HIGH COURT OF AUSTRALIA

FRENCH CJ,
CRENNAN, BELL, GAGELER AND KEANE JJ

WINGFOOT AUSTRALIA PARTNERS PTY LTD
& ANOR APPELLANTS

AND

EYUP KOCAK & ORS RESPONDENTS

Wingfoot Australia Partners Pty Ltd v Kocak
[2013] HCA 43
30 October 2013
M52/2013

ORDER

1. *Appeal allowed.*

2. *Set aside orders 1, 2 and 3 of the Court of Appeal of the Supreme Court of Victoria made on 23 October 2012 and, in their place, order that the appeal to that Court be dismissed.*

3. *The appellants pay the first respondent's costs of this appeal and the application for special leave to appeal.*

On appeal from the Supreme Court of Victoria

Representation

M F Wheelahan SC with M C Norton for the appellants (instructed by Thomsons Lawyers)

A G Uren QC with A D B Ingram for the first respondent (instructed by Slater & Gordon)

A S Pillay for the second and third respondents (instructed by Moray & Agnew)

CATCHWORDS

Wingfoot Australia Partners Pty Ltd v Kocak

Administrative law – Availability of certiorari – Legal consequences of Medical Panel's opinion under *Accident Compensation Act* 1985 (Vic) – Where separate proceedings for common law damages and statutory compensation – Whether Medical Panel's opinion on medical questions referred to it in one proceeding required to be adopted and applied in other proceeding – Whether issue estoppel – Whether order in nature of certiorari available.

Administrative law – Statutory obligation to give written statement of reasons – Standard of reasons required – Whether error of law on the face of the record.

Words and phrases – "certiorari", "error of law", "for the purposes of determining any question or matter", "Medical Panel", "medical question", "reasons", "written statement of reasons".

Accident Compensation Act 1985 (Vic), s 68.
Administrative Law Act 1978 (Vic), ss 8, 10.

1 FRENCH CJ, CRENNAN, BELL, GAGELER AND KEANE JJ. This appeal raises questions about s 68 of the *Accident Compensation Act* 1985 (Vic) ("the Act"), under which a Medical Panel must give its opinion on a medical question referred to it and a written statement of its reasons for that opinion.

2 What is the legal effect of an opinion of a Medical Panel? What standard is required of a written statement of reasons? Can the legal effect of the opinion be quashed by an order in the nature of certiorari for breach of that standard?

The Act

3 The Act has been amended frequently and extensively. Leaving to one side the minor effect of some transitional provisions, the form of the Act relevant to the appeal is the form in which it existed as at 5 April 2010[1]. It is convenient to refer to the Act in that form in the present tense.

4 Part IV of the Act deals with the payment of statutory compensation. It confers on an injured worker an entitlement to compensation in accordance with the Act[2], prescribes the benefits to which a worker is so entitled to include (amongst other things) the payment of medical expenses[3], and imposes obligations on the Victorian WorkCover Authority ("the Authority"), an employer or a self-insurer to meet that entitlement[4]. It sets out procedures by which a claim for statutory compensation is to be made by a worker, ordinarily to the employer[5], and by which a claim so made is to be assessed (so as to be either accepted or rejected), ordinarily by the Authority or a self-insurer[6].

5 Divisions 8A and 9 of Pt IV deal with common law damages. An injured worker who is or may be entitled to compensation in respect of an injury which arose between 12 November 1997 and 19 October 1999 is wholly prevented from

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1 Version No 159D.

2 Section 82.

3 Section 99.

4 Sections 20(1)(b), 125A(2) and (3), 127(1) and 143.

5 Section 103(4A).

6 Sections 20(1)(aa) and 109.

recovering common law damages in respect of that injury[7]. An injured worker who is or may be entitled to compensation in respect of an injury which arose on or after 20 October 1999[8], or before 12 November 1997[9], is prevented from recovering common law damages in respect of that injury save where certain threshold conditions are met. Those conditions include that a court, being satisfied on the balance of probabilities that the injury is a serious injury, gives leave to bring proceedings[10].

6 Part III of the Act deals with the resolution of disputes. Division 1 confers jurisdiction on the County Court to "inquire into, hear and determine any question or matter under [the Act] arising … out of" any decision of the Authority, an employer or a self-insurer (and also out of any recommendation or direction of a Conciliation Officer)[11]. It confers like jurisdiction on the Magistrates' Court[12]. Division 2 provides for the conciliation, by a Conciliation Officer appointed under Div 1A, of a dispute between a worker and the Authority, an employer or a self-insurer about a claim for compensation.

7 Division 3 of Pt III provides for the establishment and operation of Medical Panels. A Medical Panel is to be comprised of medical practitioners drawn from a list of members appointed by the Governor in Council and is to be constituted for a particular case in such number as one of those members, appointed by the Minister to be Convenor, considers appropriate[13]. The 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 ... referred by a Conciliation Officer or the County Court or the Authority or a self-insurer"[14], and

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7 Section 134A(1).

8 Section 134AB.

9 Section 135A.

10 Sections 134AB(16)(b) and (19)(a) and 135A(4)(b) and (6).

11 Section 39.

12 Section 43.

13 Section 63(2), (3) and (4).

14 Section 67(1).

"must give its opinion on a medical question in accordance with [that] Division"[15].

8 What amounts to a medical question is the subject of elaborate and exhaustive definition. It is relevant to note that a medical question encompasses a question as to: "the nature of a worker's medical condition relevant to an injury or alleged injury"[16]; "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"[17]; or "the extent to which any physical or mental condition … results from or is materially contributed to by the injury"[18]. It is relevant also to note that a medical question encompasses a question prescribed to be a medical question in respect of an application for leave to bring proceedings for common law damages in respect of an injury which arose on or after 20 October 1999[19], as well as a question determined to be a medical question by a court hearing such an application[20].

9 The Act makes provision for a medical question to be referred to a Medical Panel in a number of distinct situations. First, the County Court or the Magistrates' Court exercising jurisdiction under Pt III has power to refer on its own motion a medical question arising in the proceeding before it[21], and ordinarily has a duty under s 45(1)(b) to refer such a question if requested by a party to the proceeding. Secondly, a court hearing an application for leave to bring proceedings for common law damages in respect of an injury which arose on or after 20 October 1999 has power to refer on its own motion a medical question arising in the application before it[22], and ordinarily has a duty to refer

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15 Section 67(1A).

16 Section 5(1), "medical question", par (a).

17 Section 5(1), "medical question", par (b).

18 Section 5(1), "medical question", par (ca).

19 Section 5(1), "medical question", par (h).

20 Section 5(1), "medical question", par (i).

21 Section 45(1)(a).

22 Section 45(1A)(a).

such a question if requested by a party to the application[23]. There is no similar power or duty for a court to refer a medical question arising in an application for leave to bring proceedings for common law damages in respect of an injury which arose before 12 November 1997. Thirdly, a Conciliation Officer has a discretion to refer a medical question under Div 2 of Pt III[24], and has a duty to do so if the Authority or a self-insurer applies and the worker consents[25] or if the question arises in a dispute relating to a continuation of weekly payments after a second entitlement period[26]. Fourthly, in the assessment of a claim for non-economic loss, the Authority or a self-insurer must refer a disputed question as to the degree of impairment or total loss in respect of the injuries claimed[27]. Finally, in the assessment of a claim for industrial deafness, the Authority, a self-insurer or a court must refer a disputed question of the total percentage of hearing loss[28].

10 In each case, the person or body referring the medical question to a Medical Panel must specify the injury or alleged injury to which the medical question relates[29]. The person or body must also specify those facts relevant to the medical question that have been agreed and those questions of fact that are in dispute[30], and submit to the Medical Panel copies of all documents relating to the medical question in the possession of that person or body[31].

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23 Section 45(1A)(b).

24 Section 56(6).

25 Section 55A.

26 Section 55AA.

27 Section 104B(9).

28 Section 89(3D).

29 Section 65(6A)(a).

30 Section 65(6A)(b).

31 Section 65(6B).

11 Section 68 of the Act provides:

> "(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 and a written statement of reasons for that opinion.
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> (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.
>
> (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."

12 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"[32] and "must act informally, without regard to technicalities or legal forms and as speedily as a proper consideration of the reference allows"[33]. The Panel may ask the worker to meet with the Panel and answer questions, to supply copies of all documents in the possession of the worker which relate to the medical question to the Panel, and to submit to a medical examination by the Panel or by a member of the Panel[34]. An attendance of the worker before the Medical Panel is ordinarily to be in private[35].

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32 Section 65(1).

33 Section 65(2).

34 Section 65(5).

35 Section 65(4).

13 The Minister has power, as yet unexercised, to issue guidelines as to the procedures of Medical Panels for the purpose of ensuring procedural fairness and facilitating proper administration[36]. The Convenor also has power to give directions as to the arrangement of the business of Panels[37]. That power has been exercised to establish procedures which, amongst other things, contemplate that a party to the referral may choose to submit written submissions or other documents[38].

Facts

14 The first respondent ("the Worker") was employed by the appellants ("the Employer") when he suffered an injury to his neck at work on 16 October 1996. The extent of that injury and its present effects, if any, are contentious.

15 In May 2009, after experiencing more significant symptoms in his neck than previously, the Worker made a claim for statutory compensation in respect of the injury under Pt IV of the Act. The claim was rejected in May 2009. A subsequent attempt at conciliation was unsuccessful.

16 In November 2009, the Worker commenced two proceedings in the County Court of Victoria relating to that injury to his neck: one seeking leave to bring proceedings for common law damages in respect of the injury ("the serious injury application"); the other seeking a declaration of entitlement in respect of the injury under Pt IV of the Act ("the statutory compensation application").

17 The statutory compensation application was transferred to the Magistrates' Court, which, at the Employer's request, referred three medical questions to a Medical Panel for determination under s 45(1)(b) of the Act. The Medical Panel constituted for the purpose of opining on those questions comprised a musculoskeletal physician, a neurosurgeon and an orthopaedic surgeon. The Panel met with the Worker, took a medical history from him and conducted a physical examination of him. The Panel viewed an x-ray and an MRI scan of his cervical spine. The Worker provided to the Panel a number of medical reports

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36 Section 65(8).

37 Section 65(7).

38 "Convenor's Directions as to the Arrangement of Business and as to the Procedures of Medical Panels", issued 1 March 2008, at [29].

prepared by his own doctors, who included two neurosurgeons. The solicitors acting for the Worker also made written submissions to the Panel.

18 The Medical Panel in due course gave to the Magistrates' Court a certificate as to its opinion on the medical questions referred and a written statement of reasons for that opinion. The certificate recorded the medical questions referred by the Magistrates' Court and the answers given by the Medical Panel 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 [Employer] 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 [Employer] 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."

The Medical Panel's written statement of reasons for that opinion was a six page document, to some of the detail of which it will be appropriate to return.

19 After receiving the certificate of the opinion of the Medical Panel, the Magistrates' Court made orders by consent. The orders were expressed to "adopt" and "apply" the opinion and to dismiss the statutory compensation application.

20 The serious injury application subsequently came on for hearing in the County Court. The Employer foreshadowed a contention that the County Court was bound by the opinion of the Medical Panel, either by virtue of s 68(4) of the Act or on the basis that the orders made by consent in the Magistrates' Court gave rise to an issue estoppel which precluded the Worker from arguing that the present condition of his neck for which he sought common law damages was related to the injury he suffered on 16 October 1996. The serious injury application was adjourned and remains pending in the County Court.

Proceedings for certiorari

21 The Employer's foreshadowed contention in the County Court provoked the Worker to apply to the Supreme Court of Victoria for an order, in the nature of certiorari, quashing the opinion of the Medical Panel. The grounds of the application included that the Medical Panel failed to give adequate reasons for the opinion. The application was dismissed by the primary judge (Cavanough J) on the basis that the Worker had not established any of the grounds set out in the application[39].

22 The Court of Appeal (Nettle and Osborn JJA and Davies AJA) allowed an appeal by the Worker and made the order sought, in the nature of certiorari, quashing the opinion of the Medical Panel[40]. The Court of Appeal concluded: that the reasons given by the Medical Panel for the opinion were inadequate; that the Panel's failure to give adequate reasons constituted an error of law on the face

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39 *Kocak v Wingfoot Australia Partners Pty Ltd* [2011] VSC 285.

40 *Kocak v Wingfoot Australia Partners Pty Ltd* (2012) 295 ALR 730.

of the record and certiorari was an available remedy in those circumstances; and that there was utility in granting certiorari because the Medical Panel's opinion was to be adopted and applied by the County Court in the serious injury application by force of s 68(4) of the Act and because the Magistrates' Court order adopting and applying the opinion was capable of creating an issue estoppel in the serious injury application.

23 The Employer's appeal, by special leave, to this Court involves a challenge by one or both of the Worker and the Employer to each of those conclusions of the Court of Appeal. It is convenient to consider the conclusions about the availability and utility of certiorari before considering the conclusion about the adequacy of the reasons given by the Medical Panel.

Availability and utility of certiorari

24 The jurisdiction of the Supreme Court to make an order in the nature of certiorari is an aspect of its jurisdiction as "the superior Court of Victoria"[41]. The exercise of that jurisdiction is regulated by rules of the Supreme Court which require that it be exercised only by way of judgment or order[42].

25 The function of an order in the nature of certiorari is to remove the legal consequences or purported legal consequences of an exercise or purported exercise of power. Thus, an order in the nature of certiorari is available only in respect of an exercise or purported exercise of power which has, at the date of order, an "apparent legal effect"[43]. An order in the nature of certiorari is not available in respect of an exercise or purported exercise of power the legal effect or purported legal effect of which is moot or spent. An order in the nature of certiorari in those circumstances would be not simply inutile; it would be unavailable.

26 Jurisdictional error constitutes one basis on which the Supreme Court can make an order in the nature of certiorari to remove the purported legal consequences of a purported exercise of power under a State statute. That basis for the Supreme Court making an order in the nature of certiorari is entrenched

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41 Section 85 of the *Constitution Act* 1975 (Vic).

42 Rule 56.01(1) of the Supreme Court (General Civil Procedure) Rules 2005 (Vic).

43 *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 159; [1996] HCA 44.

by the Commonwealth Constitution[44]. Error of law on the face of the record constitutes a separate and distinct basis on which the Supreme Court can make an order in the nature of certiorari to remove the legal consequences or purported legal consequences of an exercise or purported exercise of power under a State statute[45]. That basis for the Supreme Court making an order in the nature of certiorari is not entrenched by the Commonwealth Constitution; its application can be excluded by statute[46]. Where it is not excluded, however, it applies independently of jurisdictional error. That is to say, where error of law on the face of the record is not excluded by statute as a basis for making an order in the nature of certiorari, and where an error of law on the face of the record is found, an order in the nature of certiorari can be made so as to remove the legal consequences or purported legal consequences of an exercise or purported exercise of power irrespective of whether the error of law also constitutes a breach of a condition of the valid exercise of that power.

27 Recognition of the availability of certiorari for error of law on the face of the record, independently of jurisdictional error, goes much of the way towards meeting the Employer's challenge to the conclusion of the Court of Appeal that certiorari is available to quash an opinion of a Medical Panel where the Medical Panel has given reasons for that opinion which are inadequate to comply with its duty under s 68(2) of the Act. Not only is error of law on the face of the record as a basis for making an order in the nature of certiorari quashing an opinion of the Medical Panel not excluded by statute, but the "record" of the opinion by reference to which such an error of law can be discerned has been expanded by statute to include whatever reasons the Medical Panel in fact gives for that opinion.

28 Within the meaning of the *Administrative Law Act* 1978 (Vic) ("the Administrative Law Act"), a Medical Panel is a "tribunal" and the opinion of a Medical Panel on a medical question referred to it is a "decision"[47]. Section 10 of that Act provides:

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44 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 580-581 [98]; [2010] HCA 1.

45 *Craig v South Australia* (1995) 184 CLR 163 at 175-183; [1995] HCA 58.

46 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 581 [100].

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

> "Any statement by a tribunal or inferior court whether made orally or in writing … of its reasons for a decision shall be taken to form part of the decision and accordingly to be incorporated in the record."

The effect of s 10 is to make whatever reasons a Medical Panel in fact gives for its opinion on a medical question referred to it part of that opinion and part of the record of that opinion. An error of law manifest on the face of such reasons as a Medical Panel in fact gives for its opinion on a medical question referred to it is therefore an error of law on the face of the record of that opinion. A Medical Panel which in fact gives reasons that are inadequate to meet the standard required of a written statement of reasons under s 68(2) of the Act fails to comply with the legal duty imposed on it by s 68(2) and thereby makes an error of law. Inadequacy of reasons will therefore inevitably be an error of law on the face of the record of the opinion of a Medical Panel[48], and certiorari will therefore be available to remove the legal consequences of an opinion for which non-compliant reasons have been given.

29 Whether non-compliance by the Medical Panel with its duty to give a written statement of reasons also constitutes a breach of a condition of the valid performance of the duty imposed on it by s 68(1) and (2) of the Act to form, and to give a certificate as to, its opinion on a question referred to it is not to the point. That issue would only be determinative in an application to the Supreme Court for an order in the nature of certiorari to remove the purported legal consequences of a medical opinion on the basis of jurisdictional error[49]. In an application for an order in the nature of certiorari to remove the legal consequences or purported legal consequences of a medical opinion on the basis of error of law on the face of the record, the issue simply does not arise.

30 The Court of Appeal was therefore correct to conclude that an order in the nature of certiorari is available to remove the legal consequences or purported legal consequences of an opinion in respect of which reasons given by a Medical Panel are inadequate to meet the standard required of a written statement of reasons under s 68(2) of the Act.

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48 Cf *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372 at 398-399 [129]-[130].

49 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 226 [48], 227 [55]; [2003] HCA 56.

31 Because an order in the nature of certiorari to quash an opinion is limited to removing the legal consequences or purported legal consequences of an exercise or purported exercise of power, however, the Court of Appeal was also correct to ask a threshold question. That threshold question was whether the opinion of the Medical Panel, sought to be quashed by certiorari in the application made to the Supreme Court by the Worker, had any continuing legal consequences, given that the opinion was on medical questions arising in the statutory compensation application, which by then had been dismissed.

32 The Court of Appeal's affirmative answer to that threshold question was based on a conclusion that the opinion of the Medical Panel had two legal consequences for the continuing serious injury application. One was that the County Court would be compelled by s 68(4) of the Act to adopt and apply the opinion in the determination of the serious injury application. The other was that the adoption and application of the opinion by the Magistrates' Court when dismissing the statutory compensation application created an issue estoppel binding the parties in the conduct of the serious injury application.

33 The Employer and the Worker challenge the Court of Appeal's conclusion that the opinion of the Medical Panel had those two legal consequences for the serious injury application. Both challenge the conclusion as to the first consequence. The Worker alone challenges the conclusion as to the second consequence.

34 To address those challenges, it is necessary to return to the explanation of the ambit and effect of s 68(4) of the Act given by the High Court in *Maurice Blackburn Cashman v Brown*[50]. The question in that case was whether an employer was precluded, by s 68(4) of the Act or by issue estoppel, from disputing in a common law action for damages an opinion previously given by a Medical Panel on a question referred to it in the course of the assessment of a claim for non-economic loss as to the degree of impairment in respect of the injuries claimed. The answer was "no". As to s 68(4) of the Act, the Court said[51]:

> "At first sight, s 68(4) of the Act is cast in terms of very general application. Reference is twice made to 'any court, body or person'. But the sub-section is introduced by the expression '[f]or the purposes of

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50 (2011) 242 CLR 647; [2011] HCA 22.

51 (2011) 242 CLR 647 at 660 [34]-[35] (footnote omitted).

determining any question or matter'. Those words should not be given a literal meaning. The meaning of the phrase that best accords with its context, and which should be adopted, is 'for the purposes of determining any question or matter *arising under or for the purposes of the Act*'. Those are the purposes for which the opinion of a Medical Panel on a medical question is to be adopted and applied and accepted as final and conclusive.

Once that step is taken, it is then clear that s 68(4) does not speak at all to the litigation of questions or matters that are not questions or matters arising under or for the purposes of the Act. More particularly, s 68(4) does not speak at all to an action for damages brought by a worker against an employer." (emphasis in original)

As to issue estoppel, the Court said[52]:

"The conclusions reached with respect to the construction and application of s 68(4) entail the further conclusion that no issue estoppel arises out of the opinions expressed by a Medical Panel … in an action later brought by a worker against the worker's employer.

It is a necessary condition for an issue estoppel to exist between parties that the decision from which the estoppel arises was a final decision. Where, as here, the statute establishing the body in question prescribes that its decisions are final for the purposes of that Act, no greater ambit of finality should be attributed to its decisions than the Act itself marks out. Thus no estoppel arises because the quality of 'finality' which the Act gives to an opinion expressed by a Medical Panel ... is finality for the purposes of determining any question or matter arising under or for the purposes of the Act. No wider finality should then be ascribed to a Panel's opinion."

35 The Court of Appeal reached its conclusion that the County Court would be compelled by s 68(4) of the Act to adopt and apply the opinion of the Medical Panel because it considered itself bound by the reasoning in the first of those quoted passages in *Brown* to hold that an opinion of a Medical Panel on a medical question referred to it must thereafter be adopted and applied for the purposes of determining *all* questions or matters arising under or for the purposes

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52 (2011) 242 CLR 647 at 662 [39]-[40] (footnote omitted).

of the Act. An earlier decision of the Court of Appeal, *Pope v WS Walker & Sons Pty Ltd*[53], is to the contrary. The correctness of *Pope* was not in issue in *Brown*, and is supported in the present appeal by both the Employer and the Worker. The Court of Appeal's reasoning in *Pope* highlights the potential for injustice in the outworking of the construction to which the Court of Appeal felt compelled[54], as well as the lack of support for that construction in legislative history[55]. The passage in *Brown* should not be interpreted as having overruled *Pope*.

36 The correct construction of s 68(4) of the Act, consistent with *Pope* and with *Brown*, is to read the word "any" in the introductory expression "[f]or the purposes of determining any question or matter" as referring to "*a* question or matter" not "*all* questions and matters". In respect of a particular opinion of a Medical Panel on a medical question referred to it, formed under s 68(1) and certified under s 68(2), the question or matter to which s 68(4) refers is the question or matter in which the medical question arose and in respect of which the medical question was referred to the Medical Panel.

37 What s 68(4) of the Act on that construction requires is that an opinion of a Medical Panel on a medical question referred to it must thereafter be adopted and applied for the purposes of determining *the* question or matter, arising under or for the purposes of the Act, in which the medical question arose and in respect of which the medical question was referred to the Medical Panel. What s 68(4) does not require is that the opinion must thereafter be adopted and applied for the purposes of determining some *other* question or matter.

38 The operation of s 68(4) of the Act in the present case was therefore to require the opinion given by the Medical Panel on the medical questions referred to it in the statutory compensation application to be adopted and applied by all courts and persons in the determination of the question or matter the subject of the statutory compensation application. That question or matter comprised the controversy between the parties to the statutory compensation application about the Worker's entitlement to the statutory compensation he claimed under Pt IV of the Act, and was brought to a conclusion when the statutory compensation application was dismissed. Section 68(4) did not have, and does not have, the

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53 (2006) 14 VR 435.

54 (2006) 14 VR 435 at 445 [40].

55 (2006) 14 VR 435 at 438-445 [12]-[41].

further effect of requiring the opinion given on the medical questions referred in the statutory compensation application to be adopted and applied if and to the extent that the same medical question may arise in the determination of the question or matter the subject of the serious injury application. That quite distinct question or matter, which remains unresolved, comprises the controversy between the parties to that application as to whether the Worker should have leave to bring common law proceedings.

39 That being the limited operation of s 68(4) of the Act, the second of the legal consequences for the serious injury application identified by the Court of Appeal cannot arise for the reasons set out in the second of the quoted passages in *Brown*. Section 68(4) provides an exhaustive statutory measure of the extent to which the opinion of a Medical Panel on a medical question referred to it is to be adopted and applied and is to be accepted as final and conclusive. The adoption and application of a medical opinion as required by s 68(4) cannot create an estoppel giving a greater measure of finality to a medical opinion than that provided by s 68(4) itself. The Magistrates' Court's adoption and application of the opinion when dismissing the statutory compensation application therefore created no issue estoppel binding the parties in the conduct of the serious injury application.

40 The answer to the threshold question properly asked by the Court of Appeal is that the opinion of the Medical Panel sought to be quashed by an order in the nature of certiorari had no continuing legal consequences. The only legal effect of the opinion was that given to it by s 68(4) of the Act. That legal effect was spent when the question or matter, in respect of which the medical question was referred to the Medical Panel, was brought to a conclusion by the order dismissing the statutory compensation application. The Employer's foreshadowed reliance on the opinion having legal effect in the serious injury application would be of no avail.

41 The order in the nature of certiorari made by the Court of Appeal was not available to quash the opinion of the Medical Panel because that opinion had no continuing legal consequence which could be removed by that order. Despite the irony of this being relied on by the Worker as respondent and eschewed by the Employer as appellant, that is a sufficient reason to allow the appeal.

Adequacy of reasons

42 The Employer's challenge to the Court of Appeal's conclusion that the reasons given by the Medical Panel were inadequate to meet the standard required of a written statement of reasons under s 68(2) of the Act raises a

question of public importance. Its resolution in the Employer's favour provides an independent reason for allowing the appeal.

43 The starting point for considering the standard required of a written statement of reasons under s 68(2) of the Act is recognition that there is in Australia no free-standing common law duty to give reasons for making a statutory decision[56]. The duty of a Medical Panel to give reasons for its opinion on a question referred to it is no more and no less than the statutory duty imposed by s 68(2) itself. The content of that statutory duty defines the statutory standard that a written statement of reasons must meet to fulfil it.

44 The standard required of a written statement of reasons in order to fulfil the duty imposed on a Medical Panel by s 68(2) of the Act falls therefore to be determined as an exercise in statutory construction. In the absence of express statutory prescription, that standard can be determined only by a process of implication.

45 General observations, drawn from cases decided in other statutory contexts and from academic writing, about functions served by the provision of reasons for making administrative decisions are here of limited utility. To observe, for example, that the provision of reasons imposes intellectual discipline, engenders public confidence and contributes to a culture of justification, is to say little about the standard of reasons required of a particular decision-maker in a particular statutory context. The standard of reasons required even of courts making judicial decisions can vary markedly with the context.

46 Two considerations are of particular significance in determining by implication the standard required of a written statement of reasons in order to fulfil the duty imposed on a Medical Panel by s 68(2) of the Act. One is the nature of the function performed by a Medical Panel in forming and giving an opinion on a medical question referred to it. The other is the objective, within the scheme of the Act, of requiring the Medical Panel to give a written statement of reasons for that opinion.

47 The function of a Medical Panel is to form and to give its own opinion on the medical question referred for its opinion. In performing that function, the Medical Panel is doubtless obliged to observe procedural fairness, so as to give

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56 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656; [1986] HCA 7.

an opportunity for parties to the underlying question or matter who will be affected by the opinion to supply the Medical Panel with material which may be relevant to the formation of the opinion and to make submissions to the Medical Panel on the basis of that material. The material supplied may include the opinions of other medical practitioners, and submissions to the Medical Panel may seek to persuade the Medical Panel to adopt reasoning or conclusions expressed in those opinions. The Medical Panel may choose in a particular case to place weight on a medical opinion supplied to it in forming and giving its own opinion. It goes too far, however, to conceive of the function of the Panel as being either to decide a dispute or to make up its mind by reference to competing contentions or competing medical opinions[57]. The function of a Medical Panel is neither arbitral nor adjudicative: it is neither to choose between competing arguments, nor to opine on the correctness of other opinions on that medical question. The function is in every case to form and to give its own opinion on the medical question referred to it by applying its own medical experience and its own medical expertise.

48 The reasons that s 68(2) of the Act obliged the Medical Panel to set out in a statement of reasons to accompany the certificate as to its opinion were the reasons which led the Medical Panel to form the opinion that the Medical Panel was required to form for itself on the medical question referred for its opinion. What is to be set out in the statement of reasons is the actual path of reasoning by which the Medical Panel arrived at the opinion the Medical Panel actually formed for itself.

49 Legislative history provides part of the context in which the objective of requiring the Medical Panel to give a written statement of reasons for its opinion falls to be identified. As first inserted into the Act in 1992[58], s 68(2) required only that the Medical Panel to whom a medical question was referred give a certificate as to its opinion. The obligation of a Medical Panel to furnish reasons then arose only under s 8(1) of the Administrative Law Act. That obligation, applicable to any "tribunal" which makes a "decision", is contingent on a person affected making a request for a statement of reasons and must, by force of s 8(3), be performed within a reasonable time of the making of such a request. The standard to be met by such a statement of reasons where requested and the

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57 Cf *Masters v McCubbery* [1996] 1 VR 635 at 645.

58 *Accident Compensation (WorkCover) Act* 1992 (Vic).

remedy for non-compliance of a statement of reasons with that standard are in s 8(4), which provides:

> "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."

Thus, a statement of reasons furnished in response to a request made under s 8(1) must meet the standard of being "adequate to enable a Court to see whether the decision does or does not involve any error of law". Where a statement that is furnished does not meet that standard, the statutorily prescribed remedy is for the Supreme Court, in the first instance, to order the furnishing of a further statement[59].

50 The imposition of the standard expressed in s 8(4) for a statement of reasons furnished in response to a request made under s 8(1) of the Administrative Law Act fulfils one of the aims identified by the Victorian Attorney-General to the Victorian Parliament when introducing that Act: "[t]o ensure that people are not prevented from challenging erroneous decisions merely because they cannot find out what was the tribunal's reason for deciding against them"[60].

51 In its application to a statement of reasons furnished by a Medical Panel on request for an opinion given under s 68(2) of the Act, s 8(4) of the Administrative Law Act was in 1995 held to require[61]:

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59 *Sherlock v Lloyd* (2010) 27 VR 434.

60 Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 25 October 1978 at 5091.

61 *Masters v McCubbery* [1996] 1 VR 635 at 661. See also at 650, 653.

> "medical reasons in sufficient detail, and only in sufficient detail, to show the court and the worker that the question referred to the panel has been properly considered according to law and that the opinion furnished is founded on an appropriate application of the members' medical knowledge and experience."

52 The insertion into s 68(2) of the Act of the words "and a written statement of reasons for that opinion", by an amendment in 2010[62], was designed to implement a recommendation of Mr Peter Hanks QC in a report to the Victorian Government in 2008[63]. Noting that it appeared to be an "unnecessary step" to require an affected party to request written reasons from a Medical Panel under s 8 of the Administrative Law Act and that a Panel giving an opinion will already have formulated reasons for that opinion, Mr Hanks recommended that a Medical Panel should be required to provide written reasons together with its opinion[64]. The amendment to s 68(2) of the Act to implement that recommendation removed any need for an affected party to make a request under s 8 of the Administrative Law Act.

53 Through s 10 of the Administrative Law Act, the amendment to s 68(2) of the Act had the result, already explained, that failure of reasons given by a Medical Panel to comply with the statutory standard is now an error of law on the face of the record of the opinion of the Medical Panel, so that an order in the nature of certiorari is now available to remove the legal consequences of an opinion for which non-compliant reasons were given without the party seeking that order needing to rely on the statutory remedy provided by s 8(4) of the Administrative Law Act. There is, however, nothing in the legislative history to suggest that the amendment was designed to alter the standard previously required by s 8(4) of a statement of reasons given for an opinion of a Medical Panel, namely, that the statement be adequate to enable a court to see whether the opinion does or does not involve any error of law.

54 The objective, within the scheme of the Act, of requiring the Medical Panel to give a written statement of reasons for that opinion can therefore be seen to be that persons affected by the opinion automatically be provided with a written statement of reasons adequate to enable a court to see whether the

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62 *Accident Compensation Amendment Act* 2010 (Vic).

63 *Accident Compensation Act Review: Final Report*, (2008).

64 *Accident Compensation Act Review: Final Report*, (2008) at 375 [10.323].

opinion does or does not involve any error of law. There is an obvious benefit in requiring a written statement of reasons for an opinion always to meet that standard. The benefit is that it enables a person whose legal rights are affected by the opinion to obtain from the Supreme Court an order in the nature of certiorari removing the legal effect of the opinion if the Medical Panel in fact made an error of law in forming the opinion: an error of law in forming the opinion, if made, will appear on the face of the written statement. To require less would be to allow an error of law affecting legal rights to remain unchecked. To require more would be to place a practical burden of cost and time on decision-making by an expert body for no additional legal benefit and no identified systemic gain.

55 The standard required of a written statement of reasons given by a Medical Panel under s 68(2) of the Act can therefore be stated as follows. The statement of reasons must explain the actual path of reasoning by which the Medical Panel in fact arrived at the opinion the Medical Panel in fact formed on the medical question referred to it. The statement of reasons must explain that actual path of reasoning in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law. If a statement of reasons meeting that standard discloses an error of law in the way the Medical Panel formed its opinion, the legal effect of the opinion can be removed by an order in the nature of certiorari for that error of law on the face of the record of the opinion. If a statement of reasons fails to meet that standard, that failure is itself an error of law on the face of the record of the opinion, on the basis of which an order in the nature of certiorari can be made removing the legal effect of the opinion.

56 The Court of Appeal considered that a higher standard was required of a written statement of reasons given by a Medical Panel under s 68(2) of the Act. On the premise that *Brown* held that the opinion of a Medical Panel must be adopted and applied for the purposes of determining all questions or matters arising under or for the purposes of the Act, the Court of Appeal analogised the function of a Medical Panel forming its opinion on a medical question to the function of a judge deciding the same medical question. Accordingly, it then equated the standard of reasons required of a Medical Panel with the standard of reasons that would be required of a judge giving reasons for a final judgment after a trial of an action in a court[65]. The application of that judicial standard in

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65 *Kocak v Wingfoot Australia Partners Pty Ltd* (2012) 295 ALR 730 at 742-743 [47]-[48].

circumstances where an affected party had provided to the Medical Panel opinions of other medical practitioners and had sought in submissions to rely on those opinions, and where the opinion formed by the Medical Panel itself did not accord with those opinions, meant that "it was incumbent on the [P]anel to provide a comprehensible explanation for rejecting those expert medical opinions or, if it be the case, for preferring one or more other expert medical opinions over them"[66]. Rejection of the premise and the analogy, for reasons already stated, entails rejection of the conclusion that the higher standard is required. A Medical Panel explaining in a statement of reasons the path of reasoning by which it arrived at the opinion it formed is under no obligation to explain why it did not reach an opinion it did not form, even if that different opinion is shown by material before it to have been formed by someone else.

57 The nature of the question referred to a Medical Panel, and the way that question was addressed by other medical practitioners in opinions supplied to a Medical Panel, might allow an inference to be drawn, on the balance of probabilities in a particular case, that the reasoning in fact adopted by a Medical Panel in arriving at its own differing opinion is not adequately reflected in its written statement of reasons. An inference might be drawn, for example, that the reasoning involved one or more steps not reflected in the written statement of reasons either at all or in sufficient detail to allow a court to see whether a Medical Panel made an error of law in those steps. That is not this case.

58 The written statement of the Medical Panel's reasons for its opinion in the present case listed in a schedule the documents considered by the Panel. The listed documents included those described as "Plaintiff's Medical Reports" and "Defendant's Medical reports". The statement commenced with a recitation of agreed facts. The statement then set out the medical history taken by the Panel from the Worker, findings made by the Panel from its physical examination of the Worker, and findings made by the Panel from its viewing of the x-ray and MRI scan of the Worker's cervical spine. The statement then recorded the Panel's conclusion as to the nature of the Worker's current condition as reflected in the Panel's answer to Question 1: the Worker was suffering from chronic mechanical left cervical spine dysfunction with referred pain to his left shoulder girdle and upper limb.

59 Moving on to the process of reasoning adopted by the Medical Panel to answer Questions 2 and 3, the statement of the Panel's reasons recorded that the

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66 (2012) 295 ALR 730 at 749 [55].

Panel considered the Worker's description of his employment duties, the history of his workplace injuries, medical reports of doctors who had treated and examined him, radiological results and its own examination. The statement then specifically recorded that the Panel noted various medical reports by one of the Worker's neurosurgeons and recorded that the Panel noted as well submissions on behalf of the Employer and the Worker, the thrust of which it summarised. The last six paragraphs of the statement were then as follows:

> "The Panel considered that the [Worker] suffered a soft tissue injury to the neck/cervical spine during the course of his normal work duties on 16 October 1996.
>
> The Panel further noted that the underlying degeneration in the cervical spine is a radiological diagnosis only, is often constitutional, and notes from the published medical literature that such degenerative changes may or may not cause symptoms, and that such degenerative changes on imaging studies, including MRI scanning, can commonly be seen in asymptomatic people.
>
> The Panel considered that the soft tissue injury has now resolved, that it has not had any effect upon the progression on the degenerative changes noted on various imaging studies, and that the [Worker's] current symptoms are not related to the soft tissue injury of 16 October 1996 in any way.
>
> The Panel therefore concluded that the [Worker's] employment with the [Employer] on 16 October 1996 could possibly have been, and was in fact, a significant contributing factor to a, now resolved, soft tissue injury to the neck, but could not possibly have been, and was not in fact, a significant contributing factor to any claimed recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing neck/cervical spine condition, in any way.
>
> Whilst the Panel acknowledges that the [Worker] does currently suffer from a significant medical condition of the neck/cervical spine as noted above, the Panel, based on its clinical assessment, and the documents in the enclosures, concluded that the [W]orker's current medical condition of the neck/cervical spine is not related to the now resolved soft tissue injury of the neck/cervical spine of 16 October 1996 in any way.

> The Panel therefore concluded that the [Worker's] current neck/cervical spine condition does not result from and is not materially contributed to by the [Worker's] alleged neck/cervical spine injury of 16 October 1996."

60 The primary judge found that the last six paragraphs of the statement of reasons adequately disclosed the route by which the Medical Panel arrived at its answers to Questions 2 and 3, in that it was evident from those last six paragraphs that the Medical Panel determined[67]:

> "first, that the [Worker] suffered a soft tissue injury during the course of his normal work duties on 16 October 1996; second, that the soft tissue injury has now resolved; third, that it has not had any effect upon the progression of the degenerative changes noted on the various imaging studies; fourth, that the [Worker's] current symptoms are not related to the soft tissue injury of 16 October 1996 in any way; and fifth, that (therefore) the [Worker's] employment on 16 October 1996 did not contribute to the [Worker's] current neck condition, in any way."

61 Implicit in the first of those steps in the reasoning of the Medical Panel, as identified by the primary judge, was that the Medical Panel found that all that the Worker suffered on 16 October 1996 was a soft tissue injury. The remaining four steps in the reasoning addressed why that soft tissue injury did not contribute to the degenerative changes which resulted in the Worker's current condition.

62 As argument developed in this Court, it became apparent that the gist of the Worker's complaint about the adequacy of the statement of reasons is that the statement of reasons did not address the possibility that the degenerative changes resulting in the Worker's current condition were initiated on 16 October 1996 other than through soft tissue injury. His counsel submitted on his behalf that "[i]t is a perfectly possible situation that a traumatic event can cause a soft tissue injury to ligaments and muscles and so forth and also cause an injury to the spine". That was, in the Worker's submission, the import of one of the medical reports, provided to the Medical Panel on behalf of the Worker, which was not addressed in the Panel's statement of reasons. The report, that of a neurosurgeon engaged by the Worker in 2009, expressed the opinion that what happened to the Worker on 16 October 1996 "would appear to be consistent with an injury to the

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67 *Kocak v Wingfoot Australia Partners Pty Ltd* [2011] VSC 285 at [113].

cervical spine" and on that basis "may have resulted in intervertebral disc prolapse or an aggravation of underlying cervical spondylosis".

63 The answer to the Worker's complaint lies in the implicit finding of the Medical Panel that the Worker on 16 October 1996 sustained only a soft tissue injury, and not an injury to his spine. That finding was one of fact. Whether or not that finding of fact was open to the Medical Panel is a question of law. But no further explanation of the reasoning process adopted by the Medical Panel is necessary to enable a court to address that question.

Conclusion

64 The legal effect of an opinion of a Medical Panel on a medical question referred to it is that given by s 68(4) of the Act. The legal effect given by s 68(4) is not that the opinion must be adopted and applied for the purposes of determining all questions or matters arising under or for the purposes of the Act. The legal effect given by s 68(4) is that the opinion must be adopted and applied for the purposes of determining the question or matter, arising under or for the purposes of the Act, in which the medical question arose and in respect of which the medical question was referred to the Medical Panel. The opinion is given no greater legal effect through the operation of issue estoppel.

65 The standard required of the written statement of reasons which s 68(2) of the Act obliges a Medical Panel to give for its opinion is that the statement must explain the actual process of reasoning by which the Medical Panel in fact formed its opinion and must do so in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law.

66 By operation of s 10 of the Administrative Law Act, such reasons as are given by a Medical Panel form part of its opinion and part of the record of that opinion. Such continuing legal effect as an opinion might have may be removed by an order in the nature of certiorari for an error of law on the face of the record where the reasons given do not meet the standard required of a written statement of reasons by s 68(2) of the Act.

67 Certiorari was not available in this case for two independent reasons. One was that the opinion of the Medical Panel had no continuing legal effect. That was because the matter or question, in respect of which the medical question was referred to the Medical Panel, had already been brought to a final resolution. The other was that the reasons given by the Medical Panel for its opinion met the required standard, as the primary judge found.

68 The appeal should be allowed. The substantive orders made by the Court of Appeal should be set aside. In their place, the appeal to the Court of Appeal should be dismissed, with the result that the order of the primary judge dismissing the Worker's application for an order in the nature of certiorari will stand. In accordance with conditions of the grant of special leave to appeal, the orders as to costs made by the Court of Appeal should not be disturbed and the Employer should pay the Worker's costs of this appeal.