: hearing], any recent medical reports you consider relevant.

The Workers' Compensation Act provides in s 145D(2)(c) that the

> panel may, for the purposes of assisting it in determining the question, require the worker concerned to ... produce documents to the panel, or consent to another person who has relevant documents producing them to the panel.

It was not in dispute that a necessary implication of that provision was that a panel could only require relevant documents to be produced by the worker, and that a panel would be required to take that information into account in the exercise of its jurisdiction.

64 The effect of the 19 August 2010 'request' was that the Medical Assessment Panel required Mr Seddon 'to produce' relevant, recent medical reports.

65 Mr Seddon's affidavit evidence concerning the 10 September 2010 hearing is important. His evidence was as follows:

> I advised the chairman, Dr Alexeeff that I had brought with me all my medical reports and x-rays as requested by the Acting Director; Dr Alexeeff told me that he had with him the necessary medical reports and that he did not need to see any reports from me except the x-rays which I had with me.

It appears from this evidence that what occurred involved the parties in a state of cross-purposes.

66 Mr Seddon's advice to Dr Alexeeff (that the reports he had brought were 'all my medical reports and x-rays') apparently suggested to Dr Alexeeff that Mr Seddon had brought only those, or some of those, seventeen reports and documents which the Medical Assessment Panel already possessed (see the description of those reports above at [21]). Hence, Dr Alexeeff had replied that he had the necessary reports.

67 But Mr Seddon thought that he was complying with the 19 August 2010 notice to produce recent medical reports that he considered relevant. Mr Seddon said in his affidavit that he had brought with him only six reports.

68 The reports Mr Seddon brought were not all recent medical reports. One was from 2001. Another was from 2002. A further two were from 2007 (which the Panel had in its possession in any event). These four of the six reports did not comply with the s 145D(2)(c) notice requiring Mr Seddon to produce recent medical reports.

69 There was, however, one recent report which Mr Seddon had brought which the Medical Assessment Panel did not possess. This was a report from Dr Goodheart dated 1 September 2009. It was more recent than the reports which the Medical Assessment Panel did possess and it fell within the meaning of a recent medical report as sought by the Medical Assessment Panel in its s 145D(2)(c) notice. Two questions arise. First, was that report 'produced' to the Medical Assessment Panel on 10 September 2010? Secondly, was there material in that report which had the effect that the failure of the Medical Assessment Panel to have regard to it involved a failure to take into account a relevant consideration?

70 The first issue raises for consideration the meaning of the transitive verb 'produce' in s 145D(2)(c) of the Workers' Compensation Act. That section requires that a worker 'produce documents to the panel' as required.

71 The ordinary meaning of 'produce', from ducere (to lead), is set out in the *Shorter Oxford English Dictionary*: '[b]ring forward or out, esp. for inspection or consideration, present to view or notice' (2367). The relevant definition in the *Macquarie Dictionary* is 'to bring forward; present to view or notice; exhibit' (1135).

72 In the different context of s 234(e) of the *Customs Act 1901* (Cth), the ordinary meaning of 'produce' was applied by Carruthers J to conclude that the concept involved 'a person presenting a document to a Customs officer': ***Button v Evans (No 2)*** [1984] 3 NSWLR 191, 199.

73 Mr Seddon's statement to Dr Alexeeff that he (Mr Seddon) had brought 'all my medical reports and x-rays' is not a 'production' of the 1 September 2009 report of Dr Goodheart, as a recent medical report. That report of Dr Goodheart was contained within a mix of reports, most of which were not recent. The statement by Mr Seddon did not 'bring forward', 'bring out' or 'present' the 1 September 2009 report as a recent medical report as was required by the 19 August 2010 letter to Mr Seddon. Mr Seddon's statement did just the opposite. His statement suggested that he had brought all medical reports, which were already in the possession of the Medical Assessment Panel.

74 This construction of the transitive verb 'produce' is also supported by the context of s 145D(2). That subsection is part of the section concerning 'Procedures'. It is immediately preceded by s 145D(1) which provides that the 'panel is to act speedily and informally, and in accordance with good conscience, without regard to technicalities or legal forms'.

75 In this context, and in circumstances in which the Medical Assessment Panel possessed 17 medical reports and documents, it cannot be sufficient 'production' of a recent medical report for Mr Seddon to have said that he had brought with him all medical reports as he thought had been requested.

76 The 1 September 2009 report of Dr Goodheart, although 'recent', was not a report produced to the Medical Assessment Panel. Therefore, it is not strictly necessary for me to consider the second submission of Mirvac. This was the submission that the 1 September 2009 report contained no

relevant matters which could have led to a conclusion that the Medical Assessment Panel had failed to take relevant matters into account.

77 It suffices for present purposes to indicate that there are some matters in the 1 September 2009 report which might have been relevant, although not necessarily in Mr Seddon's favour. In particular, I discuss below the submission of Mirvac that Dr Goodheart had concluded on 30 July 2009 that Mr Seddon's permanent degree of loss of use of his right arm, as an independent item, was zero percent.

78 The 30 July 2009 report does not clearly suggest that Mr Seddon's permanent degree of loss of use of his right arm (Item 13) was zero percent. The report makes no mention of the degree of loss of use by Mr Seddon of his right arm. It does not clearly contradict the conclusion by Dr Goodheart in his report dated 27 March 2007 that Mr Seddon had a 15% permanent degree of loss of use of his upper right arm based on injury to Mr Seddon's arm and elbow.

79 However, in the 1 September 2009 report, Dr Goodheart appears to address this potential inconsistency. He explains that the right shoulder symptoms have not changed, although he does not mention the elbow injury. Dr Goodheart then says that his 30 July 2009 report had included consideration of the soft tissue symptoms in Mr Seddon's right shoulder in assessing Mr Seddon's cervical injury (ie Item 36B which Dr Goodheart assessed at 5%). The implication of this comment is that Dr Goodheart might have considered that there was no permanent, and independent, Item 13 injury to Mr Seddon's upper right arm, but that the injury was included in the 5% provision under Item 36B.

80 Mr Seddon's submissions concerning the first alleged jurisdictional error should be rejected.

The second alleged jurisdictional error: acting beyond jurisdiction by determining a question of causation

81 The second jurisdictional error which Mr Seddon alleged had been made by the Medical Assessment Panel was that the Panel had acted beyond jurisdiction by impermissibly determining a question of causation. Again, Mirvac properly did not dispute that if this had occurred then it would have been a jurisdictional error, although Mirvac submitted that if the jurisdictional error had been committed then a discretion should be exercised to deny prerogative relief.

82 The relevant part of the reasons given by the Medical Assessment Panel on 10 September 2010 which relates to this alleged error is, again, its reasons concerning question 4 for the Panel (Mr Seddon's permanent degree of loss of use of his right arm).

83 The Medical Assessment Panel described Mr Seddon as presenting 'physical symptoms affecting ... the right upper limb' and 'signs of right shoulder rotator cuff disease'. The Medical Assessment Panel later said:

> [Mr Seddon] did advise of right shoulder symptoms and demonstrated signs consistent with the presence of rotator cuff disease / subacromial bursitis. The panel was of the view that this was unrelated to the accident.

In its conclusion in relation to question 4, the Panel said:

> The panel is of the view that in percentage terms, [Mr Seddon] retains a zero degree permanent loss of use of his right arm pursuant to Schedule 2 of the [Workers' Compensation Act]. With reference to Schedule 2, this is applicable to Item 13 - loss of arm at or above elbow.

84 Mr Seddon's submission was that the Medical Assessment Panel had reached its conclusion that Mr Seddon retains a zero degree permanent loss of use of his right arm by relying upon impermissible causation considerations, namely by disregarding symptoms of rotator cuff disease/subacromial bursitis because they were not caused by the accident.

85 Section 210(1)(a) and (b) of the Workers' Compensation Act relevantly provides that the statutory duty of the Medical Assessment Panel is to determine 'the nature or extent of an injury' and 'whether an injury is permanent or temporary'. It does not permit an assessment of whether the injury, once ascertained, was caused by the accident, or by some other cause.

86 In ***Re The Medical Assessment Panel; Ex parte Ansett Australia Ltd v The Medical Assessment Panel*** (399), the Full Court of this court said that issues of 'causation' were beyond power. Taken literally, that statement may overstate the situation by suggesting that causation issues are not relevant to the performance of any part of the Medical Assessment Panel's duty. However, the Full Court was speaking in the context of a determination by the Medical Assessment Panel that a depressive condition had been caused by Mr Bellart's work environment. The Full Court held that such a determination was not relevant to the statutory functions of the panel.

87 In ***Andreassen v Rural West*** [12], the Court of Appeal explained that questions of causation of the injury may need to be determined in order to ascertain whether the disability exists or whether it is permanent. The Court of Appeal in ***Andreassen v Rural West*** gave ***Bloomfield v Liebherr Australia Pty Ltd*** [2007] WASCA 154 as an example. In ***Bloomfield*** it was necessary to determine whether the cause of the applicant's cognitive problems and skin disorder was poisoning or chemical injury because if these were the causes then the condition would not be permanent. However, the Court of Appeal in ***Andreassen v Rural West*** emphasised that '[i]t is no part of the Panel's task to *determine* questions of causation, when it is asked to assess the degree of a worker's disability' [12] (original emphasis). In other words, if a medical assessment panel concludes, or would conclude, that a permanent injury has been suffered then it has no further jurisdiction to inquire as to the source of that injury.

88 In all the circumstances, the only reasonable inference is that the determination of the Medical Assessment Panel relied upon impermissible causation reasoning in reaching its conclusion that Mr Seddon retained a zero degree permanent loss of use of his right arm. This is for two reasons.

89 First, there is no other reasonable explanation for why this sentence was added by the Panel to its reasons. None was suggested by counsel: it was frankly, and properly, acknowledged by counsel for Mirvac to be a 'problem' for Mirvac's submission that no jurisdictional error had been made (ts 104).

90 The words must be construed in the context in which they are written, namely by a non-legal panel with an obligation, under s 145D to 'act speedily', and 'without regard to technicalities or legal forms'. Nevertheless, a construction of words will be preferred where 'no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent': ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355, 382 [71] (McHugh, Gummow, Kirby & Hayne JJ), quoting ***The Commonwealth v Baume*** [1905] HCA 11; (1905) 2 CLR 405, 414 (Griffith CJ). The reference by the Medical Assessment Panel to the symptoms being unrelated to the accident should not be construed as insignificant or superfluous. Counsel for Mirvac properly did not submit to the contrary.

91 Secondly, all of the evidence before the Medical Assessment Panel suggested that Mr Seddon had suffered some degree of permanent loss of use of his right arm. That evidence consisted of:

(1) A report of Dr Home, provided by Mirvac, dated 27 May 2002, which assessed Mr Seddon's permanent disability to his right upper limb at 2%.

(2) A report of Dr Goodheart, provided by Mr Seddon, dated 27 March 2007, in which Dr Goodheart had referred to a report from Dr Croser which assessed Mr Seddon's loss of use of his right arm at 5%. Dr Goodheart concluded:

> Mr Seddon has sustained a permanent 15% loss of the full and efficient function of the right arm at or above the elbow ... . This takes into account his direct elbow injury and the inflammatory shoulder symptoms described above.

92 In addition to this evidence, as the Medical Assessment Panel observed of the examination of Mr Seddon, he 'did advise of right shoulder symptoms and demonstrated signs consistent with the presence of rotator cuff disease / subacromial bursitis.'

93 All this evidence pointed in the direction of some degree of permanent loss of use of Mr Seddon's right arm. In these circumstances, there is only one reasonable meaning which could be placed on the sentence by the Medical Assessment Panel that they were of the view that the advice of Mr Seddon and his demonstrated signs were unrelated to the accident. That meaning is that the Medical Assessment Panel had relied upon issues of causation of the injury in reaching the conclusion that Mr Seddon should be assessed as having zero percent permanent loss of use of his right arm.

94 Mirvac submitted that there was one significant piece of evidence which could have supported the zero percent conclusion of the Medical Assessment Panel, independently of the Panel's reference to Mr Seddon's advice and symptoms being unrelated to the accident. Mirvac referred to the report of Dr Goodheart, which the Medical Assessment Panel possessed, dated 30 July 2009. Mirvac's submission was that in Dr Goodheart's report of 30 July 2009, Dr Goodheart had abandoned his conclusion that Mr Seddon suffered a 15% permanent loss of use of his right arm (ts 98 - 100).

95 The 30 July 2009 report from Dr Goodheart is addressed to Mr Seddon's solicitors and begins by confirming that the 27 March 2007 report had been received. In providing his assessment of Mr Seddon's disability under the Workers' Compensation Act, Dr Goodheart says:

> It is my opinion that Mr Seddon has sustained a permanent five percent (5%) loss of the full efficient function of the cervical spine as a result of his accident-sustained injuries. This is assessed according to Item 36 B of the Second Schedule of the Workers' Compensation & Rehabilitation Act 1981. This includes consideration of his associated soft tissue symptoms in the shoulder regions.
>
> It is my opinion that Mr Seddon has sustained a permanent twelve point five percent (12.5%) loss of the full efficient function of the thoracolumbar spine as a result of his injuries sustained on 17 March 2001. This takes into account his accompanying soft tissue symptoms in the lower limbs. This is assessed according to Item 36 A of the Second Schedule of the Workers' Compensation & Rehabilitation Act 1981.
>
> It is my opinion that Mr Seddon has sustained a permanent fifteen percent (15%) loss of the full efficient function of the right leg (above knee) in relation to injuries sustained on 17 March 2001. This is assessed according to Item 28 of the Second Schedule of the Workers' Compensation & Rehabilitation Act 1981. I noted that there was potential for further degenerative change within the right hip joint.

96 Mirvac's submission was effectively that upon reading this report a reasonable Panel would conclude that Dr Goodheart had retracted his 27 March 2007 assessment of Item 13 and replaced it with an assessment of 0%. This submission should not be accepted for four reasons.

(1) Dr Goodheart's 30 July 2009 report begins by referring to his earlier reports, including his 27 March 2007 report. The implication is that those reports should be read together. But nowhere in the 30 July 2009 report of Dr Goodheart does Dr Goodheart disclaim his conclusion on 27 March 2007 that Mr Seddon had suffered a 15% permanent loss of use of his right arm.

(2) After referring to matters other than Mr Seddon's right upper arm, Dr Goodheart says in his 30 July 2009 report that '[t]here had been no other change in health since my last review'.

(3) Apart from the omission of any mention of Mr Seddon's Item 13 injury (right upper limb) the assessment of injury in

Dr Goodheart's 30 July 2009 report was almost entirely consistent with his assessment in his 27 March 2007 report.

(i) In his 30 July 2009 report Dr Goodheart assessed the Item 36B (neck including cervical spine) injury to Mr Seddon at 5%. The same assessment was made in his 27 March 2007 report.

(ii) In Dr Goodheart's 30 July 2009 report he assessed the Item 36A (thoracic and lumbar spine) injury to Mr Seddon at 10%. The same assessment was made in his 27 March 2007 report.

(iii) In Dr Goodheart's 30 July 2009 report he assessed the Item 28 (right leg above knee) injury to Mr Seddon at 15%. In his 27 March 2007 report he had only assessed this injury at 10% but he had observed that 'right hip pain remained worse with activity'. And in the 30 July 2009 report, Dr Goodheart said that 'I noted that there was potential for further degenerative change within the right hip joint'.

(4) Dr Goodheart's assessment of Mr Seddon's right upper arm injury as 15% on 27 March 2007 had been dependent upon his assessment of Mr Seddon's direct elbow injury as well as the shoulder symptoms. The only mention of the elbow in Dr Goodheart's 30 July 2009 report was in relation to neck discomfort radiating through to the elbow. One reason for the omission of any elbow injury may have been that Dr Goodheart was asked in his 30 July 2009 report whether '[Mr Seddon's] functional disability is caused by the injuries sustained by him in the said accident'. Dr Goodheart had previously said in his report on 5 January 2007 that 'Mr Seddon's current elbow discomfort cannot be directly related to this incident'. But since this issue of causation was required to be ignored by the Medical Assessment Panel, the elbow injury assessment would remain relevant.

97 It is possible that the omission by Dr Goodheart of an assessment of any Item 13 injury might have been because he assessed the injury at zero percent. But Dr Goodheart did not say any of this in his 30 July 2009 report. He simply made no assessment of Item 13.

98 This possibility becomes a probability in light of the 1 September 2009 report from Dr Goodheart. In that 1 September 2009 report, which

the Medical Assessment Panel did not possess, it appears that Dr Goodheart had formed the view that the right shoulder symptoms were symptoms of the Item 36B (neck including cervical spine) injury, although he may have concluded that the elbow injury should be omitted because (as he had said on 5 January 2007) it was not related to the accident.

99 In summary, the evidence before the Medical Assessment Panel concerning Item 13 was the report of Dr Home provided by Mirvac (2%), the reports of Dr Goodheart (15% on 27 March 2007, and an omission to consider the matter on 30 July 2009) and the assessment by the Panel itself that Mr Seddon had advised of right shoulder symptoms and had demonstrated signs consistent with the presence of rotator cuff disease/subacromial bursitis. In light of all that evidence, the only reasonable inference is that the sentence of the Medical Assessment Panel, which immediately followed its description of Mr Seddon's right shoulder advice and symptoms, was a rejection of that evidence on the basis that any injury was unrelated to the accident. This was a jurisdictional error.

100 The alternative submission of Mirvac was that if jurisdictional error were proved then relief should be denied because it was very likely that the same decision would be reached by a differently constituted Medical Assessment Panel (ts 84).

101 It is now clear that the grant of an application for a writ of certiorari (a writ to 'inform', by removal of proceedings to the court) to quash a decision is discretionary: ***Re McBain; Ex parte Australian Catholic Bishops Conference*** [2002] HCA 16; (2002) 209 CLR 372.

102 It is possible that there may be cases where, unlike ***Re McBain***, the discretion to refuse to quash a decision could be exercised based only on the fact that the jurisdictional error is trivial or 'insignificant', such as a minor departure from the rules of evidence: ***Kirk v Industrial Relations Commission of New South Wales*** (565 - 566) [53] (French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ), (585) [114] (Heydon J).

103 It may even be the case that the discretion to refuse to quash a decision could be exercised in a situation where the decision maker is 'highly likely' to make the same decision (ts 84). But, even if the discretion could appropriately be exercised in such a case, as to which I express no opinion, I do not accept that the likelihood of the same decision in this case is such that my discretion to refuse relief should be exercised.

104 It can immediately be accepted that a differently constituted Medical Assessment Panel *might* come to the same conclusion as the 10 September 2010 determination. A differently constituted Panel could conclude, consistently with the 10 September 2010 determination, that the right elbow function was 'preserved' and did not disclose any Item 13 injury. It might also conclude, consistently with Dr Goodheart's 1 September 2009 report (which it might be expected that a new panel would possess), that the right shoulder symptoms experienced by Mr Seddon were symptoms of a cervical spine injury (Item 36B). It might also reject Dr Goodheart's assessment of a 5% permanent cervical spine injury and conclude, consistently with the 10 September 2010 determination, that the Item 36B injury was also zero percent (although this conclusion would be despite Dr Goodheart's 1 September 2009 assessment that the right shoulder symptoms were symptoms of some cervical spine injury).

105 All of this might be possible, but I do not consider the outcome so likely that it would be an appropriate exercise of discretion to refuse certiorari.

106 The final matter which may be relevant to the exercise of my discretion is the comments by the Medical Assessment Panel on 13 December 2010 in its purported further consideration. In the absence of submissions to the contrary by Mr Seddon I accept that the 13 December 2010 further consideration is relevant to the exercise of my discretion.

107 Although Mirvac referred to those comments as relevant to the exercise of my discretion, it focused upon the comments of the Medical Assessment Panel on 13 December 2010 in relation to Mr Seddon's alleged Item 13 injury (loss of use of right arm). Those comments support the conclusion of the Medical Assessment Panel that Mr Seddon had a zero degree Item 13 injury.

108 However, if the 13 December 2010 purported further consideration of the Medical Assessment Panel is to be considered, it must be read together with the 10 September 2010 determination. Read together with the 10 September 2010 determination, it may be that in the 13 December 2010 purported further consideration, the Medical Assessment Panel again impermissibly relied upon the issue of how the injury was caused. The Panel described how Mr Seddon had 'evidence of low grade right shoulder rotator cuff disease / subacromial bursitis'. But the Panel explained that it 'did note a family history of Rheumatoid arthritis (mother)'. This matter might have been further elaboration of the Panel's 10 September 2010

jurisdictional error when it commented that the symptoms were unrelated to the accident.

109 Mr Seddon also submitted that the 13 December 2010 purported further consideration erroneously said that 'the panel was unanimously of the view that there was no evidence of a permanent loss of the use of the right arm pursuant to Schedule 2 of the Act'. Plainly, there was other such evidence as I have explained at [91] - [92]. It may be that the Panel in this sentence was referring to the examination which it undertook of Mr Seddon, rather than the other evidence. But Mr Seddon submitted that the reference to 'unanimity' negated the possibility that the Panel was referring only to the examination because his uncontradicted evidence was that only two of the three members of the Panel conducted the examination.

110 In all these circumstances, there is ambiguity about the 13 December 2010 purported further consideration. Even if discretion could be exercised to refuse relief based only on the strength of the likelihood of the same determination being made, a fresh determination of zero percent injury under Item 13 is not so likely that a discretion should be exercised to refuse relief for jurisdictional error.

111 The 13 December 2010 purported further consideration also made reference to Mr Seddon's psychiatric assessment. Mirvac did not make any submissions concerning these comments about Mr Seddon's psychiatric assessment.

112 It suffices to note that in the purported 13 December 2010 further consideration, the Panel 'clarified' its assessment of psychiatric impairment to be 7%. This was a significant reduction from its previous assessment of 15%. The Panel suggested, contrary to its 10 September 2010 reference to 15 as a percentage, that the 15 should be an impairment number and the percentage should be 7%.

113 The lower percentage could be a significant matter in relation to the 30% threshold degree of disability under s 93E(3)(a) of the Workers' Compensation Act, particularly in circumstances in which 15% of the determination of 27% injury on 10 September 2010 was comprised of psychiatric injury. However, the determination by the Panel on 10 September 2010 had expressed the conclusion that '[t]he level of symptoms and signs demonstrated today shows an impairment greater than that defined by [Dr Ng and Dr Terence]'. Dr Ng had assessed 'a permanent psychiatric impairment in percentage terms of 10%', although

Mirvac had provided submissions to the Dispute Resolution Directorate concerning alleged errors in Dr Ng's report. It was not disputed by Mirvac (which made no submissions on this point) that a newly constituted panel could reach a conclusion of either 7% or 15%.

The third alleged jurisdictional error: failure to provide adequate reasons

114 It was not in dispute that the Medical Assessment Panel had a duty to give reasons. Nor was it in dispute that a failure to give adequate reasons would be a jurisdictional error.

115 In my reasons on the show cause application, I explained the statutory source for any implication of an obligation to give adequate reasons: see ***Seddon v Medical Assessment Panel*** [76] - [79]. This source is principally s 145A and s 145E(3) of the Workers' Compensation Act.

116 Section 145A of the Workers' Compensation Act provides that a question can only be referred to a Medical Assessment Panel under s 240 of the Workers' Compensation Act if there is a conflict of medical opinion between a medical practitioner engaged by the worker and a medical practitioner provided and paid by the employer, or each medical practitioner provided and paid if there is more than one of them.

117 In circumstances where a conflict of opinion exists, s 145E(3) provides that '[t]he determination [of the Medical Assessment Panel] and the reasons for making it are to be given in writing signed by the Chairman'. The implication from s 145E(3) is that the reasons given must be sufficient to explain the basis upon which the determination has been reached. That implication is a jurisdictional fact so that a failure to fulfil it will be a jurisdictional error: ***Kirk v Industrial Relations Commission of New South Wales*** (577) [83]; ***Donges v Ratcliffe*** [1975] 1 NSWLR 501.

118 In assessing the adequacy of reasons, the reasons must be read as a whole. This means that they include findings which can be inferred from reasons: ***Beale v Government Insurance Office of New South Wales*** (1997) 48 NSWLR 430, 443 (Meagher JA); ***Bennett v Carruthers*** [2010] WASCA 131 [27] (Mazza J).

119 The sufficiency, or adequacy, of the reasons required in any case will then depend upon the statutory framework for the decision making process as well as the nature and circumstances of the decision being undertaken.

120 The statutory framework in this case militates strongly against a finding that reasons are inadequate. Section 145D(1) provides that:

> [T]he panel is to act speedily and informally, and in accordance with good conscience, without regard to technicalities or legal forms and, except as provided under this Act, is not bound by rules of practice nor evidence.

121 As to the nature and circumstances of the decision being undertaken, all circumstances are relevant to the question of adequacy of reasons. These include: the context of the case, including the manner in which the case is conducted; the significance of evidence or legal issues; concessions which are made, and matters which are not disputed; whether the decision was reserved (see ***Pallot v Harrison*** (Unreported, WASC, Library No 950261, 12 May 1995) 6 (Owen J)) and, associated with that, the time period for which it was reserved; whether there were substantial oral or written submissions; and the nature and content of those submissions in relation to the issues concerned.

122 In this case, the Medical Assessment Panel delivered its determination on the same day as Mr Seddon's hearing and examination. The determination was four pages and generally comprehensive. It explained that all the available medical reports and x-rays were reviewed.

123 In these circumstances, a conclusion that reasons were inadequate would need to point to some substantial omission.

124 Mr Seddon's submission concerning inadequate reasons related only to the Medical Assessment Panel's answer to question 4; the Item 13 injury (loss of arm at or above elbow). His submission was that this question was a central issue for the Panel and that no reasoning supported the Panel's conclusion of a zero percent permanent injury. In particular:

(1) Mr Seddon's Form 22 had identified Item 13 as one of only five relevant items from sch 2 to the Workers' Compensation Act (Items 13, 36B, 36A, 28 and 37).

(2) The Item 13 question was one of only six questions put to the Medical Assessment Panel.

(3) The dispute which had been referred to the Medical Assessment Panel was between Dr Home, who had assessed the Item 13 injury at 2%, and Dr Goodheart who had assessed it at 15%. As I have explained, Dr Goodheart's 30 July 2009 report did not contradict this earlier assessment.

(4) The only other evidence relevant to the Item 13 assessment was the examination by the Panel itself, which concluded that Mr Seddon did advise of right shoulder symptoms and demonstrated signs consistent with the presence of rotator cuff disease/subacromial bursitis.

125 Although the submissions on behalf of Mirvac do not appear to have been in the possession of the Medical Assessment Panel, the dispute was referred to the Medical Assessment Panel by the Dispute Resolution Directorate in the context of submissions filed on behalf of Mirvac. Mirvac had asserted, at pars 4.1 - 4.4, that Dr Home's assessment of 2% permanent disability to Mr Seddon's right upper limb ought to be preferred to Dr Goodheart's 27 March 2007 assessment of 15%.

126 I have explained above at [88] - [99] why the inference to be drawn from the Medical Assessment Panel's reasons was that the Panel had relied in its conclusion upon the symptoms and advice of Mr Seddon concerning his right shoulder as being matters 'unrelated to the accident'. Although erroneous, this was adequate to explain the Panel's reasoning process.

127 If I had not reached this conclusion, and had instead concluded that the 'unrelated to the accident' statement by the Medical Assessment Panel had not formed part of its reasoning process, then its reasons would have been inadequate. Whilst the reasons might have reached a conclusion of zero percent, as I explain above at [89], there would have been nothing to indicate how it reached that conclusion.

128 I conclude that the reasons given by the Medical Assessment Panel, although disclosing a jurisdictional error due to impermissible causation reasoning, were not inadequate.

The relevance of the Panel's further consideration in December 2010

129 The final issue which arises is the relevance of the further consideration by the Medical Assessment Panel of Item 13 on 13 December 2010.

130 Counsel for Mr Seddon appeared to concede that if the 10 September 2010 determination by the Medical Assessment Panel involved jurisdictional error, and was therefore a nullity, then it was possible for the 13 December 2010 consideration by the Medical Assessment Panel to 'cure' this jurisdictional error. However, he submitted that the jurisdictional error had not been cured in this case.

131 It is not necessary to decide whether a subsequent determination can cure a decision which is invalid due to jurisdictional error and, if so, how this would be achieved. Unless the general law or statute requires it, an administrative decision which is infected by jurisdictional error is no decision at all and the statutory power has not been exercised: ***Minister for Immigration and Multicultural Affairs v Bhardwaj*** [2002] HCA 11; (2002) 209 CLR 597, 614 - 615 [51] (Gaudron & Gummow JJ), 646 [152] (Hayne J). Constitutional issues aside, it may be that legislation could provide that an administrative decision, when purportedly exercised, is spent: ***Minister for Immigration and Multicultural Affairs v Bhardwaj*** (603) [5] - [6] (Gleeson CJ).

132 It is not necessary to decide these issues because the 13 December 2010 determination by the Medical Assessment Panel did not purport to be a fresh determination on the Item 13 issue. As set out above, the Medical Assessment Panel merely sought to clarify their 10 September 2010 determination.

133 There is no general power in the Workers' Compensation Act for clarification of concluded determinations. Nor is there any general power for further questions to be raised with the Medical Assessment Panel. A particular power exists for the reconsideration of determinations within 60 days if new evidence comes to light: s 145F. But that power requires the Director (and from 1 December 2011 a 'relevant authority' being the Director or Registrar) to be satisfied of the existence of new evidence and to refer the question to the Panel. That was not the case here.

134 As counsel for Mirvac properly conceded, the 13 December 2010 further consideration by the Medical Assessment Panel therefore had no legal status. It is unnecessary to explore questions raised by Mr Seddon concerning its construction such as the reference to a family history of arthritis and awareness of right shoulder pathology; or the meaning of the statement, apparently contrary to the medical reports before the Panel, that the Panel was unanimously of the view that there was no evidence of a permanent loss of the use of the right arm.

Conclusion

135 I have upheld Mr Seddon's application on the second ground of alleged jurisdictional error only, namely that the Medical Assessment Panel acted beyond jurisdiction by making an impermissible determination of causation.

136 The reasons why the first and third grounds were rejected were not matters raised at the show cause application. They were the result of the significant assistance and benefit of a contradictor at this final hearing. In respect of those two matters, as Baron Bramwell said in ***Andrews v Styrap*** (1872) 26 LT (NS) 704, 706, '[t]he matter does not appear to me now as it appears to have appeared to me then'.

137 I will hear from the parties as to the appropriate form of orders.