[2015] WASC 286

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	SEDDON -v- MEDICAL ASSESSMENT PANEL [2015] WASC 286
CORAM	**:**	MITCHELL J
HEARD	**:**	30 JULY 2015
DELIVERED	**:**	7 AUGUST 2015
FILE NO/S	**:**	CIV 2737 of 2014
BETWEEN	**:**	RAOUL THOMAS SEDDON Applicant AND MEDICAL ASSESSMENT PANEL First Respondent REGISTRAR, ARBITRATION SERVICE OF WORKCOVER WA Second Respondent MIRVAC (WA) PTY LTD Third Respondent

Catchwords:

Judicial review - Failure to determine question in accordance with statute - Misunderstanding the nature of a statutory power - Whether inadequate reasons a jurisdictional error - Mandatory relevant considerations - Discretionary grounds for refusing certiorari - Delay - Abuse of process - Futility

Workers' compensation - 1993 scheme - Degree of disability - Question referred to Medical Assessment Panel by arbitrator - Effect of 2004 amendments limiting access to judicial review

Legislation:

Workers' Compensation and Injury Management Act 1981 (WA), s 210

Result:

Application granted
Certiorari issued

Category: B

Representation:

Counsel:

Applicant	:	Mr R E Lindsay
First Respondent	:	No appearance
Second Respondent	:	No appearance
Third Respondent	:	Mr M A Tedeschi

Solicitors:

Applicant	:	S C Nigam & Co
First Respondent	:	No appearance
Second Respondent	:	No appearance
Third Respondent	:	SRB Legal

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

A v Corruption and Crime Commissioner [2013] WASCA 288; (2013) 306 ALR 491
Craig v South Australia (1995) 184 CLR 163
Donges v Ratcliffe [1975] 1 NSWLR 501
Drysdale v WorkCover WA [2014] WASC 270
Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22; (2007) 230 CLR 89
Hammond Worthington v Da Silva [2006] WASCA 180
Kirk v Industrial Court (NSW) [2010] HCA 1; (2010) 239 CLR 531
Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation [2015] WASC 237
Milwain v Sim [2009] VSC 75; (2009) 31 VAR 53
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24
Minister for Immigration v Bhardwaj [2002] HCA 11; (2002) 209 CLR 597
Minister for Immigration v Yusuf [2001] HCA 30; (2001) 206 CLR 323
Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355

Public Service Association (SA) v Industrial Relations Commission (SA) [2011] SASCFC 14; (2011) 109 SASR 223
Public Service Association (SA) v Industrial Relations Commission (SA) [2012] HCA 25; (2012) 249 CLR 398
Re Anastas; Ex parte Welsby [2002] WASCA 83
Re Bannan; Ex parte Suleski [2001] WASCA 289
Re Croser; Ex parte Rutherford [2001] WASCA 422; (2001) 25 WAR 170
Re Croser; Ex parte Rutherford [2003] WASCA 8
Re Gillett; Ex parte Rusich [2001] WASCA 111
Re Knezevic; Ex parte Carter [2005] WASCA 139
Re Malone; Ex parte Casey [2003] WASC 266
Re McWilliam; Ex parte Juras (Unreported, WASC, Library No 960637, 11 October 1996)
Re McWilliam; Ex parte Pajdak [2002] WASCA 203
Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme [2003] HCA 56; (2003) 216 CLR 212
Re Monger; Ex parte Welsby [2003] WASCA 191
Re Narula; Ex parte Atanasoki [2003] WASCA 156
Re White; Ex parte Hutt [2005] WASCA 32
Re Wong; Ex parte Hays (Unreported, WASC, Library No 980575, 5 October 1998)
Re Wong; Ex parte Inghams Enterprises Pty Ltd [2004] WASCA 247
Ryan v The Grange at Wodonga Pty Ltd [2015] VSCA 17
Seddon v Medical Assessment Panel [No 2] [2012] WASC 1
Seiffert v The Prisoners Review Board [2011] WASCA 148
Sheraz Pty Ltd v Vegas Enterprises Pty Ltd [2015] WASCA 4 (S); (2015) 319 ALR 709
Simonsen v Legge [2010] WASCA 238
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247 (S)
United Construction Pty Ltd v Maketic [2003] WASCA 138
Velez Pty Ltd v Tudor [2011] WASCA 218
Wilderness Society of WA Inc v Minister for Environment [2013] WASC 307; (2013) 45 WAR 471
Wingfoot Australia Partners Pty Ltd v Kocak [2013] HCA 43; (2013) 252 CLR 480

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MITCHELL J:

Summary

1 The applicant was injured at work on 17 March 2001. In 2006, he commenced proceedings seeking to recover common law damages in relation to that injury.

2 Under the *Workers' Compensation and Injury Management Act 1981* (WA) (Act),[1] the applicant can only recover damages if it is agreed or determined that his degree of disability is not less than 30%.[2]

3 The applicant seeks to have an arbitrator, appointed under the Act, determine that his degree of disability is not less than 30%. In 2007 an arbitrator, faced with conflicting medical reports on certain aspects of the applicant's disability, referred six questions to a medical assessment panel constituted under the Act. The panel's valid answers to those questions will be binding on the arbitrator in determining whether the applicant's degree of disability is not less than 30%.

4 The panel attempted to answer the questions in September 2010. In 2012, this court issued certiorari to quash the September 2010 determination. The panel made two further attempts to answer the questions in June 2013 and June 2014. The applicant now challenges the validity of those further attempts.

5 In my view, the panel's answers to questions 1 - 5 in the June 2013 determination and questions 1, 3, 4 and 5 in the June 2014 determination were infected by jurisdictional error and are invalid on two grounds.

6 First, in answering questions 1 - 5 in the June 2013 determination and question 4 in the June 2014 determination, the panel did not assess the applicant's degree of disability in the manner required by the Act.

7 Second, when making its June 2014 determination, the panel misunderstood the extent of its powers by concluding that it was not permitted to receive additional material which was relevant to questions 1 and 3 - 5.

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[1] The Act has been subject to a number of name changes since 2001. I shall refer to the Act by its current name. Unless otherwise indicated, references to the provisions of the Act are to the provisions currently in force. The Act provides for different schemes to apply depending on when the relevant injury occurred. The Act refers to the scheme applicable to the applicant as the '1993 scheme'.

[2] Section 93E of the Act.

8 Certiorari should issue to quash the determinations so far as they answer those questions.

9 I will not quash the answer to question 6 in the June 2013 determination or the answer to question 2 in the June 2014 determination. This is because there is no utility in doing so. Certiorari should be refused in relation to those questions on that discretionary ground.

10 My reasons for those conclusions are set out below.

Issues

11 The re-amended grounds of the application for judicial review in substance allege that certiorari should issue because the panel:

(a) did not assess the applicant's degree of disability as required by s 93D(2) of the Act;

(b) failed to give adequate reasons for its June 2014 determination; and

(c) misunderstood the extent of its powers in refusing to receive relevant medical reports which the applicant had been required by the panel to produce.

Factual and procedural background

Injury and common law proceedings

12 On 17 March 2001 the applicant was injured at work after falling from a cherry-picker to a concrete floor. The third respondent was deemed to be his employer for the purposes of the Act.

13 In 2006 the applicant commenced proceedings in the District Court of Western Australia seeking damages for injuries he sustained in the 2001 incident against the third respondent and another company.

14 Section 93E(3) of the Act relevantly provides that damages can only be awarded in the District Court proceedings if 'it is agreed or determined that the degree of disability is not less than 30% and that agreement or determination is recorded in accordance with the regulations'. No such agreement has been reached.

Referral of degree of disability to arbitration

15 On 7 May 2007 the applicant referred the question of whether his degree of disability is not less than 30% to the Director, Conciliation, of WorkCover WA under s 93D(5) of the Act.[3] In the referral form, the applicant described his disability as:

> Injury to the right arm (item 13), neck (item 36B), thoracolumbar spine (item 36A), left leg (item 28), right leg (item 28), sexual dysfunction (item 37), psychiatric sequalae.

16 The item numbers refer to items appearing in pt 1 of sch 2 to the Act. The referral form indicated that the applicant's degree of disability, as assessed by a medical practitioner, was 42.75%.

17 The third respondent subsequently gave notice under s 93D(8) of the Act that it considered the applicant's degree of disability to be less than 30%, giving rise to a dispute for the purposes of pt IX of the Act. Arbitrator Spivey was appointed to decide whether the applicant's degree of disability was not less than 30%.

Referral of questions to panel

18 Sections 145A and 210 of the Act authorised the arbitrator to refer a question as to the nature and extent of the applicant's injury to a medical assessment panel, where there is a conflict of medical opinion on the question between medical practitioners engaged by the worker and the employer. On 6 September 2010, Arbitrator Spivey referred six questions to a medical assessment panel. The questions were as follows:

> 1) In percentage terms what, if any, is the worker's permanent degree of loss of use of his thoraco lumbar spine pursuant to Schedule 2 of the Act?
>
> 2) In percentage terms what, if any, is the worker's permanent degree of loss of use of his cervical spine pursuant to Schedule 2 of the Act?
>
> 3) In percentage terms wheat [sic], if any, is the worker's permanent degree of loss of use of his right leg pursuant to Schedule 2 of the Act?
>
> 4) In percentage terms what, if any, is the worker's permanent degree of loss of use of his right arm pursuant to Schedule 2 of the Act?

[3] Read with s 5 of the Act (definition of 'Director').

> 5) In percentage terms what, if any, is the worker's permanent degree of sexual dysfunction (loss of genitals) pursuant to Schedule 2 of the Act?
>
> 6) In percentage terms what, if any, is the worker's permanent psychiatric disability pursuant to Schedule 2? If the use of Schedule 2 is not appropriate, what is the degree of disability by reference to the First Edition of the Assessment of Disability Guide published by the Australian Medical Association of Western Australia Branch dated January 1994 (Social Security Impairment Rating Guide)? (If this is inappropriate it may be necessary to refer to the Guides to the evaluation of permanent impairment published by the American Medical Association Fourth Edition).
>
> (original emphasis)

19 A panel's determination of those questions is final and binding on the applicant, the third respondent and on any court or tribunal hearing a matter in which the determination is relevant.[4] In the absence of evidence that the determination has been varied or rescinded under s 145F of the Act, the determination is conclusive evidence of the matters determined.[5] Therefore, in deciding whether the applicant's degree of disability is not less than 30%, the arbitrator will be bound to apply the determination.

The determinations

20 Panels established under the Act have made three attempts to answer the questions referred by Arbitrator Spivey.

September 2010 determination

21 The first attempt was made on 10 September 2010. On 28 March 2012, this court issued a writ of certiorari to quash that determination. The September 2010 determination was held to be invalid on the ground that the panel acted beyond jurisdiction by relying on causation issues in an impermissible way.[6] It was held that it was no part of the panel's task to determine questions of causation when asked to assess the degree of a worker's disability. The panel was found to have relied on impermissible causation reasoning in reaching its conclusion that the applicant retained a zero degree permanent loss of use to his right arm.[7]

[4] Section 145E(6) of the Act.
[5] Section 145E(7) of the Act.
[6] ***Seddon v Medical Assessment Panel [No 2]*** [2012] WASC 1.
[7] ***Seddon [No 2]*** [86] - [88].

June 2013 determination

22 The second attempt at answering the questions referred by Arbitrator Spivey was made on 29 June 2013. It was common ground between the parties that, on this occasion, the panel answered questions 1, 2, 3 and 5[8] by reference to the American Medical Association Guides (AMA Guides). That approach was contrary to s 93D(2) of the Act. Section 93D(2) required the applicant's degree of disability to be assessed by reference to the items in pt 1 of sch 2 to the Act where it provides for an injury suffered by the applicant. The AMA Guides are to be used only where pt 1 of sch 2 does not apply. Part 1 of sch 2 provided for all of the injuries referred to in questions 1 - 5, and so the AMA Guides should not have been used. Further, the panel purported to calculate the percentages applying the calculation described in s 93D(4) of the Act, which it had not been asked to do.

23 The panel's failure to answer the questions in accordance with s 93D(2) of the Act was a clear jurisdictional error on the ground that the panel misapprehended the nature of the function it was required to perform.[9] Its purported answers to those questions did not produce the binding legal consequences provided for by s 145E(6). Nor did the June 2013 determination discharge the duty to answer the questions which had been referred to the panel. It was common ground between the parties that the answers to questions 1, 2, 3, and 5 were of no legal effect, and the questions remained to be answered by the panel. The panel's error was pointed out in a letter sent by the Registrar, Arbitration to the panel's chairman on 8 May 2014.

June 2014 determination

24 On 20 June 2014, the panel made a third attempt to answer the questions referred by Arbitrator Spivey, providing further answers to questions 1 - 2 and 3 - 5. The June 2014 determination also provided a further answer to question 4, although that had not been requested by the Registrar. The answer to question 4 was in materially the same terms as in the June 2013 determination, but omitted a reference to the AMA Guides.

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[8] The status of the answers to questions 4 and 6 was debated in these proceedings. I deal specifically with those items below.

[9] ***Craig v South Australia*** (1995) 184 CLR 163, 177 - 178; ***Re McWilliam; Ex parte Juras*** (Unreported, WASC, Library No 960637, 11 October 1996), 7 (Murray J); ***Re Gillett; Ex parte Rusich*** [2001] WASCA 111 [6], [29] - [30].

25 The June 2014 determination answered questions 1 - 5 by finding the applicant's permanent loss of efficient use under relevant items of sch 2 to be:

1. 7% for the thoracolumbar spine;

2. 1% for the cervical spine;

3. 4% for the right leg;

4. 0% for the right arm; and

5. 5% for sexual function (loss of genitals).

26 In these proceedings, the applicant challenges the validity of these second and third attempts to answer the questions referred to the panel.

Arbitration

27 Before turning to consider the challenge to the validity of the panel's determinations, I outline other steps which have been taken in the arbitration proceedings since the quashing of the September 2010 determination.

Medical reports

28 On 29 April 2012 the Registrar, Arbitration wrote to the applicant advising him of the re-referral of questions to a medical assessment panel, and listing the medical reports which had been provided to the panel.

29 On 25 May 2012, the applicant sought leave to file medical reports from Dr Stephen Adams dated 9 May 2012 and Dr Jane Fitch dated 22 May 2012. The Registrar, Arbitration had not provided these reports to the panel. Leave to file these reports was refused on 3 July 2012. There was no appeal from that decision. However, on 10 July 2012 the applicant was given leave to file a medical report of Dr J D H Bell dated 9 May 2012.

30 The applicant attended before the panel on 27 June 2013. He did so pursuant to the panel's requirement under s 145D(2) of the Act. The notice requiring the applicant's attendance also required him to produce to the panel '[a]ny information you consider relevant'.

31 The applicant's account of what occurred when he attended the panel was not challenged or contradicted. When the applicant attended the panel he held the reports of Dr Adams and Dr Fitch referred to above, as

well as a report of Dr P Hardcastle dated 29 August 2012, and placed them on his lap when he took a seat. The applicant advised the panel members that he had some additional medical reports from his lawyers that he would like to produce to the panel.

32 The panel chair said that he didn't think that the panel could accept any additional information. The chair said that he would check with the Arbitration Service to see whether or not the panel could accept the additional reports. The chair then made a telephone call in the applicant's presence. At the conclusion of the telephone call, the chair told the applicant that the panel was not permitted to accept any further reports other than those reports that had already been provided by the Registrar, Arbitration.

33 The Registrar, Arbitration had not provided Dr Hardcastle's report to the panel. Subsequently, on 9 December 2013, the arbitrator gave leave to the third respondent to rely on Dr Hardcastle's report.

Amendment of referral form

34 On 11 July 2012, the Registrar, Arbitration gave the applicant leave to amend his referral form to add to the description of the injury set out in that form. The amendment was to insert the words 'pelvis, right arm and scarring' after the words 'psychiatric sequalae'. The Registrar subsequently noted that the reference to 'right arm' was in error, and should have been to the applicant's left arm.

35 No questions were posed to the panel about the additional injuries added by the amendment.

Hearing before the arbitrator

36 On 30 July 2014, the Registrar, Arbitration made orders programming the arbitration for hearing. The orders identified the issue to be determined at the arbitration as:

> whether the arbitrator is bound by the [panel's] determination of 20 June 2014 and the degree of disability that flows from other items not assessed by the Panel.

37 The hearing of the arbitration took place before Arbitrator Nugawela on 30 October 2014 and 8 December 2014.

38 In his submissions to the arbitrator, the applicant contended that the answers to the first five questions in the June 2013 determination

'incorrectly assessed' the applicant's injuries by reference to the AMA Guides and provided final calculations as to the formula prescribed in s 93D(4) of the Act. The applicant also contended that, in answering question 4, the panel further erred in determining an issue of causation and attributing 0% in light of the findings which the panel made. The applicant also asserted that the panel had made a number of errors in the June 2014 determination.

39 At the conclusion of the hearing on 8 December 2014, the arbitrator reserved his decision. That reserved decision has not yet been delivered.

Availability of judicial review

40 Section 145E(9) of the Act 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.

41 Edelman J considered the effect of this provision in ***Seddon [No 2]***.[10] For the detailed reasons which he gave in that case, the Act does not operate to preclude judicial review for jurisdictional error.

42 However, while the Act could not take from this court its power to grant relief on account of jurisdictional error, it can deny the availability for relief for non-jurisdictional error of law appearing on the face of the record.[11] In my view the language of s 145E(9), in the context in which it appears, clearly excludes judicial review for non-jurisdictional error.

43 Some of the grounds which the applicant advances assert both jurisdictional error and error of law on the face of the record. Those grounds can only succeed in the face of s 145E(9) of the Act to the extent that they assert jurisdictional error.

Psychiatric injury

44 On 25 February 2014, orders made by the Registrar, Arbitration recorded that the applicant and third respondent agreed that the applicant's degree of psychiatric disability is 5% after the calculation prescribed in s 93D(4) of the Act. This agreement reflected the answer given to question 6 in the panel's June 2013 determination.

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[10] ***Seddon [No 2]*** [34] - [53].
[11] ***Kirk v Industrial Court (NSW)*** [2010] HCA 1; (2010) 239 CLR 531 [100].

45 Given this agreement, there is no utility in granting certiorari to quash the answer to question 6 given by the panel in its June 2013 determination. Even if that part of the determinations were to be quashed, the parties' agreement would remain. In those circumstances, it is unnecessary to deal with the arguments concerning the answer given to question 6 or the refusal of the panel to receive Dr Fitch's psychiatric report. Even if the applicant succeeded on those arguments, certiorari would still be refused on discretionary grounds.

First issue: assessing the degree of disability as required by s 93D(2)

Questions 1, 2, 3 and 5 in the June 2013 determination

46 As I have noted above, it is common ground that the panel made a jurisdictional error in answering questions 1, 2, 3 and 5 in the June 2013 determination. Both parties accept that the answers to those questions do not have the legal effect provided for in s 145E(6) of the Act.

47 The third respondent submits that, given the parties' agreement as to those matters, there is no basis for the grant of certiorari. The third respondent refers to ***Wingfoot Australia Partners Pty Ltd v Kocak***,[12] where it was noted that:

> an order in the nature of certiorari is available only in respect of an exercise or purported exercise of power which has, at the date of order, an 'apparent legal effect'. An order in the nature of certiorari is not available in respect of an exercise or purported exercise of power the legal effect or purported legal effect of which is moot or spent. (citation omitted)

48 In ***Wingfoot***, the only proceedings in which the assessment of a medical assessment panel established under Victorian legislation could operate had been concluded. The determination of the panel in that case could not have had any legal effect even if it had been validly made. The High Court decided that the panel's answer in that case did not operate in relation to an application by Mr Kocak for leave to bring proceedings for common law damages.

49 In contrast to the position under the Victorian legislation considered in ***Wingfoot***, the panel's June 2013 determination would, if validly made, be final and binding in relation to proceedings which remain on foot.[13] In the absence of agreement, the applicant can only receive damages on the recording of a determination that his degree of permanent disability is not

[12] ***Wingfoot Australia Partners Pty Ltd v Kocak*** [2013] HCA 43; (2013) 252 CLR 480 [25].
[13] Section 145E(6) of the Act

less than 30%.[14] Such a determination is made by an arbitrator in the manner provided for by s 93D of the Act. The panel's determination of questions referred by the arbitrator is clearly binding on the arbitrator, even if the determination operated only in respect of the proceedings in which the questions were referred. In addition, the language of s 145E(6) expressly provides for a broader operation of the panel's determinations than was the case under the Victorian legislation. Section 145E(6) makes the determination binding 'on any court or tribunal hearing a matter in which any such determination is relevant'.

50 The determination of questions 1 - 3 and 5 in the June 2013 determination, if it were valid, has continuing effect. The fact that all parties agree that the determination is invalid may provide discretionary grounds for refusing relief. However, in circumstances where other relief will be granted and the answers are clearly invalid, it is preferable to grant certiorari so that the record can be corrected. In this case, the third respondent has not always maintained a consistent position in relation to legal issues that have arisen in the course of the dispute.[15] Given that history, it is better to formally quash the answers to questions 1 - 3 and 5 in the June 2013 determination so that the status of that determination is clear.

Question 4 in the June 2013 determination

51 It remains necessary to address the validity of the panel's answer to question 4 in the June 2013 determination. The applicant and third respondent disagreed as to whether the answer to this question was validly determined at that time.

52 The answer to question 4 given in the June 2013 determination was infected by the same jurisdictional error as the answers to questions 1, 2, 3 and 5. In answering question 4, the panel expressed its conclusion as to the percentage of 'Whole Person Impairment' of the right arm 'using the 4th edition of the American Guides'. As with questions 1, 2, 3 and 5, the answer to question 4 was given without assessing the degree of disability of the applicant in the manner required by s 93D(2) of the Act. As noted above, that is a jurisdictional error.

[14] Section 93E(3) of the Act.

[15] Before Edelman J, the third respondent conceded that a failure to give adequate reasons would be a jurisdictional error: ***Seddon [No 2]*** [55]. The third respondent advanced a contrary argument before me. Further, a concession that the applicant had produced medical reports to the panel was made and withdrawn during the course of the hearing of the present application.

Other bases on which the third respondent resists the application for relief

53 The third respondent sought to resist the grant of relief to quash the panel's answers in the June 2013 determination on the ground that the application was an abuse of process. The third respondent also contended that the judicial review application was made more than six months after the panel made the determination. The third respondent submitted that the court should refuse an extension of the six month limitation period.

Abuse of process

54 The third respondent submits that the applicant has raised points in these proceedings which have not been taken in the arbitration proceedings. The third respondent also refers to the multiplicity of judicial review proceedings and delay in bringing this application.

Relitigation

55 It may be an abuse of the process of the court to seek to litigate an issue which should have been litigated in earlier proceedings or which has, in substance, been litigated and determined in earlier proceedings so that the new proceedings are unfairly burdensome or unjustifiably oppressive against a respondent.[16]

56 In the present case the ground on which I have found the answers to questions 1 - 5 to be invalid is that the panel applied the wrong test by determining the extent of the applicant's disability by application of the AMA Guides. That is a point raised in the arbitration proceedings in relation to the answers to questions 1 - 5 in the June 2013 determination. The arbitrator has not yet ruled on this point in the arbitration proceedings. The point is not one which has been determined in earlier proceedings. Nor is it a point which should have been, but was not, raised in earlier proceedings. The present challenge to the validity of the answer to question 4 in the June 2013 determination does not constitute an abusive attempt to litigate or relitigate that issue.

57 The above discussion assumes, without deciding, that raising a point in judicial review proceedings in this court which has been determined, or should have been raised, in arbitration proceedings under the Act can constitute an attempt to 're-litigate' so as to constitute an abuse of process.

[16] ***Sheraz Pty Ltd v Vegas Enterprises Pty Ltd*** [2015] WASCA 4 (S); (2015) 319 ALR 709 [8], [11], [21].

Multiple applications

58 The applicant cannot be criticised for the fact that this is the second judicial review application which he has made in relation to proceedings under the Act to determine his degree of disability. The earlier application in ***Seddon [No 2]*** was justified by the applicant's success in obtaining certiorari. Edelman J concluded that the panel's decision was infected by jurisdictional error. This is not a case where a party to administrative proceedings repeatedly brings unsuccessful judicial review applications with the intention or effect of frustrating the administrative process.

Delay

59 Proceedings under the Act in this case have failed to achieve the objective of determining disputes in a manner which is quick.[17] However, the delays which have occurred since the applicant referred the question of his degree of disability on 7 May 2007 have not been generally been the applicant's fault. The principal cause of delay has been the failure of panels' attempts to answer the referred questions in a manner which is authorised by the Act. That failure caused delay between 10 September 2010, when the first determination was made, and 28 March 2012, when the determination was quashed by the issue of a writ of certiorari. The second determination was not made until 29 June 2013, and the third until 20 June 2014. These delays were not a result of the applicant's conduct.

60 In all of the circumstances, bringing the present judicial review application is not an abuse of process so far as it challenges the validity of the panel's answers in the June 2013 determination.

Application for an extension of time

61 The applicant now accepts that he requires an extension of the time for bringing the judicial review application so far as it seeks to impugn the June 2013 determination. This is on the basis that the application was filed on 19 December 2014, more than 6 months after the panel made the June 2013 determination. The applicant accepted that the *Rules of the Supreme Court 1971* (WA) required such an application to be made

[17] See s 3(d) of the Act.

within 6 months, subject to an order permitting the application to be made at a later time.[18]

62 In considering whether a time limit of this nature should be extended the courts commonly consider the length of the delay and any explanation for the delay, the applicant's prospects of success, and the consequences of the grant or refusal of an extension on the parties.[19]

63 It is appropriate to grant the applicant leave to apply for certiorari to quash the answers to questions 1 - 5 in the June 2013 determination.

64 In this case the delay was considerable, but was largely explained by the fact that the panel was asked to reconsider its answers between June 2013 and June 2014. The applicant has a case which should succeed.

65 Further, for the following reasons, there is no prejudice to the third respondent if leave is granted, as the questions raised in relation to the 2013 determination will need to be determined whether or not time is extended.

66 Questions 1 - 5 were also answered in the June 2014 determination. The applicant challenges the validity of the answers in that determination. The third respondent correctly accepts that the applicant does not require leave to challenge the later answers as the judicial review application was made within 6 months of the June 2014 determination.

67 Determining the validity of the answer to questions 1 - 5 in the June 2014 determination necessarily entails considering the validity of the earlier answers. If the questions were validly answered in June 2013, then the panel could only reconsider the answers under s 145F of the Act. The process under s 145F was not engaged in the present case. The panel only had power to answer questions 1 - 5 in June 2014 if the questions were not validly answered in the June 2013 determination. If questions were not validly answered in June 2013, the panel could discharge its unperformed duty to answer the questions in June 2014.[20]

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[18] At the time the June 2013 determination was made, the requirement was contained in O 56 r 2(4) of the Rules, inserted by the *Supreme Court Amendment Rules 2013* (WA) (Government Gazette 23 April 2013, p 1590-1597). Those amendments were disallowed by the Legislative Council on 29 October 2013 (Hansard 29 October 2012, p 5562, 5567). The amendments ceased on that day, without affecting the validity of anything done or the omission of anything in the meantime: s 42(2) of the *Interpretation Act 1984* (WA). The revived O 56 r 11 of the Rules then applied. From 18 December 2013 the 6 month limit is again imposed by O 56 r 2(4) of the Rules, inserted by the *Supreme Court Amendment Rules (No 3) 2013* (WA).

[19] See, in the context of appeals, ***Simonsen v Legge*** [2010] WASCA 238 [8].

[20] ***Minister for Immigration v Bhardwaj*** [2002] HCA 11; (2002) 209 CLR 597 [51] - [53]; [155] - [156]; *Interpretation Act* s 55; ***Re Monger; Ex parte Welsby*** [2003] WASCA 191 [58] - [60].

68 It is, therefore, necessary to determine the validity of the answers given in June 2013 in dealing with the challenge to the validity of the answers given in June 2014. That is particularly so for question 4. Given that the issue of their validity must be determined in any event, leave should be granted to apply for a writ of certiorari to quash the earlier answers.

Relief in relation to the June 2013 determination

69 For the above reasons, certiorari should issue to quash the answers given to questions 1 - 5 in the June 2013 determination. In light of the agreement as to the degree of psychiatric disability, there is no utility in issuing certiorari to quash the answer given to question 6 in the June 2013 determination.

70 In ***Seddon [No 2]***, Edelman J granted certiorari quashing the whole of the September 2010 determination, although he found jurisdictional error to have been committed only in the answer to question 4. There does not appear to have been any debate before him as to whether jurisdictional error in answering one of the questions affects the validity of the answers to the balance of the questions. In my view, there is no reason why it should do so, particularly when it has been recognised that invalid parts of an answer to a single question referred to a panel may be severable from other parts of the same answer in an appropriate case.[21]

71 Section 210 of the Act enables an arbitrator to refer 'a question' as to specified matters to a medical assessment panel. Where, as occurred in the present case, more than one question is referred to a panel the failure by the panel to validly answer one of the questions does not inevitably lead to the conclusion that other questions have not been validly answered. In the circumstances of the present case, certiorari can issue to quash the answers to questions 1 - 5 in the June 2013 determination. The parties have reached agreement in relation to the subject matter of question 6, and the error I have identified in the answers to questions 1 - 5 does not affect the answer to question 6.

72 The applicant submitted that the decision in ***Bhardwaj*** was inconsistent with the proposition that invalid parts of an administrative decision affected by jurisdictional error could be severed from other parts of the decision. The reasons of the High Court do not have that effect.

[21] ***United Construction Pty Ltd v Maketic*** [2003] WASCA 138 [38]-[39]; ***Hammond Worthington v Da Silva*** [2006] WASCA 180 [68].

73 Therefore, I will grant certiorari to quash the answer to questions 1 - 5 in the panel's June 2013 determination.

Questions 2, 3 and 5 in the June 2014 determination

74 The applicant contends that the panel 'persisted in applying the impermissible concept of "impairment" … in relation to its answers to questions' 2 - 5, which is said to be a jurisdictional error.

75 The panel referred to 'impairment' in answering questions 2, 3 and 5 in the June 2014 determination. The applicant submits that 'impairment' is a concept relevant to sch 2 pt 2 to the Act, introduced in 2005, which does not apply to injuries which the applicant has sustained.

76 I do not accept the applicant's submissions in relation to questions 2, 3 and 5 of the June 2014 determination. The panel did use the word 'impairment' at certain points in its answers to questions 2, 3 and 5. However it does not appear from the panel's reasons that the term was being used in a statutory sense. It appears, from the context, that the word was being used in its ordinary sense. Further, it is clear from the panel's answers to those questions taken as a whole that the panel was applying the criteria in pt 1, rather than pt 2, of sch 2 to the Act. The item numbers referred to in the panel's reasons are located in pt 1, rather than pt 2, of sch 2.

Question 4 in the June 2014 determination

77 The position is different, however, in relation to the answer to question 4 in the June 2014 determination. The language of the answer to question 4 has not changed between the June 2013 and June 2014 determinations, other than that the words 'using the 4th edition of the American Guides' have been deleted. However, the reasons continue to refer to a '0% Whole Person Impairment' and, from that finding, express a conclusion as to the permanent degree of loss of the right arm. There is no reference to pt 1 of sch 2 to the Act. The panel failed to correct its previous error when answering question 4 in the June 2014 determination.

78 The applicant also submits that the panel took into account 'an impermissible causation issue' in answering question 4. I accept that submission. The panel has repeated the error which it made in answering question 4 in the 2010 determination. In the June 2014 determination, the panel again formed a conclusion as to the permanent degree of loss of use of the right arm by reference to its view of the cause of the applicant's intermittent sensory impairment. The panel referred to that impairment,

which the panel said was 'thought not to be related to the injury sustained'. The panel went on in the next sentence to say that it 'therefore concluded' there to be a 0% Whole Person impairment and so no permanent degree of loss of use of the right arm. That is the 'impermissible causation reasoning' to which Edelman J referred in ***Seddon [No 2]***.[22]

79 It may have been open for the panel to have concluded that the 'intermittent sensory impairment' did not cause any loss of use of the right arm. The panel found the applicant's shoulder symptoms to be experienced 'only at the extreme range of movement of the right shoulder' and there was 'no clinically significant reduction in the range of movement'. However, if that were the panel's reasoning, reference to the cause of the sensory impairment would have been unnecessary. The use of the word 'therefore' in the panel's reasons indicates that its view of causation informed its ultimate conclusion as to the degree of disability of the right arm. The panel erroneously relied on the cause of the sensory impairment in reaching its conclusion that the applicant suffered no permanent degree of loss of use of his right arm. That error might have affected the answer to question 4. In those circumstances certiorari should issue to quash the panel's answer to question 4 in the June 2014 determination.

Second issue: adequacy of reasons

80 The applicant submits that the panel failed to give adequate reasons for its determination.

Need to establish jurisdictional error

81 Section 145E(3) of the Act provides that the panel's 'determination and the reasons for making it are to be given in writing by the Chairman in a form approved by the relevant authority, and are to be given to the [Registrar] within 7 days after the day on which the determination is made'.

82 The applicant's argument in relation to reasons can only succeed in the face of s 145E(9) of the Act if the failure to give adequate reasons is a jurisdictional error. It will constitute jurisdictional error only if the power to make a valid determination is conditioned by a requirement to give adequate reasons for the determination.[23] Whether the power is so conditioned depends on the construction of the empowering statute. The

[22] ***Seddon [No 2]*** [85] - [88].
[23] As to the nature of jurisdictional error, I adopt what I said in ***Laing O'Rourke Australia Construction Pty Ltd v Samsung C & T Corporation*** [2015] WASC 237 [96] - [105].

relevant question is whether it was a purpose of the Act that a determination made without giving adequate reasons should be invalid.[24] In the absence of express provision,[25] answering this question involves construing the Act to determine whether such a purpose is to be implied.

Source of the panel's power to determine referred questions

83 A panel's power to determine questions referred to it is implicit in pt VII of the Act. Section 145A provides for a question to be referred for determination by a panel. Section 145C provides for the constitution of the panel once the referral is made. Section 146D deals with the procedure and powers of a panel in determining the question. Section 145E(1) deals with how a panel is to determine referred questions (unanimously or in accordance with the opinion of at least two members). Section 145E(2) provides for the time by which the determination must be made if a medical examination is carried out.[26] Section 145E(3) provides for the form of the determination and the requirement for reasons. However, none of the above provisions expressly confer the power to make a determination. Rather, the provisions are expressed in terms which assume the existence of such a power, which must be implied.

Legislative history

84 Section 145E was introduced into the Act by s 25 of the *Workers' Compensation and Rehabilitation Amendment Act 1993* (WA). Section 145E(1) - s 145E(4) were enacted in substantially their current form, subject to presently immaterial variations. Section 145E(5), as enacted, made the substantive provision currently contained in s 145(6) and s 145(7) of the Act. There was no equivalent to the privative clauses now found in s 145E(8) or s 145E(9) of the Act.

85 Following the enactment of s 145E, a series of decisions of this court considered whether certiorari could issue to set aside a panel's decision for inadequate reasons.

86 It is convenient to begin with the decision in ***Re Wong; Ex parte Hays***.[27] In that case the applicant challenged a decision of a panel on the ground of inadequacy of reasons. Wheeler J, with whom other members

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[24] ***Project Blue Sky Inc v Australian Broadcasting Authority*** [1998] HCA 28; (1998) 194 CLR 355; ***Wilderness Society of WA Inc v Minister for Environment*** [2013] WASC 307; (2013) 45 WAR 471 [200] - [202]; ***Seiffert v The Prisoners Review Board*** [2011] WASCA 148 [173].

[25] Contrast s 200 and s 214 of the Act.

[26] The applicant does not take any point in the present case that the June 2014 determination was made more than 28 days after the panel examined him (ts 30); as to which see ***Re Monger*** [64] - [67].

[27] ***Re Wong; Ex parte Hays*** (Unreported, WASC, Library No 980575, 5 October 1998), 8 - 9.

of the court agreed, held that there had in effect been a complete failure to give reasons. She also noted a submission that a failure to fulfil a statutory obligation to state reasons does not of itself warrant setting the decision aside, unless it gives rise to an inference that the panel has failed to exercise its powers according to law. She noted a line of authority in the Federal Court to the effect that a failure to comply with a statutory obligation to give reasons amounts to an error of law on the face of the record. It was unnecessary for Wheeler J to decide whether to follow this line of authority as, in all the circumstances, she drew an inference that the panel had either asked itself the wrong question, or had failed to identify part of the question put to it, so as to fall into jurisdictional error. However, her reasons do not indicate that failure to give adequate reasons could constitute jurisdictional error.

87 Subsequently, in ***Rusich***, the grounds on which an order nisi was granted included that the panel in that case failed to give adequate reasons as required by s 145E(3) of the Act. Miller J, with whom Ipp J concurred, concluded that the reasons were inadequate and that the order nisi should be made absolute on that ground.[28] Miller J did not expressly indicate whether the inadequate reasons gave rise to jurisdictional error or error of law on the face of the record. Murray J said that, as he would quash the panel's decision on other grounds, he would prefer to leave for another day the question of whether inadequacy of reasons might itself constitute an error of law on the face of the record such as would ground the issue of a writ of certiorari.[29] Thus Murray J appears to have considered that to have been the basis for the other judges' decision to grant certiorari on the ground of inadequate reasons.

88 A Full Court also found a panel's reasons to be inadequate in ***Re Bannan; Ex parte Suleski***.[30] Reference was made to ***Hays*** and ***Rusich,*** and certiorari was issued to quash the decision. There was no discussion of the question of whether certiorari issued on the basis of jurisdictional error or an error of law on the face of the record. It may be noted, however, that the catchwords to the court's published reasons referred to '[e]rror on the face of the record'.

89 The Full Court returned to consider the question of whether certiorari would lie on the ground that a panel failed to give adequate reasons in ***Re Croser; Ex parte Rutherford***.[31] In that case the worker asserted that a

[28] ***Rusich*** [36] - [43].
[29] ***Rusich*** [9].
[30] ***Re Bannan; Ex parte Suleski*** [2001] WASCA 289.
[31] ***Re Croser; Ex parte Rutherford*** [2001] WASCA 422; (2001) 25 WAR 170.

panel had failed to give adequate reasons for its determination as required by s 145E(3) of the Act. The members of the court differed on the question of whether the reasons were inadequate. However, all members accepted that certiorari would lie to quash a determination with inadequate reasons on the ground of error of law on the face of the record.[32] Only Murray J considered the issue of whether a failure to give adequate reasons could constitute jurisdictional error, and doubted whether it could.[33]

90 Certiorari issued to quash a panel's determination on the ground of inadequate reasons in ***Re Anastas; Ex parte Welsby***.[34] The court in that case did not indicate whether it proceeded on the basis that there was a jurisdictional error or an error of law on the face of the record.

91 A panel's determination was again quashed by the issue of a writ of certiorari in ***Re Croser; Ex parte Rutherford (No 2)***.[35] The quashed determination was the second attempt by that panel to answer questions which had been referred to it. The Full Court again proceeded on the basis that the provision of inadequate reasons constituted an error of law on the face of the record.[36]

92 In ***Re Narula; Ex parte Atanasoki***,[37] a Full Court quashed a panel's determination for inadequate reasons, on the basis that the failure to give adequate reasons constituted an error of law on the face of the record. It appears that, in that case, the worker did not argue lack of jurisdiction.[38]

93 A determination was also quashed based on inadequacy of reasons in ***Re Malone; Ex parte Casey***.[39] By this time Barker J was referring to 'yet another' such application. Templeman J also referred to 'yet another' such application in ***Re Wong; Ex parte Inghams Enterprises Pty Ltd***,[40] a case in which the reasons provided were found to be adequate.

94 It was against the background of the above decisions that amendments were made to s 145E of the Act by s 108 of the *Workers' Compensation Reform Act 2004* (WA), which came into force on 14 November 2005. Relevantly the amendment repealed s 145E(5) and

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[32] ***Croser*** [5], [11], [95].
[33] ***Croser*** [11].
[34] ***Re Anastas; Ex parte Welsby*** [2002] WASCA 83.
[35] ***Re Croser; Ex parte Rutherford*** [2003] WASCA 8.
[36] ***Rutherford (No 2)*** [22] - [23].
[37] ***Re Narula; Ex parte Atanasoki*** [2003] WASCA 156.
[38] ***Atanasoki*** [53].
[39] ***Re Malone; Ex parte Casey*** [2003] WASC 266.
[40] ***Re Wong; Ex parte Inghams Enterprises Pty Ltd*** [2004] WASCA 247 [7].

substituted s 145E(5) - s 145E(9) in substantially their current form. The amendments included the introduction of s 145E(8)(a), which provides that a panel's determination is not to be vitiated because of any informality or want of form.

Effect of 2004 amendments

95 It can be inferred from the language of s 145E(8)(a) and s 145E(9), considered against the contextual background of the history of litigation referred to above, that the purpose of the provisions was to avoid, so far as possible, the judicial review of panel decisions. As the cases to which I have referred illustrate, a common ground on which panel decisions had been challenged was inadequacy of reasons constituting an error of law on the face of the record. That purpose was, in my view, achieved by the provisions in two ways.

96 Firstly, s 145E(9) operates to exclude judicial review for non-jurisdictional error, so as to preclude the issue of certiorari to quash a panel's determination on the ground of error of law on the face of the record.

97 Secondly, the requirement for reasons contained in s 145E(3) must be construed in light of the statutory purpose reflected in s 145E(8) and s 145E(9) to limit the grounds for judicial review so far as possible. Having regard to the purpose now reflected in the terms of s 145E, the requirement for reasons should not be taken to condition the authority of the panel to validly determine questions referred to the panel. Put another way, when s 145E is considered as a whole, it cannot be concluded that it is a purpose of the provision that a determination made without giving reasons should be invalid.

98 It may also be noted that s 145E(8)(a) provides that a determination is not to be vitiated because of any informality of want of form. The failure to provide adequate reasons was the common formal ground on which decisions had been quashed in the past. It may well be that the reference to informality or want of form should, in that context, be taken to include a failure to give reasons for the determination as required by s 145E(3) of the Act. If so, s 145E(8)(a) would confirm that a failure to give written reasons is not a jurisdictional error. However, in light of the conclusions I have reached above, it is unnecessary to decide this question.

Position prior to 2004 amendments

99 Further, failure to give reasons would not have constituted jurisdictional error, even prior to the amendments introduced in 2004. Some of the decisions to which I have referred did not expressly state whether certiorari was being issued on the basis of jurisdictional error or error of law on the face of the record. Where the basis was expressly stated, however, it was error of law on the face of the record. No case decided prior to the amendment held that a failure to give adequate reasons as required by s 145E(3) constituted jurisdictional error. Murray J was the only judge to address the issue of whether a failure to give adequate reasons could constitute jurisdictional error in ***Rutherford***, and doubted that it could.

100 Courts in ***Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme***,[41] and ***Seiffert***, rejected arguments that a failure to give reasons constitutes a jurisdictional error. The legislative context was different in both cases, and the courts in both cases recognised that the question was one of statutory construction. However, in both cases, that the Act contemplated reasons being given after the decision was made counted against the requirement for reasons being jurisdictional.[42] That point can also be made in relation to s 145E(3) of the Act, which requires the determination and reasons to be given to the relevant authority 'within 7 days after the day on which the determination is made'. The making of a determination gives rise to a statutory duty to give reasons within seven days. It is the making of a valid determination which gives rise to the obligation to give reasons, rather than compliance with the requirement to give reasons being a condition for the valid exercise of a power to make the determination.

More recent decisions

101 Two decisions of this court since the amendment to s 145E in 2004 have considered whether a failure to give reasons constitutes jurisdictional error: ***Seddon [No 2]*** and ***Drysdale v WorkCover WA***.[43]

102 In ***Seddon [No 2]***, Edelman J proceeded on the basis that a failure by a panel to give adequate reasons constituted jurisdictional error.[44] Edelman J referred to a passage in ***Kirk***, that 'at least in some cases the

[41] ***Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme*** [2003] HCA 56; (2003) 216 CLR 212.
[42] ***Palme*** [33], [37]; ***Seiffert*** [174].
[43] ***Drysdale v WorkCover WA*** [2014] WASC 270.
[44] ***Seddon [No 2]*** [114] - [117].

failure to give reasons may constitute a failure to exercise jurisdiction'.[45] He saw this as supporting the proposition that a failure to give adequate reasons will be a jurisdictional error (by implication infecting the panel's determination).[46]

103 In my view, the passage in ***Kirk*** should not be understood in that sense. The passage must be understood by reference to what was decided in ***Donges***, which is the case used to illustrate the point in both ***Kirk*** and ***Soulemezis***. In ***Donges*** the applicant sought a declaration that magistrates had failed to give reasons and an order that they give their reasons. Rath J found the reasons to be inadequate and held that a declaration and mandamus could issue in those circumstances. ***Donges*** was not a case where the underlying decision was said to be invalid because of a failure to give adequate reasons for the decision. Rather, it was a case where the magistrates had failed to perform their statutory duty to give reasons for their decision. The High Court's reference to a 'failure to exercise jurisdiction' should be understood in that sense.

104 It would have been open to the applicant to seek mandamus to compel the panel to give adequate reasons for its determination, if the reasons were inadequate.[47] However, the applicant has not adopted that course. It is one thing to say that a statutory duty to give reasons may be enforced by an order in the nature of mandamus. It is another to say that a statutory decision is invalid because of a failure to give reasons for the decision.

105 In the proceedings before Edelman J, the third respondent conceded that a failure to give adequate reasons would constitute jurisdictional error. While Edelman J accepted that concession as appropriate and correct,[48] the fact that the concession was made meant that he did not have the benefit of a contradictory argument. The concession was not maintained in the present proceedings, and I have the advantage of submissions of counsel for the third respondent on this issue. Edelman J does not appear to have been taken to the legislative history to which I have referred, or to the decisions in ***Palme*** or ***Seiffert***.

106 In ***Drysdale*** Allanson J preferred the view that the Act does not make adequacy of reasons a condition for the determination of the panel to be within jurisdiction. However, in light of the different view expressed by

[45] ***Kirk*** [83], citing ***Donges v Ratcliffe*** [1975] 1 NSWLR 501, 511 and ***Soulemezis v Dudley (Holdings) Pty Ltd*** (1987) 10 NSWLR 247 (S), 477.
[46] ***Seddon [No 2]*** [117].
[47] ***Palme*** [48].
[48] ***Seddon [No 2]*** [55].

Edelman J in ***Seddon [No 2]***, Allanson J preferred to dispose of the application before him on other grounds. For reasons which I have given, I adopt the view preferred by Allanson J.

Inadequate reasons do not give rise to jurisdictional error

107 For the above reasons, I conclude that a panel's power to validly determine questions referred to it is not conditioned by compliance with the duty imposed by s 145E(3) to give reasons for that determination. It may be that the expression of a panel's reasons will reveal that the panel had committed some kind of jurisdictional error, such as taking into account irrelevant considerations or misunderstanding the nature and extent of the power being exercised.[49] However, a failure to give reasons as required by s 145E(3) of the Act is not itself a jurisdictional error invalidating the determination, the making of which engages the obligation to give reasons.

Adequacy of reasons

108 This conclusion is sufficient to dispose of the grounds attacking the June 2014 determination for failure to provide adequate reasons. It is unnecessary to decide whether the panel failed to perform its duty to give reasons under s 145E(3) of the Act. However, as the matter has been fully argued, I will make some observations about the submissions as to the adequacy of the reasons.

109 The applicant's first complaint about the reasons is that they fail to explain why the percentage degrees of disability in the answers given to questions 1, 2 and 3 in the June 2014 determination are less than those specified in answers to the same questions in the June 2013 determination. I do not think that there is any substance in this complaint. It is accepted by all parties that the panel applied the wrong standard in the June 2013 determination and so the answers to those questions were invalid and of no legal effect. The panel is under no obligation to explain why there has been a departure from answers given in an earlier invalid determination, which applied the wrong test.

110 The applicant's second complaint in relation to the reasons is that the panel has not explained why it has determined his percentage degree of disability to be lower than that expressed in medical reports provided to the panel. The applicant says that reasons given under s 145E(3) of the

[49] ***Minister for Immigration v Yusuf*** [2001] HCA 30; (2001) 206 CLR 323 [69]; ***Palme*** [48].

Act are required to explain why the panel has rejected views expressed in medical reports provided to the panel.

111 There are a number of Full Court decisions which indicate that the obligation to give reasons extends to explaining why the panel has not accepted relevant opinions advanced in medical reports provided to the panel.[50] In ***Carter***, McLure P observed that not all of the decisions can be reconciled.[51]

112 The third respondent submitted that the earlier decisions of the Full Court have been overtaken by what was said by the High Court in ***Wingfoot***. In that case the High Court rejected the proposition that a panel operating under the *Accident Compensation Act 1985* (Vic) was required to provide a comprehensible explanation for rejecting medical opinions provided by a party or preferring another medical opinion.[52] Rather, the High Court took the view that the panel was required to set out 'the actual path of reasoning by which [it] in fact arrived at the opinion … in sufficient detail to enable a court to see whether the decision does or does not involve any error of law'.[53]

113 I do not accept the submission that I should decline to follow the earlier Full Court decisions by reason of what is said in ***Wingfoot***. Although the Victorian legislation considered in ***Wingfoot*** was similar to the Act in many respects, it was different legislation. There are a number of material differences between the two Acts. I have already noted that, under s 145E(3) of the Act, a determination by a panel resolves the question for the purposes of determining whether common law damages may be claimed (see [19], [49] above). Under s 145A of the Act, a question may only be referred to a panel where there is a conflict of medical opinion. The scope of the questions which a panel may determine under the Act is much narrower than that under the Victorian legislation.

114 In my view there can be no automatic application of what is said about reasons in ***Wingfoot*** to the Act. ***Wingfoot*** does not overrule the Full Court decisions to which I have referred. Even if the approach taken in ***Wingfoot*** were inconsistent with decisions concerning s 145E(3) of the

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[50] ***Hays***,7; ***Rusich*** [40]; ***Suleski*** [12], [14] - [16]; ***Rutherford*** [80] - [84]; ***Rutherford (No 2)*** [38] - [39]; ***Atanasoki*** [46]; ***Inghams Enterprises*** [30]; ***Re White; Ex parte Hutt*** [2005] WASCA 32 [44]. See also ***Re Knezevic; Ex parte Carter*** [2005] WASCA 139 [4], [29] - [32] and ***Re McWilliam; Ex parte Pajdak*** [2002] WASCA 203 [4].

[51] ***Carter*** [22].

[52] ***Wingfoot*** [56].

[53] ***Wingfoot*** [48], [55].

Act, it would not be appropriate for me to depart from binding decisions of the Full Court.[54]

115 I note that the Act does not expressly qualify a panel's obligation to give reasons in the manner in which s 213(4) of the Act qualifies the obligation of an arbitrator to give reasons for decision.[55] However, even when s 213(4) of the Act limits what reasons must do, an arbitrator may be required to explain why centrally relevant medical opinions are accepted or rejected.[56]

116 Applying the test adopted in the Full Court cases to which I have referred, the panel's reasons in relation to questions 1 – 4 in the June 2014 determination are inadequate.

117 The panel was required to have regard to the contents of the conflicting medical reports relied on by the parties.[57] However, the percentage disability which the panel assessed in its answers to questions 1 - 4 was significantly less than the percentages expressed in medical reports provided to the panel.[58] It is not apparent from the panel's reasons why it rejected those assessments.

118 Nor is this a case, such as ***Carter***, where the reason for the rejection can be reasonably inferred from the panel's express reasons. In answering questions 1 - 3, the panel refers to some physical observations and then employs the following manner of expression in each case:

> Following review of medical information provided at the time of this review and taking into account history provided by [the applicant] and examination findings the [panel] reached the above determination pursuant to [the relevant item of sch 2 to the Act].

119 At most, this formulaic expression indicates that regard has been had to three matters, one of which may include the relevant medical reports. It does not explain why the opinions expressed in the medical reports which significantly differ from the panel's conclusion have been rejected. The relevant opinions may have been rejected because they were based on facts which the history provided by the applicant showed to be incorrect. They may have been rejected, in some cases, because the report was

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[54] ***Public Service Association (SA) v Industrial Relations Commission (SA)*** [2011] SASCFC 14; (2011) 109 SASR 223 [6]; ***Public Service Association (SA) v Industrial Relations Commission (SA)*** [2012] HCA 25; (2012) 249 CLR 398 [50].
[55] As to the operation of s 213(4) see ***Velez Pty Ltd v Tudor*** [2011] WASCA 218 [57] - [70].
[56] ***Velez*** [85].
[57] ***Sulseki*** [15]; ***Carter*** [31].
[58] A summary of the percentages given in the reports is set out in the applicant's affidavit sworn 15 December 2014, Annexure E, page 107.

regarded as out of date. They may have been rejected because the panel regarded them as misstating applicable medical principle. The panel may have decided to rely on its own examination, conducted a year earlier, and preferred its own assessment to those of other practitioners. Alternatively the panel may have overlooked particular opinions in its review of the large volume of medical information provided by the arbitrator. It is not possible to infer from the material which reason led to the panel's decision to reject the reports.

120 Therefore, the panel did not comply with the obligation in s 145E(3) of the Act to give reasons for its determination of the answers to questions 1 - 4. However, that failure to comply with the statutory requirement was not a jurisdictional error.

Third issue: refusal to receive additional reports

121 As I have noted above, the applicant responded to the panel's notice to produce '[a]ny information you consider relevant' by bringing reports of Dr Hardcastle, Dr Adams and Dr Fitch to the panel. He placed the reports on his lap when he took a seat before the panel and informed the panel that he had reports that he wanted to produce. The panel chair said that the panel was not permitted to accept the further reports.

122 The applicant challenged the manner in which the panel dealt with these reports in two ways.

Failure to have regard to mandatory relevant considerations

123 First, the applicant contended that the panel failed to take into account a mandatory relevant consideration by failing to have regard to the reports the applicant sought to produce.

124 An allegation that a decision-maker failed to have regard to a relevant consideration is an allegation that the decision-maker failed to have regard to a matter which the empowering legislation requires the decision-maker to consider as a condition for the valid exercise of the relevant statutory power.[59]

125 No such requirement is expressly stated in relation to documents which the panel requires a worker to produce to it under s 145D(2)(c) of the Act. I doubt whether there is a proper basis for implying a duty of the panel to consider such documents. The documents produced might be

[59] ***Minister for Aboriginal Affairs v Peko-Wallsend Ltd*** (1986) 162 CLR 24, 39 - 40; ***A v Corruption and Crime Commissioner*** [2013] WASCA 288; (2013) 306 ALR 491 [88] - [90].

entirely irrelevant to the questions referred to a panel for its determination.

126 The applicant relies on the decision of Neave JA, with whom other members of the court agreed, in ***Ryan v The Grange at Wodonga Pty Ltd***.[60] In that case Neave JA observed that a panel constituted under Victorian legislation is bound to consider the worker's answers to questions and the documents submitted by the worker when forming its opinion.

127 That conclusion was drawn from the provisions of a different Act and, so far as it concerned documents produced by a worker, was not necessary for the court's decision in that case. In these circumstances it is not necessary for me to be satisfied that the view expressed in ***Ryan*** is plainly wrong before departing from it.[61] However, the terms of the Victorian legislation were very similar to s 145D of the Act. The observations of three judges of the Victorian Court of Appeal are obviously entitled to very considerable respect.

128 In my view the second argument advanced by the applicant on this issue (considered below) provides a clearer basis for finding that the panel in the present case committed jurisdictional error in refusing to receive the medical reports which the applicant had been required to produce. It is, therefore, not necessary for me to decide whether the valid performance of the panel's function is conditioned by a requirement that the panel have regard to documents produced under s 145D(2)(c) of the Act.

Misapprehension of powers

129 Secondly, the applicant contends that jurisdictional error arose because the panel misconceived the nature of the functions it was performing in relation to the matters it was entitled to consider. The applicant contends that the reports which the applicant produced were relevant to the panel's determination of the referred questions. The applicant contends that it was open to the panel to consider those additional medical reports. The applicant submits that, by regarding itself as precluded from considering the reports, the panel misconceived the nature and limits of the power it was exercising by misconstruing the Act.

130 I accept those submissions. The panel was expressly empowered by s 145D(2) of the Act to require a worker to produce documents which the

[60] ***Ryan v The Grange at Wodonga Pty Ltd*** [2015] VSCA 17 [60]; see also ***Milwain v Sim*** [2009] VSC 75; (2009) 31 VAR 53 [28].
[61] Contrast ***Farah Constructions Pty Ltd v Say-Dee Pty Ltd*** [2007] HCA 22; (2007) 230 CLR 89 [135].

panel could consider. That power was not circumscribed by a decision of the arbitrator.[62] It was not part of the arbitrator's function to circumscribe the factual material to which the panel could legitimately have regard in answering the questions which had been referred to the panel. The panel misconstrued the Act, misunderstood the extent of its powers and misapprehended the nature of its function when, through its chair, it indicated that it was not permitted to receive additional material.

131 If those errors led the panel to exclude material that could have affected its assessment it would have proceeded to determine the questions in a manner which the Act did not authorise. There is nothing in the Act to exclude the usual inference that such an error by an administrative tribunal is jurisdictional.[63]

132 The report of Dr Fitch may be put to one side for present purposes. As the applicant correctly accepts, the parties' agreement as to the extent of psychiatric injury means that Dr Fitch's report is of no moment.

133 Dr Adams' report was directly relevant to the answer to question 5. Consideration of his report might have affected the panel's assessment of the applicant's permanent degree of injury or impairment in relation to the applicant's genitals. The panel assessed the relevant percentage loss at 5%. Dr Adams, who specialises in sexual health, assessed the applicant's disability as equivalent to 15% loss of genitals.

134 Dr Hardcastle's report, based on various material and a clinical assessment on 29 August 2012, was directly relevant to questions 1 - 4. He considered that there was no permanent impairment in relation to the applicant's cervical spine. He expressed views as to the applicant's degree of permanent impairment by reference to the items of sch 2 to which those questions related.

135 The panel, in answering question 2, found that the applicant suffered from a 1% permanent loss of the efficient use of his cervical spine. If the panel had considered Dr Hardcastle's report, it could not have assisted the applicant. Dr Hardcastle assessed the percentage as 0%. It would, therefore, be futile to quash the panel's answer to question 2 merely so that the panel could consider the answer to that question in light of Dr Hardcastle's report. As there is no other reason to quash the panel's answer to question 2 in the June 2014 determination, prerogative relief in

[62] See reg 67(1) of the *Workers' Compensation and Injury Management Arbitration Rules 2011* (WA).
[63] ***Kirk*** [72]; ***Craig***, 177 - 178.

relation to the answer to question 2 should be refused on discretionary grounds.

136 Dr Hardcastle's report could have influenced the panel in the applicant's favour in relation to the answers to questions 1, 3 and 4. Dr Hardcastle, an orthopaedic surgeon, assessed the degree of permanent impairment of the thoracolumbar spine at 15%, while the panel assessed the applicant's permanent loss of efficient use of his thoracolumbar spine at only 7%. Dr Hardcastle assessed the degree of permanent impairment of the right leg at 12%, while the panel assessed the applicant's permanent loss of efficient use of his right leg at only 4%. Dr Hardcastle assessed the degree of permanent impairment of the right arm at 2%, while the panel assessed the applicant's permanent loss of efficient use of his right arm at 0%.

137 The third respondent submitted that the panel would have failed to accord procedural fairness if it had taken account of medical reports provided by the applicant without giving the third respondent an opportunity to be heard in relation to that issue. Assuming that to be the case, the argument does not provide a reason why the panel cannot consider material which the applicant produces. The argument simply goes to the extent that the panel should give the third respondent an opportunity to respond to that material.

138 The third respondent submitted that the applicant had not 'produced' the reports to the panel within the meaning of s 145D(2)(c) of the Act. That argument succeeded before Edelman J in ***Seddon [No 2]***. However, in my view the circumstances of the applicant's proffering of reports at his assessment on 27 June 2013 were materially different to the circumstances with which Edelman J was concerned. On 27 June 2013 the applicant had the reports and told the panel that he would like to produce them. It is difficult to see what more the applicant could reasonably have done on that occasion to 'produce' the reports to the panel. The panel knew that the applicant had the reports and declined to receive them on the basis that it was not permitted to accept any further reports beyond those which had been submitted by the Registrar, Arbitration. In my view the applicant did produce the reports of Dr Adams and Dr Hardcastle pursuant to the requirement made under s 145D(2)(c) of the Act.

139 I will, therefore, issue certiorari to quash the answers to questions 1 and 3 of the June 2014 determination by reason of the panel's erroneous conclusion that it could not receive Dr Hardcastle's report which the

applicant produced. This error is also an additional ground for quashing the panel's answer to question 4 in the June 2014 determination.

140 I will also issue certiorari to quash the answer to question 5 by reason of the panel's erroneous conclusion that it could not receive Dr Adams' report in relation to permanent loss of use of the applicant's genitals.

Other matters

141 The applicant's grounds raised a number of other matters which went to the merits of the panel's June 2014 determination, rather than the question of whether the Act authorised the panel to make the determination.

142 The applicant contended that percentage disabilities in relation to question 1, 3 and 4 given were lower than any of the percentages given in the medical reports and so there was no evidence to support the findings. This ground ignores the fact that the panel undertook its own examination of the applicant and could draw conclusions from its own observations.

143 The applicant also contended that the panel erred in converting a 15% reduction in sexual function to a 5% loss of use of genitals under item 37 in sch 2 to the Act. That is a complaint which goes to the merits rather than the validity of the panel's decision.

Orders

144 For the reasons I have given, I will grant leave to apply for certiorari to quash the June 2013 determination and issue certiorari to quash the answers to questions 1 - 5 in the June 2013 determination and answers 1, 3, 4 and 5 in the June 2014 determination.

145 The applicant also sought an order that the matter be referred back to the second respondent to appoint an arbitrator to consider afresh the applicant's disabilities in relation to questions to which no valid answer has been given by a panel (being questions 1, 3, 4 and 5). I do not have the authority to make such an order. In this judicial review application, the court is confined to setting aside an invalid determination, and does not have authority to determine how the respondents should deal with the further conduct of the matter.