IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. M52 of 2013

BETWEEN:

WINGFOOT AUSTRALIA PARTNERS PTY LTD and GOODYEAR TYRES PTY LTD
Appellants

- and -

EYUP KOCAK
First Respondent

- and -

DR PETER LOWTHIAN (as Convenor of medical panels pursuant to the provisions of the *Accident Compensation Act 1985*)
Second Respondent

- and -

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

APPELLANTS' SUBMISSIONS

Part I – Certification for publication on the Internet:

1. The appellants certify that these submissions, and the chronology, are in a form suitable for publication on the Internet.

Part II – Concise statement of the issues the appeal presents:

2. The appeal presents the following issues –

   (a) what is the content of the obligation of a Medical Panel under s 68 of the *Accident Compensation Act 1985* (Vic) (**the Act**) to give reasons for its opinion;

Filed on behalf of: the appellants

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(b) did the Court of Appeal correctly interpret s 68(4) of the Act having regard to the decision of this Court in *Maurice Blackburn Cashman v Brown* (2011) 242 CLR 647; and

(c) do inadequate reasons for an opinion of a Medical Panel constitute a ground for quashing the opinion for error of law on the face of the record?

Part III – s 75B of the Judiciary Act 1903:

3. The appellants consider that no notice should be given under section 78B of the *Judiciary Act 1903* (Cth).

Part IV – Decisions at first instance and on appeal:

4. Neither the reasons for judgment of the primary judge, nor the reasons for judgment of the Court of Appeal, have been reported in authorised reports. The medium neutral and other citations for the decisions are as follows:

(a) *Kocak v Wingfoot Australia Partners Pty Ltd & Ors* [2011] VSC 285; and

(b) *Kocak v Wingfoot Australia Partners Pty Ltd & Ors* [2012] VSCA 259; (2012) 295 ALR 730.

Part V – Relevant facts:

5. In 1992 the appellants, trading as South Pacific Tyres (**the Employers**), employed the first respondent (**the Worker**), initially as a cureman, and later as a serviceman.

6. The Worker alleges that on 16 October 1996 he suffered a neck injury while pulling a heavy spool of rubber at work. He was put on light duties until January 1997.

7. The Worker alleges that on 8 May 2000 he suffered a major injury to his lower back, again while at work. Although he initially returned to work on light duties, he ceased work in March 2001 and has not worked since. The Worker submitted a WorkCover claim for statutory compensation payments under the Act in respect of his lower back injury, which claim was accepted. In 2007 the Worker commenced a proceeding in the Common Law Division of the Supreme Court of Victoria, seeking damages in respect of that injury. That proceeding is still pending.

8. The Worker alleges that in March 2009 he developed more significant pain in his neck. He was admitted to hospital. His neurosurgeon recommended surgery and sought acceptance of liability for statutory compensation for treatment expenses (surgery and an

orthopaedic bed) by reference to the claim for compensation for the May 2000 lower back injury. Liability was denied on the basis that the Worker's neck complaint was not related to the May 2000 injury.

9. In May 2009 the Worker submitted a new WorkCover claim, on the basis that his neck condition was related to the neck injury he alleged he sustained in October 1996. Liability was denied on 20 May 2009 and, on 29 June 2009, a conciliation officer certified that conciliation had failed to resolve the matter.

10. In November 2009 the Worker commenced two proceedings in the County Court of Victoria relating to the injury to the neck alleged to have occurred on 16 October 1996: one seeking (among other things) leave to bring common law proceedings pursuant to 135A(4)(b) of the Act, and the other seeking a declaration of entitlement to medical or like expenses pursuant to s 99 of the Act.

11. On 2 February 2010 the s 99 compensation proceeding was transferred to the Magistrates' Court. On 8 June 2010, at the Employers' request, the Magistrates' Court referred three medical questions to a Medical Panel for determination pursuant to s 45(1)(b) of the Act. On 26 August 2010, the Medical Panel gave written notice of its opinion pursuant to s 68 of the Act, together with a statement of reasons. The medical questions, and the Medical Panel's opinion in respect of each, were as follows:

Question 1 **What is the nature of the [Worker's] neck/cervical spine condition relevant to the alleged neck/cervical spine injury?**

Answer The Panel is of the opinion that the [Worker] is suffering from chronic mechanical left cervical spine dysfunction with referred pain to the left shoulder girdle and upper limb, in the absence of objective signs of radiculopathy, on a background of radiological changes of multilevel degeneration and a left C5–6 disc prolapse, but this condition is not relevant to any alleged neck/cervical spine injury.

Question 2 **Was the [Worker's] employment with the [Employers] on 16 October 1996 a significant contributing factor to his alleged neck/cervical spine injury?**

Answer The Panel is of the opinion that the [Worker's] employment with the [Employers] on 16 October 1996 was in fact a significant contributing factor to a now resolved soft tissue injury to the neck, but was not in fact and could not possibly have been a significant contributing factor to any claimed recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing neck or cervical spine condition, in any way.

Question 3 **What is the extent to which any neck/cervical spine condition results from or is materially contributed to by the [Worker's] alleged neck/cervical spine injury on 16 October 1996?**

Answer The Panel is of the opinion that the [Worker's] current neck/cervical spine condition does not result from, nor is it materially contributed to by the [Worker's] alleged neck/cervical spine injury of 16 October 1996.

12. On 20 September 2010 the Worker's solicitors returned to the Employers' solicitors a signed minute of consent orders, providing (among other things) that the Magistrates' Court adopt the Medical Panel's opinion dated 15 August 2010 and that the proceeding be dismissed. Orders in those terms were formally made in the Magistrates' Court on 29 September 2010.

13. On 3 November 2010, at the commencement of the hearing of the Worker's application in the County Court for leave to bring a damages proceeding, the Employers' counsel foreshadowed that the Employers would contend that the County Court was bound by the Medical Panel opinion, either by virtue of s 68(4) of the Act, or on the basis that the Magistrates' Court consent order gave rise to a common law issue estoppel which precluded the Worker from arguing that his cervical spine disorder was related to the October 1996 neck injury. The hearing of the application was adjourned, and is now listed for hearing on 11 September 2013.

14. On 29 November 2010 the Worker commenced the judicial review proceeding in the Supreme Court of Victoria which is the subject of this appeal. The Worker sought an order in the nature of certiorari to quash the Medical Panel opinion on the ground that the Medical Panel had erred in law, including by failing to give adequate reasons for its opinion. The primary judge refused the claim for certiorari, for reasons including that the Medical Panel's reasons were not inadequate.

15. The Worker successfully appealed the decision of the primary judge. The Court of Appeal concluded as follows, at [2] –

    (a) the reasons were inadequate and the appeal should be allowed;

    (b) the Panel's failure to give adequate reasons constituted an error of law on the face of the record;

    (c) certiorari is an available remedy in the circumstances; and

    (d) there is utility in granting certiorari because:

        (i) perforce of s 68(4) of the Act, the Panel's opinion must be accepted and adopted by the County Court in the [Worker's] serious injury application; and

(ii) an earlier Magistrates' Court order that adopted and applied the Panel's opinion (also perforce of s 68(4) of the Act) on the [Worker's] application for a declaration of entitlement to medical or like expenses for the same injury, is capable of creating an issue estoppel in the serious injury application.

16. The Court of Appeal made an order in the nature of certiorari quashing the Medical Panel's opinion and directing that the questions the subject of the opinion be referred to a differently constituted Medical Panel for re-determination.

Part VI – Argument

10 ***The obligation to give reasons***

17. The Court of Appeal erred at [47] to [50] in its formulation of the content of the obligation of a Medical Panel to give reasons for its opinion. The standard that the Court of Appeal has imposed on Medical Panels is tantamount to a judicial standard of reasons. That conclusion follows from the penultimate sentence of paragraph [47] –

> Accordingly, just as judges who decide serious injury applications must give reasons sufficient to explain their path of reasoning – from the evidence to the facts and from the facts to their conclusions – so too we think must Medical Panels, on whose opinions the whole exercise may now rest.[1]

20 18. The obligation of a Medical Panel to give reasons for its opinion is statutory, and is derived from ss 68(2) and (3) of the Act. There is no express support in the Act for the content of the obligation to give reasons identified by the Court of Appeal at [47] to [50]. There are no provisions of the Act, or any other applicable legislation, that correspond to the express requirements of some Commonwealth legislation, such as s 25D of the *Acts Interpretation Act 1901* (Cth)[2], the language of which the Court of Appeal at [48] of its reasons appears to have picked up and imported into its formulation of the obligation of a Medical Panel to give reasons under the Act.

19. There were four steps in the Court of Appeal's reasoning at [47] –

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[1] The Court of Appeal cited *Re Croser; Ex parte Rutherford* [2001] WASCA 422, [66]–[68] (Olsson AUJ).

[2] See: *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 13(1); *Administrative Appeals Tribunal Act 1975* (Cth), s 28(1); *Migration Act 1958* (Cth), s 430(1). And see also: *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 46(2); *Administrative Decisions Tribunal Act 1997* (NSW), s 49(3); *Acts Interpretation Act 1954* (Qld), s 27B; *Judicial Review Act 1991* (Qld), s 3 ("reasons"), s 34; *Judicial Review Act 2000* (Tas), s 3 ("reasons"), s 31; *Administrative Decisions (Judicial Review) Act 1989* (ACT), s 2 ("statement of reasons"), s 13; *Legislation Act 2001* (ACT), s 179.

(a) serious injury applications now stand to be determined on the basis of Medical Panel opinions which judges are bound to accept;

(b) judges who decide serious injury applications must give reasons sufficient to explain their path of reasoning – from the evidence to the facts and from the facts to their conclusions;

(c) Medical Panels, on whose opinions the whole exercise may now rest should give such reasons; and

(d) if that is the standard to be required for some opinions, then consistency and convenience require that it be so for all of them.

10 20. The starting point is the Court of Appeal's statement in [47] that, "In effect, serious injury applications now stand to be determined on the basis of Medical Panel Opinions which judges are bound to accept". That statement is to be informed by the Court of Appeal's statement at [45] that Medical Panel opinions are, "binding on all courts and tribunals in relation to all matters and questions arising under or out of the Act, and thus in effect [are] binding upon the keeper of the gateway to common law proceedings". Those statements were the product of the Court's erroneous conclusion at [28] that this Court's decision in *Maurice Blackburn Cashman v Brown* (2011) 242 CLR 647 did not preserve the Court of Appeal's earlier decision in *Pope v W S Walker & Sons Pty Ltd*[3] (***Pope v Walker***).

Maurice Blackburn Cashman v Brown (2011) 242 CLR 647

20 21. The Court of Appeal erred at [28] in its construction of s 68(4) of the Act in holding that in *Maurice Blackburn Cashman v Brown*[4] there had been a "re-interpretation" of s 68(4), so that a Medical Panel opinion obtained for statutory compensation purposes is binding on a court hearing an application for leave to bring a damages proceeding, with the consequence that the Court of Appeal's decision to the contrary in *Pope v Walker* does not survive.

22. *Pope v Walker* concerned an application under s 134AB(16)(b) of the Act for leave to bring a damages proceeding in respect of an injury arising out of or in the course of, or due to the nature of, employment on or after 20 October 1999. By parity of reasoning, the construction of s 68(4) adopted in *Pope v Walker* should apply also to an application under
30 s 135A(4)(b) of the Act to bring a damages proceeding in respect of an injury arising out of

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[3] (2006) 14 VR 435.

[4] (2011) 242 CLR 647.

or in the course of, or due to the nature of, employment before 12 November 1997, which was the application that the Worker had brought in the County Court that is referred to in the Court of Appeal's reasons in this proceeding.

23. Before the Court of Appeal, the Employers and the Worker submitted that the Court of Appeal should continue to follow *Pope v Walker*. There was no submission to the contrary.

24. In *Maurice Blackburn Cashman v Brown*, this Court held that the opening words of s 68(4) of the Act are to be read as, "[F]or the purposes of determining any question or matter *arising under or for the purposes of the Act*"[5]. The Court of Appeal effectively treated this passage as if it constituted the text of the section.

25. Questions raised by the application of legislation can only be answered by first giving close attention to the relevant provisions[6]. Reference to decided cases (and in particular to expressions used in decided cases to explain the application of a provision to particular facts and circumstances) may serve only to "mask" the nature of the task of applying the provision in a different case[7].

26. Here, the Court of Appeal (having failed itself to construe s 68(4) on its terms) allowed the statements of this Court in *Maurice Blackburn Cashman v Brown* to mask, or even supplant, the language of s 68(4) without having regard to the confined nature of the question in issue in that case. The observations of the Privy Council in *Odgen Industries Pty Ltd v Lucas*[8] are apposite in this regard –

> [I]n a common law system of jurisprudence which depends largely upon judicial precedent and the earlier pronouncements of judges, the greatest possible care must be taken to relate the observation of a judge to the precise issues before him and to confine such observations, even though expressed in broad terms, to the general compass of the facts before him, unless he makes it clear that he intended his remarks to have a wider ambit. It is not possible for judges always to express their judgments so as to exclude entirely the risk that in some subsequent case their language may be misapplied and any attempt at such perfection of expression could only lead to the opposite result of uncertainty or even obscurity as regards the case in hand.
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> These general principles are particularly important when questions of construction of statutes are in issue.

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[5] (2011) 242 CLR 647 at 660 [34] (emphasis in original). Note that this Court in *Maurice Blackburn Cashman v Brown* considered s 68(4) prior to the 2010 amendments to s 68(2) and (3); there was no amendment to s 68(4). The appellants submit that nothing turns on this.

[6] *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 311 per Hayne and Heydon JJ and the authorities cited in fn (96) therein.

[7] *Shi v Migration Agents Registration Authority* [2008] 235 CLR 286 at 311 per Hayne and Heydon JJ ; *Marshall v Director-General, Department of Transport* (2001) 205 CLR 603 at 632 - 633 per McHugh J; *Odgen Industries Pty Ltd v Lucas* [1970] AC 113 at 127 per Lord Upjohn (for the Board), recently cited in *Baini v R* (2012) CLR 469 at 476 [14] fn (24) per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

[8] [1970] AC 113 at 127 per Lord Upjohn (for the Board).

> It is quite clear that judicial statements as to the construction and intention of an Act must never be allowed to supplant or supersede its proper construction and courts must beware of falling into the error of treating the law to be that laid down by the judge in construing the Act rather than found in the words of the Act itself.
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> No doubt a decision on particular words binds inferior courts on the construction of those words on similar facts but beyond that the observations of judges on the construction of statutes may be of the greatest help and guidance but are entitled to no more than respect and cannot absolve the court from its duty of exercising an independent judgment.

27. The issue in *Maurice Blackburn Cashman v Brown* was whether a Medical Panel opinion given pursuant to a reference under s 104B(9) of the Act was binding on a court hearing a common law damages proceeding (that is, a proceeding that was outside the Act). The Court was not required to determine whether by operation of s 68(4) a Medical Panel opinion obtained for one purpose under the Act (e.g. statutory compensation) was binding on a court hearing an application with a different purpose under the Act (e.g. an application for leave to commence a damages proceeding). That latter issue had been resolved by the Court of Appeal in *Pope v Walker*, which held that a Medical Panel opinion obtained for a statutory compensation purpose was not binding on a court hearing an application under s 134AB(16)(b) of the Act for leave to bring a damages proceeding.

28. In that case, the primary judge had considered himself bound to adopt a literal interpretation of the s 68(4) prescription that a Medical Panel opinion must be, "accepted as final and conclusive by any court, body or person irrespective of who referred the medical question" (emphasis added). That approach was rejected on appeal. Having considered at some length the history of s 68(4) of the Act[9], including in particular the 2000 amendments by which s 134AB was introduced, Eames JA (Neave JA and Bell AJA agreeing) held that s 68(4) had to be read down to give effect to Parliament's intention –[10]

> In my view, the word "any" [in s 68(4)] cannot be interpreted literally, because to do so would give the provision unlimited operation, which could not have been intended.
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> The [post-2000] amended provisions lend no support for the conclusion that Medical Panel opinions obtained under the quite distinct procedure under s 45(1), and for the quite distinct purpose of a statutory benefits dispute, would equally have final and conclusive effect in a s 134AB proceeding. To read that conclusion into the broad words of s 68(4) would be to ignore the distinction between s 134AB proceedings and those concerned with statutory benefits disputes which the legislation implicitly, if not expressly, acknowledges.

[9] (2006) 14 VR 435 at 438 – 442.

[10] (2006) 14 VR 435 at 444 - 445.

29. The Employers adopt the reasoning of Eames JA. The Employers also adopt a submission advanced below on behalf of the Worker, namely that –[11]

(a) s 45(1A) of the Act enables the court hearing an application under s 134AB(16)(b) for leave to bring a damages proceeding to refer a medical question to a Medical Panel for opinion[12]; and

(b) if s 68(4) applied to a leave application, then the court could be faced with competing (and apparently binding) medical opinions.

30. The Court of Appeal treated *Maurice Blackburn Cashman v Brown* as effectively overruling *Pope v Walker*. Whilst there are references to *Pope v Walker* in this Court's reasons in *Maurice Blackburn Cashman v Brown* at [29] and in footnote (28), this Court did not overrule *Pope v Walker*, and there was no occasion to do so, because the issue in *Pope v Walker* was not before the Court. The effect of the Court of Appeal's decision in this case is to reinstate the construction of s 68(4) adopted by the primary judge in *Pope v Walker* in circumstances where –

(a) in *Pope v Walker*, at first instance and on appeal, none of the parties supported the primary judge's construction[13];

(b) before the Court of Appeal in this proceeding, neither the Employers nor the Worker supported the construction;

(c) the construction was rejected on appeal in *Pope v Walker* following a considered analysis of s 68(4) in the broader context of the Act; and

(d) neither this Court in *Maurice Blackburn Cashman v Brown*, nor the Court of Appeal below, considered the merits of the Court of Appeal's reasons in *Pope v Walker*.

31. If the construction of s 68(4) adopted in *Pope v Walker* is accepted, then the Court of Appeal's four step reasoning process referred to in [19] of these submissions falls away. In any event, the third and fourth steps taken by the Court of Appeal at [47] of its reasons, and referred to in paragraphs [19(c) and (d)] of these submissions involve "judicial legislation", a term that the Court of Appeal employed at [44] in referring to other cases that had considered the required standard of Medical Panel reasons.

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[11] The submission is recorded by the Court of Appeal at [27].

[12] Note that s 45(1) both before and after the 2010 amendments provides (in different terms) that (subject to exceptions) upon the request of a party to the proceeding the County Court "must" refer a medical question to a Medical Panel.

[13] As noted at (2006) 14 VR 435 at 436 [1] per Eames JA.

32. The Court of Appeal's erroneous application of *Maurice Blackburn Cashman v Brown* extends to the Court's *obiter dicta* at [35] to [37] where the Court expresses the opinion that the order of the Magistrates' Court in the compensation proceeding does not give rise to an issue estoppel in a common law damages proceeding insofar as the Court adopted the Medical Panel's answer to Question 1. As the Court of Appeal acknowledges, the passage from *Maurice Blackburn Cashman v Brown* which it quotes at [36] of its reasons concerned whether a Medical Panel opinion alone gives rise to an issue estoppel. There is no justification for construing s 68(4) of the Act so that it cuts across an issue estoppel that would otherwise arise from an order of the Court, let alone for some purposes (e.g., a leave application), but not another (a damages proceeding).

The content of the obligation to give reasons

33. At paragraph [42] of its reasons the Court of Appeal refers to, "the body of case law which defines the quality of reasons required to satisfy a statutorily imposed obligation to give reasons"[14]. Of the three cases cited by the Court of Appeal at footnote (27), two are arbitration cases[15]. The third case is an English planning case, where the principles are expressed to be those governing, "the proper approach to a reasons challenge in the planning context"[16]. The Court of Appeal's reference at [46] to "the realm of reasons jurisprudence" diverts attention from the text of the Act. Judicial formulations of the content of the obligation to give reasons required by arbitration, planning or other legislation do not dictate the content required by s 68(2) and (3) of the Act in the present case.

34. The following features of the Act are relevant to determining the content of the obligation of a Medical Panel to give reasons.

35. The function of a Medical Panel is to give *its opinion* on any medical question referred to it[17]. Questions may be referred to a Medical Panel by a number of means, including –

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[14] Note that the Court of Appeal's assumption in [40] and [42] that, at the time of amending s 68 of the Act, Parliament was aware of the Court of Appeal's decision in *Sherlock v Lloyd* (2010) 27 VR 434 is incorrect. The *Accident Compensation Amendment Act 2010* received the Royal Assent on 23 March 2010, and the amendments to s 68 commenced operation on 5 April 2010. The Court of Appeal's reasons in *Sherlock v Lloyd* were published on 28 May 2010.

[15] *Re Poyser and Mills' Arbitration* [1964] 2 QB 467; *Oil Basins Ltd v BHP Billiton Ltd* (2007) 18 VR 346 – but see instead *Westport Insurance Corporation v Gordian Runoff Limited* (2011) 244 CLR 239 at 262 [21]-[23], and 270 [53] per French CJ, Gummow, Crennan and Bell JJ, and at 302-303 [169] per Kiefel J.

[16] *South Bucks District Council v Porter* (No 2) [2004] 1 WLR 1953 at 1964 [35] per Lord Brown. The obligation to give reasons appears to have arisen under rule 19(1) of the *Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000*, referred to by Lord Brown at 1959 [17].

[17] Section 67(1), (1A), s 68(1).

(a) by a court exercising jurisdiction under Part III in relation to statutory compensation [s 45(1)];

(b) by a court hearing an application under s 134AB(16)(b) for leave to bring a damages proceeding [s 45(1A)];

(c) by a Conciliation Officer [s 55AA, s 55A, s 56(6)];

(d) by the Authority, a self insurer or a court in connection with a hearing loss dispute [s 89(3D)]; and

(e) by the Authority or self insurer in relation to a dispute concerning the assessment of the degree of impairment in accordance with the AMA Guides [s 104B(9)][18].

10 36. A Medical Panel is comprised of medical practitioners[19]. A Medical Panel is not bound by rules or practices as to evidence, but may inform itself on any matter relating to a reference in any manner it thinks fit[20]. A Medical Panel must act informally, without regard to technicalities or legal forms, and as speedily as a proper consideration of the reference allows[21]. A Medical Panel may ask a worker to meet with the Panel and answer questions, and to submit to a medical examination[22].

37. In *Sherlock v Lloyd*[23], the Court of Appeal described a Medical Panel as a statutory expert, providing an expert opinion for the assistance of the court and the parties on medical (not legal) questions[24].

38. In this appeal the Court is called upon to construe s 68 in the form that existed after the
20 amendments that commenced on 5 April 2010[25]. In respect of proceedings commenced on or after 5 April 2010, where it appears to a court that the formation of an opinion by a Medical Panel will depend substantially on the resolution of factual issues that are more

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[18] A reference under s 104B(9) was the subject of *Maurice Blackburn Cashman v Brown* (2011) 242 CLR 647.

[19] *Accident Compensation Act*, s 68(3).

[20] Section 65(1).

[21] Section 65(2).

[22] Section 65(5).

[23] (2010) 27 VR 434 at 439 [20] per Maxwell P, Ashley JA and Byrne AJA. See also the Second Reading Speech of the responsible Minister when introducing Act No 26 of 2000 (Hansard 13 April 2000, p 1001ff), in which it was stated that "the value of the medical panels is that independent experts determine medical questions and the degree of whole person impairment in a non adversarial environment".

[24] The use of medical practitioners to assist in the resolution of compensation disputes can be traced back to the *Workmen's Compensation Act 1897* (UK), Second Schedule, cl (13). See also: *Workmen's Compensation Act 1906* (UK), Second Schedule, cl (15); *Workers Compensation Act 1915* (Vic), ss 22, 26 and Second Schedule, cl (14).

[25] See the transitional provision in s 344 of the Act.

appropriately determined by a judge, then the court must not refer the medical question[26]. In the case of referral by a Conciliation Officer on or after 5 April 2010, the Convenor may decline to convene a Medical Panel, and the Medical Panel may decline to give an opinion where it is apparent that the formation of an opinion by the Medical Panel will depend substantially on the resolution of factual issues that are more appropriately determined by a court[27].

39. By s 68(4) of the Act, the opinion of a Medical Panel must be accepted as final and conclusive.

40. There is no appeal from an opinion of a Medical Panel; only judicial review[28]. Judicial review is concerned with the legality of the exercise of a power[29]. The ambit of judicial review is largely confined to whether, in forming its expert opinion, a Medical Panel has accorded procedural fairness[30], has made an error of law, has failed to take account of relevant considerations, has taken account of irrelevant considerations[31], or whether the opinion is affected by fraud[32].

41. The only express content of the obligation to give reasons is that s 68(2) and (3) of the Act require that the Medical Panel give a statement of reasons for *its opinion*[33]. Section 68(2) does not contain any obligation to make findings[34], or to refer to material on which any findings might be based, or to explain away possible findings that were rejected[35]. A Medical Panel gives an expert opinion following inquisitorial processes[36]. The fact that a Medical Panel opinion is binding, with the consequence that, once adopted, it may affect

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[26] Section 45(1D). This sub-section was not applicable to the referral in the present case because it was inserted by s 76(3) in Part 9 of the *Accident Compensation Amendment Act 2010*, and commenced operation on 5 April 2010, and by the transitional provision in s 323 of the Act, s 45 as amended applies to proceedings commenced on or after the commencement date of the amending Act. The referral the subject of this proceeding occurred on 8 June 2010, but the proceeding was commenced in November 2009.

[27] Section 65(5A). This sub-section was inserted by s 89 in Part 9 of the *Accident Compensation Amendment Act 2010*, and commenced operation on 5 April 2010, and by the transitional provision in s 344 of the Act applies in respect of any medical question referred to a Medical Panel on and after the commencement date.

[28] See *Hockey v Yelland* (1984) 157 CLR 124.

[29] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 26 per Brennan J.

[30] *Masters v McCubbery* [1996] 1 VR 635.

[31] *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 349 [75] per McHugh, Gummow and Hayne JJ.

[32] *Craig v South Australia* (1995) 184 CLR 163 at 176; *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189.

[33] cf *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 344 [64] per McHugh, Gummow and Hayne JJ.

[34] cf *Masters v McCubbery* [1996] 1 VR 635 at 643.10 per Winneke P.

[35] cf *Acts Interpretation Act 1901* (Cth) s 25 and the provisions referred to in footnote 2 above.

[36] See also *Sherlock v Lloyd* (2010) 27 VR 434 at 439 [20]; *Re Knezevic; Ex parte Carter* [2005] WASCA 139 at [31] per McLure JA, with whom Wheeler JA and Roberts-Smith JA agreed.

substantive rights, does not alter the character of the function of the Medical Panel as being the formation and provision of expert opinion[37].

42. Any implied content of a Medical Panel's obligation to give a written statement of reasons is to be informed by the features of the Act referred to above. The content of the requirement that a Medical Panel give reasons should reflect the nature of the function of the Medical Panel. That function is neither arbitral nor judicial[38]. The text of the Act indicates that a Medical Panel brings its own expertise and skill to bear upon the formation of its own opinion on medical questions[39].

43. The content of the obligation to give reasons is also informed by the considerations that an opinion given by a Medical Panel involves no legal standard, and that there is no appeal from a Medical Panel opinion[40].

44. Therefore, it is not correct to impose on a Medical Panel an obligation to give reasons as if it is discharging a judicial function subject to an appeal by way of rehearing. To do so invites over-zealous judicial review to discern whether there is some inadequacy in the way the reasons have been expressed[41]. Imposition of a judicial standard also cuts across the finality prescribed by s 68(4) of the Act, and fails to promote the legislative objects of having medical questions determined informally, promptly, economically, and finally, by medical practitioners[42].

45. Winneke P in *Masters v McCubbery* was correct in formulating the obligation of a Medical Panel to give reasons as –[43]

> A medical panel is not required to do more than provide sufficient reasons to enable it to be seen by the court and the parties that it has arrived at its decision in accordance with its statutory functions.
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> ...
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> ... they are not obliged to overwhelm themselves with the provision of elaborate reasons. As I have already pointed out they are required to do no more than to provide a succinct statement of why they came to the conclusions which they did sufficient to enable the parties and the court to see that they have addressed their mind to relevant

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[37] cf, the observations of Winneke P in *Masters v McCubbery* [1996] 1 VR 635 at 643.16 and of Ormiston JA at 644 and 649 as to the nature of the "opinion" provided by a Medical Panel going to the question whether such an opinion was a "decision" for the purposes of the *Administrative Law Act 1978*.

[38] See *Shoalhaven City Council v Firedam Civil Engineering Pty Limited* (2011) 244 CLR 305 at 315-316 [26] per French CJ, Crennan and Kiefel JJ.

[39] See *In re an Arbitration between Dawdy and Harteup* (1885) 15 QBD 426 at 430 per Lord Esher MR.

[40] See *Soulemezis v Dudley Holdings Pty Ltd* (1987) 10 NSWLR 247 at 281 per McHugh JA.

[41] See *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ.

[42] *Interpretation of Legislation Act 1984* (Vic), s 35(a).

[43] [1996] 1 VR 635 at 650 and 651. Note that the obligation to give reasons in *Masters v McCubbery* arose under s 8 of the *Administrative Law Act*.

matters and have not acted unreasonably: see *Iveagh (Earl of) v Minister of Housing and Local Government* [1964] 1 QB 395 at 410.

46. In departing from these principles, the Court of Appeal fell into error.

The Medical Panel's reasons were adequate

47. If the judicial standard of reasons held by the Court of Appeal to be applicable is rejected, then the decision of the primary judge that the reasons in this case were not inadequate was correct, and the Court of Appeal was in error at [69] in holding otherwise.

48. Having regard to the formulation of Winneke P in *Masters v McCubbery* cited in paragraph [45] above, the Medical Panel was required only to give reasons that demonstrated that it had arrived at its decision in accordance with its statutory functions. Consistent with that standard, the primary judge was satisfied of the adequacy of the Panel's reasons[44]. The reasons disclose both that the Panel had turned its mind to the relevant question asked of it (whether the Worker's 1996 injury contributed to his present neck condition), and the steps in the reasoning process that led to the Panel's opinion[45]. The Panel was not required to address or deal with alternative diagnoses to any greater extent than it did[46]. The Panel stated that it had taken account of the documents listed in "Enclosure A"[47], and there was no reason to doubt that statement. In its statement of reasons, the Panel referred expressly to clinical records of the Employers' in-house medical centre and of Dr Tunaley, and to reports of Dr Baglar and Mr D'Urso. The Panel referred to and commented on the radiological evidence before it. The Panel referred to the fact that it had conducted a clinical interview of the Worker, and to the submissions of the parties. These features of the Medical Panel's reasons were adequate to show that the Panel had discharged its statutory function.

49. By contrast, the Court of Appeal's criticisms of the Panel's reasons arose from the application of a judicial standard of reasons, as indicated by paragraph [47] of the Court's reasons. The Court of Appeal's criticism at [69] that the Panel's reasons left the parties to wonder which of a number of possible routes the Panel had taken to reach its conclusion, if valid, is a product of the application of a judicial standard apt to a decision where there is a right of appeal by way of re-hearing. There is nothing in the Court of Appeal's

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[44] See the primary judge's reasons at [112]-[115] and [135]-[155]. The primary judge's analysis of the reasons might in places be taken to suggest that, far from being inadequate, the Medical Panel's reasons went beyond the standard formulated by Winneke P in *Masters v McCubbery*.

[45] Primary judge's reasons at [113].

[46] Primary judge's reasons at [115].

[47] Primary judge's reasons at [144].

criticism of the Panel's reasons to suggest that the reasons did not enable determination of whether the Panel had discharged its statutory functions, that being the applicable standard.

The consequences of a failure to give adequate reasons

50. If, contrary to the Employers' primary submission, the reasons of the Medical Panel were inadequate, then the Court of Appeal erred at [81] to [87] in holding that the inadequacy of reasons was an error of law on the face of the record in consequence of which the opinion of the Medical Panel should be quashed[48]. The appropriate remedy available to the Worker, but not sought, was an order in the nature of mandamus[49].

10 51. There has been consideration in the authorities, in the context of different legislation, of the question whether breach of a statutory obligation to give reasons affects the legality of the administrative decision to which the reasons relate. Many of the cases are referred to by the Court of Appeal at [70] to [83][50], and include the reasons of Brennan J (dissenting in the result) in *Repatriation Commission v O'Brien* who stated, in relation to the obligation under s 43(2) of the *Administrative Appeals Tribunal Act 1975* (Cth) to give reasons –[51]

> [A] failure by a tribunal adequately to fulfil its statutory obligation to state the reasons for making an administrative decision does not, without more, invalidate the decision or warrant its being set aside by a court of competent jurisdiction. … An A.A.T. decision, if
20 it is made in accordance with the statutory provisions that govern the exercise of its power, is not invalidated by a mere failure to expose fully the reasons for making it.

52. In *Dornan v Riordan*[52], which was an appeal from a decision refusing relief under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**), a Full Court of the Federal Court held that the failure of the Pharmaceutical Benefits Remuneration Tribunal

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[48] The Court of Appeal exercised power under Order 56 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) to grant relief by an order in the nature of certiorari.

[49] In *Re Minister for Immigration and Multicultural Affairs; Ex Parte Palme* (2003) 216 CLR 212 at 226 [48] Gleeson CJ, Gummow and Heydon JJ observed that compliance by the Minister with the statutory duty to give reasons may be ordered. In *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 at 150 the Privy Council noted that when justices were required to set out the evidence on the record of the conviction, as nearly as might be in the terms in which it was given, detection of a hiatus on the record would justify a mandamus to them, to complete the record by setting out the evidence on the point. However, in *R v Northumberland Compensation Tribunal; ex parte Shaw* [1952] 1 KB 338 at 352 Denning LJ stated that when the tribunal sent their record to the King's Bench in answer to the writ of certiorari, this return was examined, and if it was defective or incomplete it was quashed.

[50] In addition to the cases cited by the Court of Appeal, see *Soliman v University of Technology, Sydney* [2012] FCAFC 146 at [49] to [54] per Marshall, North and Flick JJ and, for completeness, *Lothian and Borders Police v Gemmell* [2005] Scot CS CSOH 32 at [70] and *X, Re Judicial Review* [2008] NIQB 22 at [18]. The latter two cases were referred to by the Court of Appeal in *Sherlock v Lloyd* (2010) 27 VR 434 at 443 [40].

[51] (1985) 155 CLR 422 at 445-6.

[52] (1990) 24 FCR 564. *Dornan v Riordan* was referred to by a Full Court of the Federal Court in *Muralidharan v Minister for Immigration* (1996) 62 FCR 402 at 414, where in an appeal from the refusal of an application under the *ADJR Act* the Full Court held that inadequate reasons of the Refugee Review Tribunal meant that, for the purposes of s 5(1)(b) of the *ADJR Act*, procedures required by law to be observed in connection with the making of the decision were not observed. That finding engaged the Court's statutory jurisdiction under s 16 the *ADJR Act* to quash the decision.

to state adequate reasons for a decision constituted an error of law supporting an order that the Tribunal's decision be set aside. The Court referred to the opinion of Brennan J in *Repatriation Commission v O'Brien* and stated –[53]

> [T]he law appears to us to be that a substantial failure to state reasons for a decision, in the circumstance that a statement of reasons is a requirement of the exercise under the statute of the decision-making power, constitutes an error of law.

53. And in *Re Minister for Immigration and Multicultural Affairs; Ex Parte Palme*[54] (***Palme***) the majority held that a failure to comply with a requirement to give reasons in s 501G of the *Migration Act 1958* (Cth) did not taint a decision to cancel a visa with jurisdictional error[55]. McHugh J observed in *Palme* that it is not easy to accept the notion that a decision is made without authority because subsequently the decision-maker fails to give reasons for the decision, however it is always possible that a statutory scheme has made the giving of reasons a condition precedent to the validity of a decision[56]. An example of such a scheme is s 33 of the *Criminal Procedure Act 1986* (NSW), considered by the Court in *Fleming v R*[57].

54. In the present case, the question whether inadequate reasons of a Medical Panel render the opinion invalid, or otherwise taint the opinion with error of law, is to be informed by the language and statutory purpose of the relevant provisions of the Act[58]. So informed, and having regard to the legislative history of s 68, the requirement to give reasons under s 68(2) and (3) of the Act is correctly regarded as separate from the opinion, with the consequence that inadequate reasons do not affect the opinion itself.

55. Before the amendment of s 68 of the Act by s 90 of the *Accident Compensation Amendment Act 2010* (Vic)[59], there was no requirement under the Act that a Medical Panel give reasons for its opinion. Rather, as the Court of Appeal's decision in *Sherlock v Lloyd*[60] illustrates, if requested to do so by any person affected by its opinion, a Medical Panel was obliged by s 8 of the *Administrative Law Act 1978* (Vic) to furnish a statement of reasons. This was in consequence of the Court of Appeal's decision in *Masters v*

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[53] at 573 per Sweeney, Davies and Burchett JJ.

[54] (2003) 216 CLR 212.

[55] *Palme* at 226 [48] per Gleeson CJ, Gummow and Heydon JJ, and at 227 [55] per McHugh J.

[56] *Palme* at 227 [55].

[57] (1998) 197 CLR 250 at 260 [22] per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ.

[58] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388-9 [91]; *Palme* at 225 [44] per Gleeson CJ, Gummow and Heydon JJ and at 227 [55] per McHugh J.

[59] Section 90 is within Part 9 which, by virtue of s 2(7) commenced operation on 5 April 2010.

[60] (2010) 27 VR 434.

McCubbery[61], which held that for the purposes of the *Administrative Law Act* a Medical Panel was a "tribunal" and its opinion was a "decision".

56. In *Sherlock v Lloyd*[62], which was decided by reference to s 68 of the Act before the 2010 amendments, the Court of Appeal held that the failure of a Medical Panel to give adequate reasons in response to a request made pursuant to s 8 of the *Administrative Law Act* was not an error of law that vitiated the Panel's opinion.

57. In August 2008 the *Hanks Report*[63] recommended the introduction of a requirement in the Act that Medical Panels give reasons. The rationale for the requirement was stated as –

> 10.322. Although the Convenor is not required to provide reasons together with the opinion unless requested to do so under the AL Act, it is understood that the usual practice of Medical Panels is to provide reasons with opinions, except where the referral was made by a Court,[64] presumably because it is only the Panel's opinion which is binding on the Court and not the reasons for that opinion.
>
> 10.323. It appears an unnecessary step to require an affected party to request written reasons from the Panel following receipt of its opinion. On the basis that the Panel has already formulated reasons in forming an opinion, I recommend that the Panel should be required to provide written reasons together with its opinion.

58. The *Accident Compensation Amendment Act 2010* was the legislative response to the Hanks Report[65]. The object of the amendment was administrative convenience, namely to obviate the requirement for a request for reasons under s 8 of the *Administrative Law Act.*

59. Under s 68 of the Act after the 2010 amendments, a Medical Panel has three obligations: (1) to form an opinion [s 68(1)]; (2) to give a certificate as to its opinion [s 68(2) and (3)]; and (3) to give a written statement of reasons for its opinion [s 68(2) and (3)]. Within seven days after forming its opinion, a Medical Panel must furnish its written opinion and a written statement of reasons for the opinion [s 68(3)]. The text of s 68 reflects a conceptual and a temporal distinction between the opinion itself, and the reasons for the opinion.

60. Under s 68(4) of the Act, the *opinion* of the Medical Panel is to be adopted and applied: there is no occasion to apply the reasons of a Medical Panel[66]. Section 68(2) of the Act assumes the formation of the opinion, and imposes obligations in respect of a certificate,

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[61] [1996] 1 VR 635.

[62] (2010) 27 VR 434.

[63] *Accident Compensation Act Review, Final Report,* Peter Hanks QC, August 2008.

[64] Footnote 250 of the Hanks Report states, "Typically, Medical Panels provide written reasons to the parties to the dispute, but not to the Court.".

[65] See the Hansard of 10 December 2009 for the Legislative Assembly for the *Accident Compensation Amendment Bill 2009*, and the Minister's statement at 4615, and the second reading speech at 4622.

[66] *Lianos v Inner & Eastern Health Care Network* (2001) 3 VR 136. This point is also referred to in the *Hanks Report* at [10.322].

and written reasons for the opinion. The giving of a statement of reasons was, and remains, a step that is *posterior* to formation of the opinion, and it is not to be supposed that the amendments to s 68(2) and (3) of the Act in 2010 introduced an obligation to give reasons such that, "a failure to comply with that sub-section necessarily so vitiated the decision as to require it being set aside for error of law"[67]. Therefore, the obligation to give reasons is not a condition of the valid exercise of the statutory function of a Medical Panel in forming its opinion, and accordingly, failure to give adequate reasons does not, of itself, constitute error affecting the opinion.

61. For these reasons the legality of the exercise of the Medical Panel's function was not conditional upon the giving of adequate reasons, and it follows that there was no material error of law on the face of the record that afforded a ground to quash the opinion. The mere occurrence of error is not sufficient[68]. To be a material error of law, the error must affect the decision itself[69]. An error of law not affecting the decision itself, even if appearing on the face of the record, does not afford a ground on which certiorari may issue to quash the decision. Alternatively, as a matter of discretion, certiorari should ordinarily be refused where the error is not material.

Part VII – Legislation

62. Attached and marked "**Annexure A**" is a copy of the following sections from Version 159D of the Act **as at 5 April 2010**: ss 5(1) (definition of "medical question"), 45, 55AA, 55A, 56, 63 - 68, 89, 104B, 323, 344 and 345. Aside from consequential amendments, and other amendments not relevant to the issues in this appeal, these provisions are still in force, in the form included in Annexure A, at the date of these submissions.

63. Attached and marked "**Annexure B**" is a copy of ss 45, 65 and 68 from Version 159A of the Act **as at 1 March 2010**. The amended versions of these sections included in Annexure A above apply as follows:

(a) the amendments to s 45 apply to a proceeding commenced on or after 5 April 2010 (see s 323 of the Act);

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[67] *Comeare v Lees* (1987) 151 ALR 647 at 656.38 per Finkelstein J; see the reasons of the primary judge at [122]; cf *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 227 [55] per McHugh J.

[68] cf, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 384 per Toohey and Gaudron JJ in relation to error of law under the *ADJR Act*.

[69] *Samad v District Court (NSW)* (2002) 209 CLR 140 at 155-6 [44] per Gleeson CJ and McHugh J; *R v Hull University Visitor; Ex parte Page* [1993] 1 AC 682 at 702 per Lord Browne-Wilkinson; *R v Governor of Brixton; Ex parte Levin* [1997] AC 741 at 748-9 per Lord Hoffmann. See also, *R v The District Court; Ex parte White* (1966) 116 CLR 644 at 648-9 and 650 per Barwick CJ.

(b) the amendments to s 65 apply to any medical question referred to a Medical Panel on or after 5 April 2010 (see s 344 of the Act); and

(c) the amendments to s 68 apply to an opinion given by a Medical Panel on or after 5 April 2010 (see s 345 of the Act).

64. Attached and marked "**Annexure C**" is a copy of ss 8 and 10 of the *Administrative Law Act 1978* (Vic) as at the date of these submissions.

Part VIII – Orders sought

65. The appellants seek the following orders–

A. The appeal be allowed.

B. Paragraphs 1 – 3 of the orders of the Court of Appeal made 23 October 2012 be set aside and in lieu thereof it be ordered that the appeal to that Court be dismissed.

C. The appellants pay the first respondent's costs of the appeal to this Court.

Part IX – Oral Argument

66. The appellants estimate they will require 2 hours for the presentation of oral argument.

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DATED: 14 June 2013.

Annexure A

Accident Compensation Act 1985 (Vic) Version 159D as at 5 April 2010:

- s 5(1) (definition of "medical question"),
- s 45,
- s 55AA,
- s 55A,
- s 56,
- ss 63 - 68,
- s 89,
- s 104B,
- s 323,
- s 344,
- s 345.

medical practitioner means—

S. 5(1) def. of *medical practitioner* amended by No. 83/1987 s. 6(1)(e), substituted by No. 64/1989 s. 5(1)(f), amended by Nos 67/1992 s. 64(7)(a), 23/1994 s. 118(Sch. 1 item 1.1), 97/2005 s. 182(Sch. 4 item 1(a)).

(a) a medical practitioner registered under the **Health Professions Registration Act 2005**; and

(b) in relation to anything done for the purposes of this Act—

(i) in a place within Australia but outside Victoria, a medical practitioner who is lawfully qualified in that place to do that thing; and

(ii) in a place outside Australia, a medical practitioner who is lawfully qualified in that place to do that thing and who is approved for the purposes of this Act by the Authority or self-insurer;

medical question means—

S. 5(1) def. of *medical question* inserted by No. 64/1989 s. 5(1)(f), amended by Nos 67/1992 s. 6(f)(i)–(iv), 50/1994 s. 5(3), 60/1996 s. 4(1), 107/1997 s. 3(1)(a)–(d), 26/2000 s. 3, 102/2004 s. 17(1), 9/2010 ss 28(3), 51(2)(a), 74(2).

(a) a question as to the nature of a worker's medical condition relevant to an injury or alleged injury; or

(ab) a question as to the existence, extent or permanency of any incapacity of a worker for work or suitable employment and the question whether a worker is partially or totally incapacitated; or

(aba) a question as to whether a worker has a current work capacity or has no current work capacity and what employment would or would not constitute suitable employment; or

(abaa) a question as to whether a worker, on a particular date or during a particular period, had no current work capacity

and if not, what employment would or would not have constituted suitable employment on that date or during that period; or

(abb) a question as to whether a worker has no current work capacity and is likely to continue indefinitely to have no current work capacity; or

(abc) a question as to whether a worker has a current work capacity and, because of the injury, is, and is likely to continue indefinitely to be incapable of undertaking—

(i) further or additional employment or work; or

(ii) further or additional employment or work that would increase the worker's current weekly earnings—

and, if not so incapable, what further or additional employment or work the worker is capable of undertaking; or

(ac) a question as to the medical, personal and household or occupational rehabilitation service provided, or to be provided, to a worker for an injury, including a question as to the adequacy, appropriateness or frequency of that service; or

(b) a question whether a worker's employment was in fact, or could possibly have been, a significant contributing factor to an injury or alleged injury, or to a similar injury; or

(ba) if paragraph (b) does not apply, a question whether a worker's employment was in fact, or could possibly have been, a contributing factor to an injury or alleged injury, or to a similar injury; or

(c) a question as to the extent to which any physical or mental condition, including any impairment, resulted from or was materially contributed to by the injury; or

(ca) a question as to the extent to which any physical or mental condition, including any impairment, results from or is materially contributed to by the injury; or

(d) a question as to the level of impairment of a worker including a question of the degree of impairment of a worker assessed in accordance with section 91 and a question as to whether or not that impairment is permanent; or

(da) a question as to the amount of the total percentage referred to in section 89(3)(b); or

(e) a question as to whether a worker has an injury which is a total loss mentioned in the Table to section 98E(1); or

(f) a question whether a worker's incapacity for work resulted from or was materially contributed to by an injury or alleged injury; or

(fa) a question whether a worker's incapacity for work results from or is materially contributed to by an injury or alleged injury; or

* * * * *

(h) a question prescribed to be a medical question in respect of an application for leave under section 134AB(16)(b); or

(i) a question determined to be a medical question by a court hearing an application for leave under section 134AB(16)(b).

S. 5(1) def. of *medical service* inserted by No. 64/1989 s. 5(1)(f), amended by Nos 67/1992 ss 6(g)(i)(ii), 64(7)(a), 50/1994 s. 5(4), 7/1996 s. 3(2)(a)(b), 63/1996 s. 98(Sch. item 1.1), 78/1997 s. 97(Sch. item 1.1), 81/1998 s. 19(1)(b), 95/2003 s. 4(1).

medical service includes[1]—

(a) attendance, examination or treatment of any kind by a medical practitioner, registered dentist, registered optometrist, registered physiotherapist, registered chiropractor, registered osteopath or registered podiatrist; and

(b) the provision and as may be necessary from time to time (including at the time of the injury) the repair, adjustment or replacement of crutches, artificial members, eyes or teeth or spectacle glasses; and

(ba) the provision and as may be necessary from time to time (including at the time of the injury) the repair, adjustment or replacement of hearing aids of a type approved by the Authority by a person or a class of persons approved by the Authority; and

45 Medical questions

S. 45 substituted by No. 67/1992 s. 10.

(1) If the court exercises jurisdiction under this Part, the court—

S. 45(1) substituted by No. 107/1997 s. 21(5), amended by No. 26/2000 s. 5(1), substituted by No. 9/2010 s. 76(1).

(a) may on the court's own motion, refer a medical question to a Medical Panel for an opinion under this Division; or

(b) subject to subsections (1B), (1C) and (1D), must refer a medical question to a Medical Panel for an opinion under this Division if—

(i) a party to the proceedings requests that a medical question or medical questions be referred; and

(ii) that party notified the court of the party's intention to make the request no later than 14 days prior to the date fixed for hearing of the proceedings or another time determined by the court.

(1A) This section extends to, and applies in respect of, an application for leave under section 134AB(16)(b)—

S. 45(1A) inserted by No. 26/2000 s. 5(2).

(a) so as to enable in accordance with subsection (1)(a) the court hearing the application to refer a medical question (including a medical question as defined in paragraphs (h) and (i) of the definition of ***medical question*** in section 5(1)); or

(b) so as to require in accordance with subsection (1)(b) the court hearing the application at the request of a party to the application to refer a medical question (including a medical question as defined in paragraph (h) of the definition of ***medical question*** in section 5(1) but excluding a

medical question as defined in paragraph (i) of that definition)—

for the opinion of a Medical Panel.

S. 45(1B) inserted by No. 26/2000 s. 5(3), amended by No. 9/2010 s. 76(2).

(1B) The Court may refuse to refer a medical question to a Medical Panel on an application under subsection (1)(b) if the Court is of the opinion that the referral would, in all the circumstances, constitute an abuse of process.

S. 45(1C) inserted by No. 26/2000 s. 5(3), amended by No. 9/2010 s. 76(2).

(1C) The Court has on an application under subsection (1)(b) the discretion as to the form in which the medical question is to be referred to a Medical Panel.

S. 45(1D) inserted by No. 9/2010 s. 76(3).

(1D) The court must not refer a medical question if it appears to the court that the formation of an opinion by the Medical Panel on the medical question will depend substantially on the resolution of factual issues which are more appropriately determined by the court than by a Medical Panel.

S. 45(1E) inserted by No. 9/2010 s. 76(3).

(1E) If under subsection (1D) a court has not referred a medical question to a Medical Panel, the court may—

(a) state a question to be answered by the court for the purposes of determining the factual issues referred to in subsection (1D); and

(b) give directions for the hearing and determination of that question; and

(c) hear and determine the question, and by the answer to that question, make appropriate findings of fact.

S. 45(1F) inserted by No. 9/2010 s. 76(3).

(1F) After answering a question referred to in subsection (1E) the court may refer a medical question to a Medical Panel for an opinion.

(1G) If, under subsection (1F), the court refers a medical question to a Medical Panel, the court must provide the Medical Panel with—

S. 45(1G) inserted by No. 9/2010 s. 76(3).

(a) a copy of the question and the court's answer to the question; and

(b) any reasons published by the court in relation to the question; and

(c) any further documents the court considers appropriate.

(1H) In forming an opinion on the medical question referred to a Medical Panel under subsection (1F), the Medical Panel is bound by the answer to the question stated and answered by the court under subsection (1E).

S. 45(1H) inserted by No. 9/2010 s. 76(3).

(2) If the Court refers a medical question to the Panel, the Court must give each party to the proceedings, copies of all documents in the possession of the Court relating to the medical question.

S. 45(2) amended by Nos 107/1997 s. 21(6), 9/2010 s. 76(4).

* * * * *

S. 45(3) repealed by No. 107/1997 s. 21(7).

(4) If the Court refers a medical question to a Medical Panel, the Court must give a copy of the Panel's opinion to the worker and to the employer, Authority or self-insurer and may give a copy to a party to the proceedings.

S. 45(4) amended by Nos 50/1993 s. 78(1)(c), 81/1998 s. 22(a), 9/2010 s. 76(4).

55 Lodging of disputes

S. 55 substituted by No. 67/1992 s. 10.

(1) Any party to a dispute may refer the dispute for conciliation by a Conciliation Officer.

S. 55(2) amended by No. 41/2006 s. 8.

(2) A referral for conciliation of a dispute must be lodged with the Senior Conciliation Officer by sending or delivering notice in the form approved by the Minister within 60 days after notice of the decision was given to or served on the worker or claimant.

S. 55(2A) inserted by No. 50/1994 s. 29(1).

(2A) A referral must be signed or sealed personally by the party making the application unless the Senior Conciliation Officer is satisfied that there are special circumstances preventing the party from personally doing so.

(3) The Senior Conciliation Officer may, on application, allow—

(a) an extension of time for lodging an application; or

(b) an application to be lodged out of time—

if he or she considers it appropriate in the circumstances of the particular case.

* * * * *

S. 55(4) substituted by No. 50/1994 s. 29(2), repealed by No. 107/1997 s. 16(1).

55AA Referral of medical question without consent

S. 55AA inserted by No. 9/2010 s. 29.

(1) Where a medical question arises in a dispute relating to section 93CD, the Conciliation Officer must, within 7 days after becoming aware of the medical question, refer the medical question to a Medical Panel.

(2) The Authority or self-insurer must bear all the costs reasonably incurred by a worker in relation to a referral of a medical question under this section.

S. 55A inserted by No. 26/2000 s. 7(1).

55A Referral of medical question by consent

(1) Without limiting any other provision of this Act, the Authority or a self-insurer may apply to the Senior Conciliation Officer in accordance with this section for a medical question relevant to a claim for compensation by a worker to be referred by a Conciliation Officer to a Medical Panel.

(2) The Authority or a self-insurer can only make an application under this section with the consent of the worker and in the absence of a dispute.

(3) If a Conciliation Officer is satisfied after considering an application under this section that—

(a) the medical question is in an appropriate form; and

(b) the worker has given informed and genuine consent; and

(c) the medical question is relevant and would assist in the consideration and management of the worker's claim; and

(d) the Authority or the self-insurer, and the worker, have provided all the relevant documents and information—

the Conciliation Officer must refer the medical question to a Medical Panel.

(4) The Authority or a self-insurer must bear all the costs reasonably incurred by a worker in relation to an application under this section.

55AB Production and disclosure of information

S. 55AB inserted by No. 9/2010 s. 82.

A party to a dispute who participates in a conciliation, must produce all documents in the party's possession, custody or power and disclose all information, to the conciliation officer that—

(a) relate to the dispute; and

(b) are reasonably available to the party—

unless the party claims privilege or immunity from producing that document or disclosing that information.

56 Procedures before Conciliation Officers

S. 56 substituted by No. 67/1992 s. 10.

(1) The Senior Conciliation Officer may give directions as to the arrangement of the business of the Conciliation Officers.

(2) A Conciliation Officer must, having regard to the need to be fair, economical, informal and quick, and having regard to the objects of the Act, make all reasonable efforts to conciliate in connection with a dispute and to bring the parties to agreement.

(3) A person who is a party to any dispute is not entitled to be represented by a legal practitioner at any conciliation conference.

(4) The Conciliation Officer and each party to a dispute may agree to a party being represented by a legal practitioner at a conciliation conference.

(5) A provider of a medical service or a provider of a service under section 99 or 99A who has examined a worker may, with the consent of the worker and at the request of the Conciliation Officer—

S. 56(5) amended by Nos 50/1993 s. 81(b), 107/1997 s. 16(2).

(a) meet with the Conciliation Officer and answer questions; and

(b) supply relevant documents to the Conciliation Officer.

S. 56(5A) inserted by No. 9/2010 s. 83(1).

(5A) The Authority or a self-insurer must pay the reasonable costs of a report provided by a registered health practitioner specified in subsection (5B) who has examined a worker if—

(a) the report has been requested by a Conciliation Officer; and

(b) the worker has consented to a report being provided.

S. 56(5B) inserted by No. 9/2010 s. 83(1).

(5B) The following registered health practitioners are specified for the purposes of subsection (5A)—

(a) a registered medical practitioner;

(b) a registered dentist;

(c) a registered optometrist;

(d) a registered physiotherapist;

(e) a registered chiropractor;

(f) a registered osteopath;

(g) a registered podiatrist;

(h) a registered psychologist.

S. 56(6) substituted by No. 107/1997 s. 21(8).

(6) A Conciliation Officer may refer a medical question to a Medical Panel for an opinion under this Division.

S. 56(7) repealed by No. 107/1997 s. 21(8).

* * * * *

(8) If the Conciliation Officer is satisfied that sufficient information has been supplied to him or her in connection with a dispute, the Conciliation Officer may exercise functions under this Division—

(a) without having any conciliation conference; and

(b) without requesting further information from any party to the dispute.

(9) The Conciliation Officer may request a party who participates in a conciliation to produce a document or a class of documents specified, or provide information or information of a kind specified, that the Conciliation Officer considers may be relevant to the resolution of the dispute.

S. 56(9) amended by No. 50/1993 s. 89, substituted by No. 107/1997 s. 16(3).

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S. 56(9A) inserted by No. 107/1997 s. 16(3), repealed by No. 9/2010 s. 83(2).

(10) A Conciliation Officer may at his or her discretion make any documents or information provided under subsection (9) available to any other party.

(11) A person who, in connection with a dispute referred for conciliation, makes a statement that the person knows to be false or misleading in a material particular is guilty of an offence.

S. 56(11) amended by No. 9/2010 s. 156.

Penalty: In the case of a natural person, 180 penalty units or 6 months imprisonment or both;

In the case of a body corporate, 900 penalty units.

57 Conciliation of disputes

S. 57 substituted by No. 67/1992 s. 10.

(1) The Conciliation Officer may do any one or more of the following things in connection with the dispute or any part of the dispute—

(a) make such recommendations to the parties to the dispute as he or she considers to be appropriate;

S. 62(5) inserted by No. 9/2010 s. 87.

(5) A payment made in accordance with subsection (2) is not a payment of compensation under this Act except for the purposes of—

(a) calculating employer premiums;

(b) contributions under Division 6A of Part IV;

(c) seeking an indemnity from a third party under section 138;

(d) seeking a refund of payments under section 249A.

Pt 3 Div. 3 (Heading) inserted by No. 67/1992 s. 10.

Division 3—Medical Panels

S. 63 substituted by No. 67/1992 s. 10.

63 Establishment and constitution

S. 63(1) amended by No. 60/2003 s. 19(2).

(1) Medical Panels must be constituted as necessary for the purposes of this Act and Part VBA of the **Wrongs Act 1958** to carry out such functions as may be conferred on a Medical Panel under this Act or that Part.

(2) For the purpose of constituting Panels, there is to be a list of members consisting of medical practitioners appointed by the Governor in Council.

S. 63(3) substituted by No. 26/2000 s. 9.

(3) From the list of members under subsection (2), the Minister—

(a) must appoint a Convenor; and

(b) may appoint a Deputy Convenor.

S. 63(3A) inserted by No. 26/2000 s. 9.

(3A) The Deputy Convenor may, subject to the direction of the Convenor, exercise the functions and powers conferred on the Convenor by or under this Act.

(3B) In the temporary absence of the Convenor, the Deputy Convenor has, and may exercise, the functions and powers conferred on the Convenor by or under this Act.

S. 63(3B) inserted by No. 26/2000 s. 9.

(4) The Convenor may—

S. 63(4) substituted by Nos 81/1998 s. 27, 9/2010 s. 88.

(a) convene a Medical Panel; and

(b) determine the number of members that are to constitute a Medical Panel based on what he or she considers to be appropriate in each particular case.

* * * * *

S. 63(4A) inserted by No. 81/1998 s. 27, repealed by No. 9/2010 s. 88.

(5) If a medical practitioner on the list of members has treated or examined or been engaged to treat or examine a worker (otherwise than in his or her capacity as a member of a Medical Panel) he or she must not be a member of a Medical Panel examining the worker.

S. 63(5) amended by No. 60/1996 s. 8.

(6) A matter or thing done or omitted to be done by a member of a Medical Panel or the Convenor of the Medical Panels in the exercise of the functions and powers of a member of a Medical Panel or the Convenor does not, if the matter or thing was done or omitted in good faith, subject the member of a Medical Panel or the Convenor of the Medical Panels personally to any action, liability, claim or demand.

S. 63(6) substituted by No. 7/1996 s. 13(3).

(6A) A matter or thing done or omitted to be done in the provision of expert advice to a Medical Panel by a consultant engaged for that purpose does not, if the matter or thing was done or omitted in good faith, subject the consultant personally to any action, liability, claim or demand.

S. 63(6A) inserted by No. 26/2000 s. 10.

(7) A member of a Panel is entitled to be paid a remuneration (if any) and the travelling and other allowances specified in the instrument of appointment.

S. 63(8) amended by No. 46/1998 s. 7(Sch. 1), substituted by Nos 108/2004 s. 117(1) (Sch. 3 item 1.4), 80/2006 s. 26(Sch. item 1.2).

(8) The **Public Administration Act 2004** (other than Part 3 of that Act) applies to a member in respect of the office of member.

(9) An instrument of appointment of a member may specify other terms and conditions not inconsistent with the Act.

(10) The Authority must appoint such officers and employees as are necessary for the proper functioning of medical panels.

S. 63A inserted by No. 7/1996 s. 14.

63A Advisory functions

(1) The Convenor of the Medical Panels—

(a) must advise the Minister in relation to any matter referred to the Convenor by the Minister; and

(b) may advise the Minister in relation to the operation and procedures of Medical Panels.

(2) The Convenor of the Medical Panels may constitute a Medical Panel consisting of such number of members as the Convenor considers appropriate, for the purpose of providing a report to the Convenor of the Medical Panels in respect of any matter referred to the Convenor of the Medical Panels under subsection (1)(a).

64 Term of and removal from office and vacancies

S. 64 substituted by No. 67/1992 s. 10.

(1) Subject to this Division, a person is on the list of members for the term not exceeding 3 years specified in the instrument of appointment.

(2) A member may resign from the list of members by writing signed by the member and delivered to the Minister.

(3) The Governor in Council may remove or suspend a member from the list of members if, in the opinion of the Governor in Council, the member—

(a) becomes incapable of performing official duties; or

(b) neglects to perform those duties.

(4) A person ceases to be a member of a Medical Panel—

(a) at the expiry of a member's term of office; or

(b) if the member resigns; or

(c) if the member is removed; or

(d) if, as a result of disciplinary or similar action, the member ceases to be entitled to practise as a medical practitioner; or

(e) if the member ceases to be a medical practitioner; or

(f) if the member becomes bankrupt; or

(g) if the member is convicted of an indictable offence or of an offence which, if committed in Victoria, would be an indictable offence.

S. 64(4)(g) amended by No. 50/1993 s. 110(1)(c).

65 Procedures and powers

S. 65 substituted by No. 67/1992 s. 10.

(1) A Panel is not bound by rules or practices as to evidence, but may inform itself on any matter relating to a reference in any manner it thinks fit.

(2) The Panel must act informally, without regard to technicalities or legal forms and as speedily as a proper consideration of the reference allows.

S. 65(3) substituted by No. 50/1994 s. 31(1).

(3) Information given to a Panel cannot be used in any civil or criminal proceedings in any court or tribunal, other than proceedings—

S. 65(3)(a) amended by No. 52/1998 s. 311(Sch. 1 item 1.2).

(a) before the County Court, the Magistrates' Court or the Tribunal under this Act or the **Workers Compensation Act 1958**;

(b) for an offence against this Act or the **Accident Compensation (WorkCover Insurance) Act 1993** or the **Workers Compensation Act 1958**;

S. 65(3)(c) substituted by No. 107/1997 s. 20.

(c) for an offence against the **Crimes Act 1958** which arises in connection with a claim for compensation under this Act.

S. 65(3)(d) repealed by No. 107/1997 s. 20.

* * * * *

(4) Any attendance of a worker before a Medical Panel must be in private, unless the Medical Panel considers that it is necessary for another person to be present.

S. 65(4A) inserted by No. 9/2010 s. 89(1).

(4A) If a worker is a minor or a person under a disability, the Medical Panel must permit a representative of the worker to be present.

(5) A Panel may ask a worker—

(a) to meet with the Panel and answer questions;

S. 65(5)(b) amended by No. 107/1997 s. 21(9).

(b) to supply copies of all documents in the possession of the worker which relate to the medical question to the Panel;

(c) to submit to a medical examination by the Panel or by a member of the Panel.

S. 65(5A) inserted by No. 9/2010 s. 89(2).

(5A) Notwithstanding sections 67(1A) and 68(1), if a Conciliation Officer refers a medical question to a Medical Panel under section 56(6) and it becomes apparent to the Convenor or the Medical Panel that the formation of an opinion by the Medical Panel on the medical question will depend substantially on the resolution of factual issues which are more appropriately determined by a court than by a Medical Panel—

(a) the Convenor may decline to convene a Medical Panel; or

(b) the Medical Panel may decline to give an opinion on the medical question.

S. 65(5B) inserted by No. 9/2010 s. 89(2).

(5B) The Convenor must inform the Conciliation Officer, in writing, of a decision made by the Convenor or the Medical Panel under subsection (5A)(a) or (b).

S. 65(5C) inserted by No. 9/2010 s. 89(2).

(5C) If a Medical Panel has been referred a medical question and the Medical Panel considers that further information is required to enable the medical panel to form a medical opinion on the question—

(a) the Medical Panel may request the person or body referring the medical question to provide the information within the period specified in the requirement; and

(b) the time limit specified in section 68(1) is suspended from the date a request under paragraph (a) is made until the end of the period specified in the requirement.

(6) If a Panel so requests and the worker consents, a person who is—

S. 65(6)(a) amended by No. 50/1994 s. 31(2).

(a) a provider of a medical service (within the meaning of paragraph (a) of the definition of ***medical service*** in section 5(1));

S. 65(6)(b) repealed by No. 50/1993 s. 81(c).

* * * * *

who has examined the worker must—

(c) meet with the Panel and answer questions; and

(d) supply relevant documents to the Panel.

S. 65(6A) inserted by No. 26/2000 s. 11(1).

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

(a) the injury or alleged injury to, or in respect of, which the medical question relates;

(b) the facts or questions of fact relevant to the medical question which the person or body is satisfied have been agreed and those facts or questions that are in dispute.

S. 65(6B) inserted by No. 26/2000 s. 11(1).

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

(7) The Convenor may give directions as to the arrangement of the business of the Panels.

S. 65(8) substituted by No. 26/2000 s. 12.

(8) The Minister may for the purposes of—

(a) ensuring procedural fairness in the procedures of the Medical Panels; and

(b) facilitating the proper administration of the Medical Panels—

issue guidelines as to the procedures of Medical Panels.

(8A) The Minister must consult with the Attorney-General before issuing any guidelines under this section.

S. 65(8A) inserted by No. 60/2003 s. 19(3).

(9) The Convenor may give directions as to the procedures of the Panels but may not give directions inconsistent with any guidelines issued by the Minister.

(10) The Convenor of the Medical Panels and a member of a Medical Panel has in the performance of his or her duties as the Convenor of the Medical Panels or as a member of a Medical Panel the same protection and immunity as a Judge of the Supreme Court has in the performance of his or her duties as a Judge.

S. 65(10) inserted by No. 7/1996 s. 15.

(11) In this section—

S. 65(11) inserted by No. 9/2010 s. 89(3).

representative of the worker means—

(a) if proceedings have not been commenced in respect of the worker's claim, an administrator appointed in respect of the worker under the **Guardianship and Administration Act 1986**;

(b) if proceedings have commenced in respect of the worker's claim—

(i) the worker's litigation guardian; or

(ii) a person appointed by the court to be a representative of the worker for the purposes of subsection (4A).

S. 66 substituted by No. 67/1992 s. 10.

66 Validity of acts or decisions

An act or decision of a Panel is not invalid by reason only of any defect or irregularity in or in connection with the appointment of a member.

S. 67 substituted by No. 67/1992 s. 10.

67 Examination by a Medical Panel

S. 67(1) amended by Nos 50/1993 s. 78(1)(c), 50/1994 s. 32(1), 81/1998 s. 22(a).

(1) The function of a Medical Panel is to give its opinion on any medical question in respect of injuries arising out of, or in the course of or due to the nature of employment before, on or after the commencement of section 10 of the **Accident Compensation (WorkCover) Act 1992** referred by a Conciliation Officer or the County Court or the Authority or a self-insurer.

S. 67(1A) inserted by No. 107/1997 s. 21(1).

(1A) A Medical Panel must give its opinion on a medical question in accordance with this Division.

S. 67(1B) inserted by No. 107/1997 s. 21(1).

(1B) This Division as amended by section 21 of the **Accident Compensation (Miscellaneous Amendment) Act 1997** applies to and in respect of the opinion of a Medical Panel given on a medical question referred to a Medical Panel on or after the commencement of that section.

S. 67(2) amended by Nos 50/1993 s. 78(1)(c), 81/1998 s. 22(a).

(2) A Conciliation Officer, the County Court, the Authority or a self-insurer may, at any time or from time to time, require any worker—

(a) who claims compensation under this Act; or

(b) who is in receipt of weekly payments of compensation under this Act—

to submit himself or herself for examination by a Medical Panel on a date and at a place arranged by the Convenor of Medical Panels.

(3) If—

(a) a worker has submitted himself or herself for examination by a medical practitioner in accordance with a requirement of the Authority or self-insurer or has been examined by a medical practitioner selected by the worker; and

S. 67(3)(a) amended by Nos 50/1993 s. 78(1)(c), 81/1998 s. 22(a).

(b) the Authority or self-insurer or the worker (as the case may be) has furnished the other with a copy of the medical practitioner's report of the examination—

S. 67(3)(b) amended by Nos 50/1993 s. 78(1)(c), 81/1998 s. 22(a).

the Medical Panel may refuse to proceed with an examination if it is not provided with a copy of the medical practitioner's report of the examination.

(4) If a worker unreasonably refuses to comply with section 65(5) or in any way hinders the examination—

S. 67(4) amended by No. 50/1994 s. 32(2).

(a) the worker's rights to recover compensation under this Act with respect to the injury; or

(b) the worker's rights to weekly payments—

are suspended until the examination has taken place, and when it takes place, any period between the date on which the worker refused to comply with section 65(5) or in any way hindered the examination and the date of the examination shall be taken into account for the purpose of calculating, subject to this Act, a period of time for the purposes of Part IV.

* * * * *

S. 67(4A) inserted by No. 107/1997 s. 21(2), repealed by No. 26/2000 s. 11(2).

(5) Any weekly payments which would otherwise be payable during the period of suspension are forfeited.

S. 68 substituted by No. 67/1992 s. 10.

68 Opinions

S. 68(1) amended by Nos 50/1993 s. 78(1)(c), 107/1997 s. 21(3), 81/1998 s. 22(a).

(1) A Medical Panel must form its opinion on a medical question referred to it within 60 days after the reference is made or such longer period as is agreed by the Conciliation Officer, the County Court, the Authority or self-insurer.

S. 68(2) amended by No. 9/2010 s. 90(1).

(2) The Medical Panel to whom a medical question is so referred must give a certificate as to its opinion and a written statement of reasons for that opinion.

S. 68(3) amended by Nos 50/1993 s. 78(1)(c), 81/1998 s. 22(a), 9/2010 s. 90(2).

(3) Within seven days after forming its opinion on a medical question referred to it, a Medical Panel must give the relevant Conciliation Officer or the County Court or the Authority or self-insurer its written opinion and a written statement of reasons for that opinion.

S. 68(4) inserted by No. 107/1997 s. 21(4).

(4) For the purposes of determining any question or matter, the opinion of a Medical Panel on a medical question referred to the Medical Panel is to be adopted and applied by any court, body or person and must be accepted as final and conclusive by any court, body or person irrespective of who referred the medical question to the Medical Panel or when the medical question was referred.

Ss 69–80 repealed by No. 67/1992 s. 10.

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(2) Compensation for industrial deafness shall be in accordance with this section, section 89 and Division 2.

S. 88(2) amended by No. 64/1989 s. 35(e)(i).

(3) Unless the Authority, self-insurer, a Conciliation Officer, the Medical Panel or the County Court (as the case requires) determines otherwise industrial deafness shall be deemed to have occurred at a constant rate within the total number of years of exposure to industrial noise in employment.

S. 88(3) amended by Nos 64/1989 s. 35(e)(ii), 67/1992 s. 13(3), 50/1993 s. 78(1)(f), 50/1994 s. 35(3), 81/1998 s. 23(a), 102/2004 s. 17(2).

(4) Notwithstanding subsection (3), the date of injury shall be deemed to be—

(a) the last day of the worker's employment out of which or in the course of which the injury arose; or

S. 88(4)(a) substituted by No. 64/1989 s. 9(3).

(b) the date of the claim if the worker is still employed in that employment at the date of the claim.

S. 88(4)(b) substituted by No. 64/1989 s. 9(3).

89 Further loss of hearing

(1) In this section and sections 88, 91 and 98C—

S. 89(1) amended by No. 102/2004 s. 15(1).

Compensation law means this Act, the **Workers Compensation Act 1958** or any other workers compensation law of the Commonwealth or a State or Territory of the Commonwealth;

S. 89(1) def. of *Compensation law* inserted by No. 102/2004 s. 15(2).

further injury means a further loss of hearing in respect of industrial deafness after a worker has on one or more occasions suffered a prior injury;

S. 89(1) def. of *prior hearing loss* inserted by No. 102/2004 s. 15(2).

prior hearing loss means a loss of hearing for which a worker has received compensation under a Compensation law for loss of hearing;

prior injury means industrial deafness for which the worker has received or become entitled to receive compensation for loss of hearing.

S. 89(2) amended by No. 102/2004 s. 15(3)(a)(b).

(2) Subject to subsection (3A), a worker who suffers a further injury shall be entitled to receive in respect of the further injury, in addition to any other compensation payable under section 88, compensation in accordance with section 98C(3A), being compensation referrable to a percentage calculated in accordance with subsection (3) of the amount that would have been payable for a total loss of hearing.

(3) The percentage shall be the difference between—

S. 89(3)(a) amended by No. 102/2004 s. 15(4)(a).

(a) the total percentage of the loss of hearing in respect of industrial deafness from which the worker was suffering immediately after the further injury in respect of which the claim is made; and

Note to s. 89(3)(a) inserted by No. 28/2005 s. 17(1).

Note

The percentage NAL loss is to be determined in accordance with section 91(4). The percentage NAL loss is then converted in accordance with section 91(3).

S. 89(3)(b) amended by No. 102/2004 s. 15(4)(b).

(b) the total percentage of the loss of hearing in respect of industrial deafness immediately after the prior injury or prior hearing loss or in the case of more than one prior injury or

prior hearing loss the latest of the prior injuries or prior hearing losses.

Note

The percentage NAL loss is to be determined in accordance with section 89(3C). The percentage NAL loss is then converted in accordance with section 91(3A).

Note to s. 89(3)(b) inserted by No. 28/2005 s. 17(2).

(3A) Despite anything to the contrary in this Act, a worker who suffers a further injury is not entitled to compensation under this section or section 98C unless the worker has suffered in total a binaural loss of hearing of at least 10 percent NAL resulting from the further injury and any prior injury or prior hearing loss.

S. 89(3A) inserted by No. 102/2004 s. 15(5).

(3B) The total percentage referred to in subsection (3)(a) is to be determined in accordance with section 91(4).

S. 89(3B) inserted by No. 102/2004 s. 15(5).

(3C) The total percentage referred to in subsection (3)(b) is to be determined by reference to—

S. 89(3C) inserted by No. 102/2004 s. 15(5).

(a) if a percentage has been determined in accordance with the Improved Procedure for Determination of Percentage Loss of Hearing (1988 Edition or a later prescribed edition) published by the National Acoustic Laboratory, that percentage; or

(b) in any other case, the percentage which having regard to the medical evidence available is determined to be the equivalent of the percentage that (as nearly as can be estimated) would have been determined in accordance with the Improved Procedure for Determination of Percentage Loss of Hearing (1988 Edition or a later prescribed edition) published by the National Acoustic Laboratory.

S. 89(3D) inserted by No. 102/2004 s. 15(5).

(3D) If a worker disputes the total percentage referred to in subsection (3)(b) as determined in accordance with subsection (3C), the Authority, self-insurer or a court must refer the question of what is the amount of the total percentage referred to in subsection (3)(b) as a medical question to a Medical Panel for an opinion.

(4) For the purposes of this section the register kept under section 90 shall be taken into account.

S. 89(5) inserted by No. 107/1997 s. 24, repealed by No. 102/2004 s. 15(6).

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90 Effect of determination for industrial deafness

(1) A determination for the payment of compensation for industrial deafness which is not reviewed shall be a final determination in respect of the percentage of the diminution of the worker's hearing on the date of the assessment.

(2) A determination for the payment of compensation shall state the percentage of diminution of the worker's hearing in respect of industrial deafness at the date of the determination in relation to which the amount of the compensation is assessed.

S. 90(3) amended by No. 107/1997 s. 37(1)(a)(b).

(3) A determination for compensation for industrial deafness shall fully extinguish all rights of the worker to compensation for industrial deafness under section 98, 98C or 98E or under the **Workers Compensation Act 1958** up to the date of the determination but shall not prevent the worker from obtaining compensation under section 98, 98C or 98E for further industrial deafness suffered after that date.

S. 104A(6) inserted by No. 107/1997 s. 35(5), amended by No. 82/2001 s. 19(3).

(6) Directions made under subsection (1)—

(a) may require that each of the parties to a claim or their legal representatives provide information by affidavit to the other parties or their legal representatives and, if applicable, to a Conciliation Officer; and

(b) may require that the parties to a claim and their legal representatives must attend at a conference or conferences in respect of the claim.

S. 104B inserted by No. 107/1997 s. 43(2).

104B Claims for compensation under section 98C

(1) In addition to the requirements under section 103, this section applies to a claim for compensation under section 98C.

S. 104B(1A) inserted by No. 26/2000 s. 16(1).

(1A) Subject to subsection (1B), a claim for compensation under section 98C or 98E, not being a claim for compensation for industrial deafness, can not be made before the expiry of the period of 12 months after the date of the relevant injury.

S. 104B(1B) inserted by No. 26/2000 s. 16(1).

(1B) Despite subsection (1A), the Authority or a self-insurer may receive a claim for compensation under section 98C or 98E before the expiry of the period of 12 months after the date of the relevant injury if the relevant injury has stabilised.

S. 104B(1BA) inserted by No. 102/2004 s. 4.

(1BA) If a worker has commenced an application under section 134AB(4)(b), the worker can not make a claim for compensation under section 98C until the proceedings under section 134AB in respect of that application have been finally determined.

(1C) If liability has been accepted or determined in respect of a prior claim for compensation for an injury, the Authority or a self-insurer may after the expiry of the period of 18 months after the date of the relevant injury and without a claim having been made under section 98C or 98E, request the worker to attend an independent examination under subsection (4).

S. 104B(1C) inserted by No. 26/2000 s. 16(1), amended by No. 41/2006 s. 19(1).

(1CA) For the purposes of this section, a request under subsection (1C) has the effect of initiating a claim for compensation under section 98C or 98E in respect of the worker by the Authority or self-insurer.

S. 104B(1CA) inserted by No. 41/2006 s. 19(2).

(1D) The Authority or self-insurer may within 90 days of receiving a claim made by the worker by notice in writing to the worker suspend the claim made by the worker if—

S. 104B(1D) inserted by No. 102/2004 s. 5(1), amended by No. 41/2006 s. 19(3)(a)(b).

(a) the Authority or self-insurer has insufficient medical information to determine the matters specified in subsection (2); or

(b) the Authority or self-insurer can not make a determination under subsection (2) because the condition of the injury of the worker is not stable.

(1E) The Authority or self-insurer must within 14 days—

S. 104B(1E) inserted by No. 102/2004 s. 5(1).

(a) if subsection (1D)(a) applies, of having sufficient medical information to determine the matters specified in subsection (2); or

(b) if subsection (1D)(b) applies, of being able to make a determination under subsection (2) because the condition of the injury of the worker has stabilised—

by notice in writing to the worker remove the suspension under subsection (1D).

S. 104B(2) amended by No. 81/1998 s. 23(a), substituted by No. 102/2004 s. 5(2), amended by No. 41/2006 s. 19(4)(a).

(2) The Authority or self-insurer must within 120 days of receiving a claim made by the worker or in the case of a claim initiated by the Authority or self-insurer, within 120 days of the relevant date—

S. 104B(2)(a) amended by No. 41/2006 s. 19(4)(b).

(a) if the claim is a claim made by the worker, accept or reject liability for each injury included in the claim;

(b) obtain an assessment or assessments in accordance with section 91 as to the degree of permanent impairment (if any) of the worker resulting from the injury or injuries in respect of which liability is accepted;

(c) after taking into account the assessment or assessments obtained under paragraph (b), determine the degree of permanent impairment (if any) of the worker for each of the purposes of—

(i) section 98C;

(ii) section 134AB;

(iii) Subdivision 1 of Division 3A;

(d) determine whether the worker has an injury which is a total loss mentioned in the Table to section 98E(1);

(e) calculate any entitlement to compensation under section 98C or 98E;

(f) advise the worker as to—

S. 104B(2)(f)(i) amended by No. 41/2006 s. 19(4)(c).

(i) if the claim is a claim made by the worker, the decision to accept or reject liability for each injury included in the claim;

(ii) each of the determinations as to the degree of permanent impairment (if any) of the worker and whether the worker has an injury which is a total loss mentioned in the Table to section 98E(1) resulting from the injury or injuries in respect of which liability is accepted;

(iii) the calculation of any entitlement to compensation under section 98C or 98E;

* * * * *

S. 104B (2)(f)(iv) repealed by No. 41/2006 s. 18(1).

(g) provide to the worker a copy of—

(i) any medical reports, correspondence and other documents provided to; and

(ii) any medical reports, correspondence and other documents obtained from—

any medical practitioner referred to in section 91(1)(b) conducting an independent examination.

(2AA) For the purposes of this section—

S. 104B(2AA) inserted by No. 41/2006 s. 19(5).

claim made by the worker means—

(a) a claim by a worker for compensation under section 98C or 98E; or

(b) a claim by a worker for compensation under section 98C or 98E in accordance with subsection (5D)(a);

relevant date means—

(a) if the worker makes a claim for compensation under section 98C or 98E in accordance with subsection (5D)(a), the day on which the claim is received by the Authority or self-insurer; or

(b) if the worker advises the Authority or self-insurer that he or she disputes the written statement under subsection (5C), the day on which the dispute is resolved; or

(c) if the worker does not make a claim or dispute the statement within the period specified under subsection (5D), the day on which that period expires; or

(d) if the worker accepts the written statement of the injury or injuries under subsection (5C), the day on which the Authority or self-insurer receives the advice of the worker that he or she accepts the written statement of the injury or injuries.

S. 104B(2A) inserted by No. 102/2004 s. 5(2).

(2A) The Authority or self-insurer is not bound by the assessment or assessments obtained under subsection (2)(b) in determining the degree of permanent impairment (if any) under subsection (2)(c).

S. 104B(3) amended by Nos 81/1998 s. 23(a), 102/2004 s. 5(3), 41/2006 s. 19(6).

(3) If the Authority or self-insurer rejects liability in relation to the injuries included in the claim made by the worker and the worker disputes the decision as to liability, the worker must not commence proceedings in relation to the claim made by the worker unless the worker first refers the dispute for conciliation by a Conciliation Officer in accordance with Division 2 of Part III

and until the Conciliation Officer has issued a certificate under section 49.

(4) The worker must at the request of the Authority or self-insurer attend an independent examination to be conducted by a medical practitioner referred to in section 91(1)(b) for the purposes this section.

S. 104B(4) amended by Nos 107/1997 s. 25(3), 81/1998 s. 23(a), substituted by No. 102/2004 s. 5(4).

(5) The Authority or self-insurer must obtain assessments in accordance with section 91 as to the degree of permanent impairment resulting from any injury for which liability is accepted or established for the purposes of—

S. 104B(5) amended by Nos 26/2000 s. 16(2), 82/2001 s. 6(a), substituted by No. 102/2004 s. 5(5).

(a) determining any entitlement of the worker to compensation under section 98C;

(b) determining the whole person impairment under sections 134AB(3) and 134AB(15);

(c) Subdivision 1 of Division 3A.

(5A) A worker must include all injuries arising out of the same event or circumstance in a claim for compensation under section 98C.

S. 104B(5A) inserted by No. 26/2000 s. 16(3), substituted by No. 102/2004 s. 5(6).

(5AA) A worker can only make one claim for compensation under section 98C in respect of injuries arising out of the same event or circumstance.

S. 104B(5AA) inserted by No. 102/2004 s. 5(6).

(5AB) Subject to subsection (5D)(a), if a claim for compensation under section 98C or 98E has been initiated in respect of a worker by the Authority or self-insurer, the worker cannot make a claim for compensation under section 98C or 98E in respect of injuries arising out of the same event or circumstance.

S. 104B(5AB) inserted by No. 41/2006 s. 19(7).

S. 104B(5B) inserted by No. 26/2000 s. 16(3), substituted by No. 102/2004 s. 5(6).

(5B) A determination of the degree of impairment must take into account all impairments resulting from the injuries entitling the worker to compensation included in the claim for compensation under section 98C.

S. 104B(5C) inserted by No. 26/2000 s. 16(3), amended by No. 41/2006 s. 19(8).

(5C) If the independent examination has been requested by the Authority or a self-insurer under subsection (1C), the Authority or self-insurer must give the worker a written statement of the injury or injuries to be included in the assessments and a statement of rights in a form approved by the Authority for the purposes of this section.

S. 104B(5D) inserted by No. 26/2000 s. 16(3), amended by No. 41/2006 s. 19(9)(a).

(5D) A worker must within 60 days of receiving a written statement under subsection (5C)—

(a) make a claim for compensation under section 98C or 98E in respect of any additional injuries that the worker believes have arisen out of the same event or circumstance; or

S. 104B(5D)(b) amended by No. 41/2006 s. 19(9)(b).

(b) advise the Authority or self-insurer that he or she disputes the statement; or

S. 104B(5D)(c) inserted by No. 41/2006 s. 19(9)(c).

(c) advise the Authority or self-insurer that he or she accepts the written statement of the injury or injuries.

S. 104B(5DA) inserted by No. 41/2006 s. 19(10).

(5DA) If after receiving a written statement under subsection (5C) the worker makes a claim for compensation under section 98C or 98E in respect of any additional injuries that the worker believes have arisen out of the same event or circumstance—

(a) the claim by the worker and the claim initiated by the Authority or self-insurer are to be considered as one consolidated claim; and

(b) the consolidated claim is to be dealt with in accordance with subsection (2).

(5DB) If the worker advises the Authority or self-insurer that he or she disputes the written statement under subsection (5C), the worker must not commence proceedings in relation to the claim unless the worker first refers the dispute for conciliation by a Conciliation Officer in accordance with Division 2 of Part III and until the Conciliation Officer has issued a certificate under section 49.

S. 104B(5DB) inserted by No. 41/2006 s. 19(10).

(5E) If the worker does not make a claim or dispute the statement within the period specified under subsection (5D), the injury or injuries specified in the written statement are deemed to be the only injury or injuries arising from the same event or circumstance which are to be included in the determination of impairment to be dealt with in accordance with subsection (2).

S. 104B(5E) inserted by No. 26/2000 s. 16(3), amended by Nos 102/2004 s. 5(7)(a), 41/2006 s. 19(11).

(5F) If the worker was not 18 years of age at the time of the event or circumstance, the determination of impairment resulting from the injury can not be made until the worker attains the age of 18 years.

S. 104B(5F) inserted by No. 26/2000 s. 16(3), amended by No. 102/2004 s. 5(7)(b)(i)(ii).

(6) The worker must within 60 days of being advised under subsection (2) in respect of a claim made by the worker advise the Authority or self-insurer in writing whether the worker accepts or disputes the decision as to liability in respect of each of the injuries claimed.

S. 104B(6) amended by Nos 81/1998 s. 23(a), 26/2000 ss 16(4)(a), s. 17(1), 82/2001 s. 20(1), substituted by No. 102/2004 s. 5(8), amended by No. 41/2006 s. 19(12).

S. 104B(6A) inserted by No. 102/2004 s. 5(8).

(6A) If under subsection (6) a worker disputes any part of the decision as to liability, the worker does not have to respond to any other part of the advice under subsection (2).

S. 104B(6B) inserted by No. 102/2004 s. 5(8), amended by No. 41/2006 s. 19(13).

(6B) Subject to subsection (6), the worker must within 60 days of being advised under subsection (2) advise the Authority or self-insurer in writing—

(a) whether the worker accepts or disputes the determinations of impairment and total loss;

S. 104B(6B)(b) amended by No. 41/2006 s. 18(2)(a).

(b) if the worker accepts the determinations of impairment and total loss, whether the worker accepts or disputes the entitlement to compensation, if any.

S. 104B(6B)(c) repealed by No. 41/2006 s. 18(2)(b).

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S. 104B(7) amended by Nos 81/1998 s. 23(a), 26/2000 ss 16(4)(b), s. 17(2), 82/2001 s. 20(1), substituted by No. 102/2004 s. 5(8).

(7) If the decision made under subsection (2)(a) to reject liability for an injury is varied as the result of a decision of a court or an agreement between the worker and the Authority or self-insurer, the Authority or self-insurer must within 90 days of the variation—

(a) obtain an assessment or assessments in accordance with section 91 as to the degree of permanent impairment (if any) of the worker resulting from the injury or injuries in respect of which liability is accepted or determined;

(b) after taking into account the assessment or assessments obtained under paragraph (a), determine the degree of permanent impairment (if any) of the worker for each of the purposes of—

(i) section 98C;

(ii) section 134AB;

(iii) Subdivision 1 of Division 3A;

(c) determine whether the worker has an injury which is a total loss mentioned in the Table to section 98E(1);

(d) calculate any entitlement to compensation under section 98C or 98E;

(e) advise the worker as to—

(i) the decision or determination of liability for each injury included in the claim;

(ii) each of the determinations as to the degree of permanent impairment (if any) of the worker and whether the worker has an injury which is a total loss mentioned in the Table to section 98E(1) resulting from the injury or injuries in respect of which liability is accepted;

(iii) the calculation of any entitlement to compensation under section 98C or 98E;

* * * * *

S. 104B (7)(e)(iv) repealed by No. 41/2006 s. 18(1).

(f) provide to the worker a copy of—

(i) any medical reports, correspondence and other documents provided to; and

(ii) any medical reports, correspondence and other documents obtained from—

any medical practitioner referred to in section 91(1)(b) conducting an independent examination.

S. 104B(7A) inserted by No. 102/2004 s. 5(8).

(7A) The Authority or self-insurer is not bound by the assessment or assessments obtained under subsection (7)(a) in determining the degree of permanent impairment (if any) under subsection (7)(b).

S. 104B(7B) inserted by No. 102/2004 s. 5(8).

(7B) The worker must within 60 days of being advised under subsection (7) advise the Authority or self-insurer in writing—

(a) whether the worker accepts or disputes the determinations of impairment and total loss;

S. 104B(7B)(b) amended by No. 41/2006 s. 18(3)(a).

(b) if the worker accepts the determinations of impairment and total loss, whether the worker accepts or disputes the entitlement to compensation, if any.

S. 104B(7B)(c) repealed by No. 41/2006 s. 18(3)(b).

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S. 104B(8) amended by Nos 81/1998 s. 23(a), 26/2000 s. 16(4)(c), substituted by No. 26/2000 s. 17(3), amended by No. 102/2004 s. 5(9)(a)(b), substituted by No. 41/2006 s. 18(4).

(8) Subject to section 134AB(36), the Authority or self-insurer must, within 14 days of being advised by the worker either under subsection (6B) or (7B) or at a later date that the worker accepts the determinations of impairment and total loss and the entitlement to compensation—

(a) if the entitlement is under section 98C, make payments in accordance with section 98D; or

(b) if the entitlement is under section 98E, pay the amount specified for the total loss under section 98E.

(9) The Authority or self-insurer must, within 14 days of being advised by the worker that the worker disputes the determinations of impairment or total loss in respect of the injury or injuries claimed, refer the medical questions as to—

S. 104B(9) amended by Nos 81/1998 s. 23(a), 26/2000 s. 16(4)(d)(i)(ii), 82/2001 s. 6(b), substituted by No. 102/2004 s. 5(10).

(a) the degree of impairment assessed in accordance with section 91 resulting from the injury or injuries claimed for which liability is accepted or established; and

(b) whether the worker has an injury or injuries claimed for which liability is accepted or established which is a total loss mentioned in the Table to section 98E(1)—

to a Medical Panel for its opinion under section 67.

(9A) For the purposes of subsection (9), if a worker has suffered an injury arising out of the same event or circumstance resulting in both psychiatric impairment and impairment other than psychiatric impairment—

S. 104B(9A) inserted by No. 102/2004 s. 5(10).

(a) the worker may—

(i) accept or dispute the determinations of impairment of both psychiatric impairment and impairment other than psychiatric impairment; or

(ii) accept or dispute either the determination of psychiatric impairment or the determination of impairment other than psychiatric impairment but can not accept only part of the determination of impairment other than psychiatric impairment; and

(b) the Authority or self-insurer must refer under that subsection the medical questions relating to the determination or determinations disputed in accordance with subsection (9).

S. 104B(10) amended by No. 81/1998 s. 23(a), substituted by No. 26/2000 s. 17(4), amended by No. 82/2001 s. 20(1), substituted by No. 41/2006 s. 18(5).

(10) The Authority or self-insurer must, within 60 days of obtaining the opinion of the Medical Panel under section 67, advise the worker of the opinion and the entitlement, if any, under section 98C or 98E.

S. 104B(10A) inserted by No. 26/2000 s. 17(4), substituted by No. 41/2006 s. 18(5).

(10A) The worker must, within 60 days of being advised by the Authority or self-insurer of the entitlement of the worker to compensation in accordance with subsection (10), advise the Authority or self-insurer whether the worker accepts or disputes the entitlement to compensation.

S. 104B(10B) inserted by No. 26/2000 s. 17(4), substituted by No. 41/2006 s. 18(5).

(10B) Subject to section 134AB(36), the Authority or self-insurer must, within 14 days of being advised by the worker either under subsection (10A) or at a later date that the worker accepts the entitlement to compensation—

(a) if the entitlement is under section 98C, make payments in accordance with section 98D; or

(b) if the entitlement is under section 98E, pay the amount specified for the total loss under section 98E.

(11) For the purposes of this section, liability in relation to a claim does not include a question as to the degree of permanent impairment of a worker or whether a worker has an injury which is a total loss mentioned in the Table to section 98E(1).

* * * * *

S. 104B(11A) inserted by No. 26/2000 s. 17(5), repealed by No. 41/2006 s. 18(6).

(12) No appeal lies to any court or Tribunal from a determination or opinion—

S. 104B(12) amended by No. 102/2004 s. 5(11).

(a) as to the degree of permanent impairment of a worker resulting from an injury; or

(b) as to whether a worker has an injury which is a total loss mentioned in the Table to section 98E(1).

(13) For the purposes of this section, the Minister may issue directions to be published in the Government Gazette for or with respect to procedures for the determination of claims for compensation under section 98C, including directions requiring that information in classes of claims specified in the directions must be provided by affidavit.

S. 104B(14) inserted by No. 26/2000 s. 16(5).

(14) This section as amended by section 16 of the **Accident Compensation (Common Law and Benefits) Act 2000** applies in respect of—

(a) all claims for compensation under section 98C given, served or lodged on or after the commencement of section 16 of the **Accident Compensation (Common Law and Benefits) Act 2000**;

(b) an assessment for the purposes of sections 134AB(3) and 134AB(15) in respect of an injury to a worker on or after 20 October 1999 whose claim for compensation under section 98C was given, served or lodged before the commencement of section 16 of the **Accident Compensation (Common Law and Benefits) Act 2000**;

(c) a claim specified in subsection (15).

S. 104B(15) inserted by No. 26/2000 s. 16(5).

(15) If a worker has given, served or lodged a claim for compensation under section 98C before the commencement of section 16 of the **Accident Compensation (Common Law and Benefits) Act 2000** and on or after that commencement claims compensation under section 98C for any other injury which arose from the same event or circumstance in respect of which the injury the subject of the previous claim arose, this section as amended by section 16 of the **Accident Compensation (Common Law and Benefits) Act 2000** applies in respect of the subsequent claim.

S. 104B(16) inserted by No. 26/2000 s. 16(5).

(16) Subject to subsection (14), this section as in force before the commencement of section 16 of the **Accident Compensation (Common Law and Benefits) Act 2000** continues to apply in respect of all claims for compensation under section 98C given, served or lodged before the commencement of section 16 of the **Accident Compensation (Common Law and Benefits) Act 2000**.

S. 104B(17) inserted by No. 26/2000 s. 17(6).

(17) This section as amended by section 17 of the **Accident Compensation (Common Law and Benefits) Act 2000** applies in respect of—

(a) all claims for compensation under section 98C given, served or lodged on or after the commencement of section 17 of the **Accident Compensation (Common Law and Benefits) Act 2000**;

(b) a request made under subsection (1C) on or after that commencement;

(c) an assessment on or after that commencement for the purposes of sections 134AB(3) and 134AB(15) in respect of an injury to a worker on or after 20 October 1999.

(18) This section as amended by section 20 of the **Accident Compensation (Amendment) Act 2001** only applies— S. 104B(18) inserted by No. 82/2001 s. 20(2).

(a) in the case of subsection (6), to any case in which the Authority or self-insurer obtained the assessments and determination on or after the date of commencement of section 20 of that Act;

(b) in the case of subsection (7), to any case in which the worker was advised under subsection (6) on or after the date of commencement of section 20 of that Act;

(c) in the case of subsection (10), to any case in which the Authority or self-insurer obtained the opinion of the Medical Panel under section 67 on or after the date of commencement of section 20 of that Act.

(19) If as at the commencement of section 5 of the **Accident Compensation Legislation (Amendment) Act 2004** a worker has attended at least 1 impairment examination, the assessment of impairment and the final determination of the claim of the worker must be completed in accordance with this section as in force before that commencement. S. 104B(19) inserted by No. 102/2004 s. 5(12).

(20) If as at the commencement of section 5 of the **Accident Compensation Legislation (Amendment) Act 2004** a worker has lodged an impairment claim but has not attended any impairment examinations, the worker may before attending an impairment examination elect by notice in writing to the Authority or self-insurer— S. 104B(20) inserted by No. 102/2004 s. 5(12).

(a) to continue to have the claim determined in accordance with this section as in force before that commencement; or

(b) to withdraw the claim.

S. 104B(21) inserted by No. 102/2004 s. 5(12).

(21) If a worker withdraws a claim under subsection (20)(b), the worker may submit a new claim as if it were the first claim of that type that the worker was submitting in respect of that injury.

S. 104B(22) inserted by No. 41/2006 s. 18(7).

(22) This section as in force before the commencement of section 5 of the **Accident Compensation Legislation (Amendment) Act 2004** applies to a worker to whom subsection (19) or (20)(a) applies with the following modifications—

(a) as if in subsection (6) as then in force "and of the consequences as specified in subsection (11A) of confirming in writing that he or she wishes to receive any compensation to which he or she is entitled" were omitted;

(b) as if in subsection (7) as then in force "and if the worker accepts the entitlement to compensation, whether or not he or she wishes to receive the compensation to which he or she is entitled" were omitted;

(c) as if in subsection (8) as then in force, for "wishes to receive the compensation to which he or she is entitled" there were substituted "accepts the entitlement";

(d) as if in subsection (10) as then in force "and of the consequences as specified in subsection (11A) of confirming in writing that he or she wishes to receive any compensation to which he or she is entitled" were omitted;

(e) as if in subsection (10A) as then in force, for "wishes to receive the compensation to which he or she is entitled" there were substituted "accepts or disputes the entitlement to compensation";

(f) as if in subsection (10B) as then in force, for "wishes to receive the compensation to which he or she is entitled" there were substituted "accepts the entitlement to compensation";

(g) as if subsection (11A) as then in force were repealed.

S. 104B(23) inserted by No. 41/2006 s. 18(7).

(23) Subject to subsection (22), this section as amended by section 18 of the **Accident Compensation and Other Legislation (Amendment) Act 2006** applies to an impairment claim whether lodged before, on or after 18 November 2004 unless the worker has before 1 June 2006—

(a) made an application under section 134AB(4); or

(b) advised the Authority or self-insurer under subsection (7B) or (10A) that he or she wishes to receive the compensation to which he or she is entitled.

105 Medical certificate

S. 105 substituted by No. 50/1994 s. 50.

S. 105(1) amended by No. 9/2010 s. 20(1).

(1) A medical certificate referred to in section 103 that relates to a claim for compensation that is, or includes, compensation in the form of weekly payments must—

(a) be issued by a medical practitioner; and

(b) be in a form approved by the Authority; and

S. 105(1)(c) amended by No. 107/1997 s. 30(9).

(c) specify the expected duration of the worker's incapacity and whether the worker has a current work capacity or has no current work capacity.

319 Section 114

S. 319 inserted by No. 9/2010 s. 191.

Section 114(2)(c)(ii), (2A), (2B) and (2C), as substituted or inserted by section 45 of the amending Act, applies to a claim whether made before , on or after the commencement date.

320 Section 91

S. 320 inserted by No. 9/2010 s. 191.

Section 91, as amended by section 53 of the amending Act, applies in respect of a claim under section 98C or 98E whether made before, on or after the commencement date if the worker attends the first impairment assessment for the purposes of section 104B(2)(b) on or after the commencement date.

321 Section 98C

S. 321 inserted by No. 9/2010 s. 191.

Section 98C, as amended by section 54 of the amending Act, applies in respect of a claim under section 98C whether made before, on or after the commencement date if the worker attends the first impairment assessment for the purposes of section 104B(2)(b) on or after the commencement date.

322 Section 43 (Jurisdiction of Magistrates' Court)

S. 322 inserted by No. 9/2010 s. 191.

Section 43, as amended by section 75 of the amending Act, applies in respect of proceedings commenced under this Act on or after the commencement date.

323 Section 45 (Medical questions)

S. 323 inserted by No. 9/2010 s. 191.

Section 45, as amended by section 76 of the amending Act, applies only in respect of proceedings commenced on or after the commencement date.

59(9) immediately before the commencement date;

(b) disputes referred to conciliation on and after the commencement date.

342 Section 62 (Costs)

S. 342 inserted by No. 9/2010 s. 191.

Section 62, as amended by section 87 of the amending Act, applies in respect of disputes that have been referred to conciliation on and after the commencement date.

343 Section 63 (Establishment and constitution)

S. 343 inserted by No. 9/2010 s. 191.

Section 63, as amended by section 88 of the amending Act, applies in respect of referrals made to a Medical Panel on and after the commencement date.

344 Section 65 (Procedures and powers)

S. 344 inserted by No. 9/2010 s. 191.

Section 65, as amended by section 89 of the amending Act, applies in respect of any medical question referred to a Medical Panel on and after the commencement date.

345 Section 68 (Opinions)

S. 345 inserted by No. 9/2010 s. 191.

Section 68, as amended by section 90 of the amending Act, applies in respect of any opinion given by a Medical Panel under section 68 on and after the commencement date.

346 Division 3AA of Part IV (Employer obligations)

S. 346 inserted by No. 9/2010 s. 191.

Division 3AA of Part IV, as inserted by section 91 of the amending Act, applies in respect of a claim for compensation in respect of an injury or death under this Act that is accepted by the Authority on and after the commencement date.

Annexure B

Accident Compensation Act 1985 (Vic) Version 159A as at 1 March 2010:

- s 45,
- s 65,
- s 68.

45 Medical questions

S. 45 substituted by No. 67/1992 s. 10.

S. 45(1) substituted by No. 107/1997 s. 21(5).

(1) Where the County Court exercises jurisdiction under this Part, the County Court—

(a) may refer a medical question; or

S. 45(1)(b) amended by No. 26/2000 s. 5(1).

(b) if a party to the proceedings requests that a medical question or medical questions be so referred, must, subject to subsections (1B) and (1C), refer that medical question or those medical questions—

to a Medical Panel for an opinion under this Division.

S. 45(1A) inserted by No. 26/2000 s. 5(2).

(1A) This section extends to, and applies in respect of, an application for leave under section 134AB(16)(b)—

(a) so as to enable in accordance with subsection (1)(a) the court hearing the application to refer a medical question (including a medical question as defined in paragraphs (h) and (i) of the definition of ***medical question*** in section 5(1)); or

(b) so as to require in accordance with subsection (1)(b) the court hearing the application at the request of a party to the application to refer a medical question (including a medical question as defined in paragraph (h) of the definition of ***medical question*** in section 5(1) but excluding a medical question as defined in paragraph (i) of that definition)—

for the opinion of a Medical Panel.

(1B) The County Court may refuse to refer a medical question to a Medical Panel on an application under subsection (1)(b) if the County Court is of the opinion that the referral would, in all the circumstances, constitute an abuse of process.

S. 45(1B) inserted by No. 26/2000 s. 5(3).

(1C) The County Court has on an application under subsection (1)(b) the discretion as to the form in which the medical question is to be referred to a Medical Panel.

S. 45(1C) inserted by No. 26/2000 s. 5(3).

(2) If the County Court refers a medical question to the Panel, the Court must give each party to the proceedings, copies of all documents in the possession of the Court relating to the medical question.

S. 45(2) amended by No. 107/1997 s. 21(6).

* * * * *

S. 45(3) repealed by No. 107/1997 s. 21(7).

(4) If the County Court refers a medical question to a Medical Panel, the Court must give a copy of the Panel's opinion to the worker and to the employer, Authority or self-insurer and may give a copy to a party to the proceedings.

S. 45(4) amended by Nos 50/1993 s. 78(1)(c), 81/1998 s. 22(a).

46 Admissibility of statements by injured workers

S. 46 substituted by No. 67/1992 s. 10.

(1) If a worker after receiving an injury makes any statement in writing in relation to that injury to the worker's employer or to the Authority or to any person acting on behalf of the employer or the Authority, the statement shall not be admitted to evidence if tendered or used by the employer or the Authority in any proceedings under this Act unless the employer or the Authority has, at least 14 days before the hearing, furnished to the worker or to the worker's legal practitioner or agent a copy in writing of the statement.

S. 46(1) amended by Nos 50/1993 s. 78(1)(d), 35/1996 s. 453(Sch. 1 item 1.1), 81/1998 s. 22(b).

(d) if, as a result of disciplinary or similar action, the member ceases to be entitled to practise as a medical practitioner; or

(e) if the member ceases to be a medical practitioner; or

(f) if the member becomes bankrupt; or

(g) if the member is convicted of an indictable offence or of an offence which, if committed in Victoria, would be an indictable offence.

S. 64(4)(g) amended by No. 50/1993 s. 110(1)(c).

65 Procedures and powers

S. 65 substituted by No. 67/1992 s. 10.

(1) A Panel is not bound by rules or practices as to evidence, but may inform itself on any matter relating to a reference in any manner it thinks fit.

(2) The Panel must act informally, without regard to technicalities or legal forms and as speedily as a proper consideration of the reference allows.

(3) Information given to a Panel cannot be used in any civil or criminal proceedings in any court or tribunal, other than proceedings—

S. 65(3) substituted by No. 50/1994 s. 31(1).

(a) before the County Court, the Magistrates' Court or the Tribunal under this Act or the **Workers Compensation Act 1958**;

S. 65(3)(a) amended by No. 52/1998 s. 311(Sch. 1 item 1.2).

(b) for an offence against this Act or the **Accident Compensation (WorkCover Insurance) Act 1993** or the **Workers Compensation Act 1958**;

(c) for an offence against the **Crimes Act 1958** which arises in connection with a claim for compensation under this Act.

S. 65(3)(c) substituted by No. 107/1997 s. 20.

* * * * *

S. 65(3)(d) repealed by No. 107/1997 s. 20.

(4) Any attendance of a worker before a Medical Panel must be in private, unless the Medical Panel considers that it is necessary for another person to be present.

(5) A Panel may ask a worker—

(a) to meet with the Panel and answer questions;

S. 65(5)(b) amended by No. 107/1997 s. 21(9).

(b) to supply copies of all documents in the possession of the worker which relate to the medical question to the Panel;

(c) to submit to a medical examination by the Panel or by a member of the Panel.

(6) If a Panel so requests and the worker consents, a person who is—

S. 65(6)(a) amended by No. 50/1994 s. 31(2).

(a) a provider of a medical service (within the meaning of paragraph (a) of the definition of ***medical service*** in section 5(1));

S. 65(6)(b) repealed by No. 50/1993 s. 81(c).

* * * * *

who has examined the worker must—

(c) meet with the Panel and answer questions; and

(d) supply relevant documents to the Panel.

S. 65(6A) inserted by No. 26/2000 s. 11(1).

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

(a) the injury or alleged injury to, or in respect of, which the medical question relates;

(b) the facts or questions of fact relevant to the medical question which the person or body is satisfied have been agreed and those facts or questions that are in dispute.

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

S. 65(6B) inserted by No. 26/2000 s. 11(1).

(7) The Convenor may give directions as to the arrangement of the business of the Panels.

(8) The Minister may for the purposes of—

S. 65(8) substituted by No. 26/2000 s. 12.

(a) ensuring procedural fairness in the procedures of the Medical Panels; and

(b) facilitating the proper administration of the Medical Panels—

issue guidelines as to the procedures of Medical Panels.

(8A) The Minister must consult with the Attorney-General before issuing any guidelines under this section.

S. 65(8A) inserted by No. 60/2003 s. 19(3).

(9) The Convenor may give directions as to the procedures of the Panels but may not give directions inconsistent with any guidelines issued by the Minister.

(10) The Convenor of the Medical Panels and a member of a Medical Panel has in the performance of his or her duties as the Convenor of the Medical Panels or as a member of a Medical Panel the same protection and immunity as a Judge of the Supreme Court has in the performance of his or her duties as a Judge.

S. 65(10) inserted by No. 7/1996 s. 15.

66 Validity of acts or decisions

S. 66 substituted by No. 67/1992 s. 10.

An act or decision of a Panel is not invalid by reason only of any defect or irregularity in or in connection with the appointment of a member.

68 Opinions

S. 68 substituted by No. 67/1992 s. 10.

S. 68(1) amended by Nos 50/1993 s. 78(1)(c), 107/1997 s. 21(3), 81/1998 s. 22(a).

(1) A Medical Panel must form its opinion on a medical question referred to it within 60 days after the reference is made or such longer period as is agreed by the Conciliation Officer, the County Court, the Authority or self-insurer.

(2) The Medical Panel to whom a medical question is so referred must give a certificate as to its opinion.

S. 68(3) amended by Nos 50/1993 s. 78(1)(c), 81/1998 s. 22(a).

(3) Within seven days after forming its opinion on a medical question referred to it, a Medical Panel must give the relevant Conciliation Officer or the County Court or the Authority or self-insurer its opinion in writing.

S. 68(4) inserted by No. 107/1997 s. 21(4).

(4) For the purposes of determining any question or matter, the opinion of a Medical Panel on a medical question referred to the Medical Panel is to be adopted and applied by any court, body or person and must be accepted as final and conclusive by any court, body or person irrespective of who referred the medical question to the Medical Panel or when the medical question was referred.

Ss 69–80 repealed by No. 67/1992 s. 10.

* * * * *

Annexure C

Administrative Law Act 1978 (Vic) Version 53 as at 1 July 2012:

- s 8,
- s 10.

limited by statute for the making of the decision but shall not exercise any other jurisdiction or power or grant any other remedy.

8 Reasons for decision to be furnished by tribunal on request by party concerned

(1) A tribunal shall, if requested to do so by any person affected by a decision made or to be made by it, furnish him with a statement of its reasons for the decision.

(2) The request may be made orally or in writing to the tribunal or to any member or officer thereof but must be made either before the giving or notification of the decision or else within thirty days after the decision has come to the knowledge of the person making the request and in any event not later than ninety days after the giving or notification of the decision.

S. 8(2) amended by Nos 10097 s. 174(8)(b), 63/1987 s. 7, 4/1989 s. 8(1)(b), 52/1998 s. 311(Sch. 1 item 2.2).

(3) The statement of reasons shall be in writing and furnished within a reasonable time.

(4) The Supreme Court, upon being satisfied by the person making the request that a reasonable time has elapsed without any such statement of reasons for the decision having been furnished or that the only statement furnished is not adequate to enable a Court to see whether the decision does or does not involve any error of law, may order the tribunal to furnish, within a time specified in the order, a statement or further statement of its reasons and if the order is not complied with the Court, in addition to or in lieu of any order to enforce compliance by the tribunal or any member thereof, may make any such order as might have been made if error of law had appeared on the face of the record.

S. 8(4) amended by No. 110/1986 s. 140(2) (Sch.).

S. 8(5) amended by No. 110/1986 s. 140(2) (Sch.).

(5) Notwithstanding anything in this section a tribunal shall not be bound to furnish a statement of reasons, and the Court shall not be bound to order it to do so, where to furnish the reasons would, in the opinion of the Court, be against public policy, or the person making the request is not a person primarily concerned with the decision and to furnish the reasons would, in the opinion of the Court, be against the interests of a person primarily concerned.

S. 8(6) inserted by No. 52/1998 s. 311(Sch. 1 item 2.3) (as amended by No. 101/1998 s. 22(1)(b)).

(6) Nothing in this section applies to the Victorian Civil and Administrative Tribunal or the Business Licensing Authority.

S. 9 amended by No. 110/1986 s. 140(2) (Sch.).

9 Interim relief

The Supreme Court, in order to prevent irreparable damage pending judicial review, may by order suspend the operation, or postpone the coming into effect, of a decision made or to be made by a tribunal or restrain the implementing thereof until the expiration of fourteen days from the furnishing by the tribunal of a statement of reasons as provided by subsection (1) of section 8 or for such further time as the Court shall deem fit.

10 Reasons to be part of record

Any statement by a tribunal or inferior court whether made orally or in writing, and whether or not made pursuant to a request or order under section 8, of its reasons for a decision shall be taken to form part of the decision and accordingly to be incorporated in the record.