SUPREME COURT OF QUEENSLAND

CITATION:	*De Ross v General Medical Assessment Tribunal & Anor* [2009] QCA 327
PARTIES:	**ALAN GRAEME DE ROSS** (applicant/first respondent) **v** **GENERAL MEDICAL ASSESSMENT TRIBUNAL – THORACIC** (first respondent/second respondent) **WORKCOVER QUEENSLAND** (second respondent/appellant)
FILE NO/S:	Appeal No 5223 of 2009 SC No 10548 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 October 2009
DELIVERED AT:	Brisbane
HEARING DATE:	9 October 2009
JUDGES:	Keane, Holmes and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	WORKERS' COMPENSATION – PROCEEDINGS TO OBTAIN COMPENSATION – DETERMINATION OF CLAIMS – EVIDENCE – DISCLOSURE OF DOCUMENTS AND PRIVILEGE – where the respondent commenced proceedings for compensation under the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) ("the Act") – where the Act prescribed that the appellant may refer a matter to the tribunal by relevantly "giving the tribunal a copy of all the relevant documents" – where "relevant documents" defined in the Act – where the appellant conceded that it did not give the tribunal a copy of documents that it conceded were "relevant documents" – whether the resultant decision of the tribunal without consideration of those documents was authorised by the Act *Judicial Review Act* 1991 (Qld), s 20 *WorkCover Queensland Act* 1996 (Qld), s 34

Workers' Compensation and Rehabilitation Act 2003 (Qld), s 5, s 32, s 499, s 500, s 500A, s 503, s 510, s 510C, s 515

De Ross v General Medical Assessment Tribunal & Anor [2009] QSC 111, affirmed
Lansen v Minister for Environment and Heritage (2008) 174 FCR 14; [2008] FCAFC 189, cited
Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited

COUNSEL: G P Long SC, with S A McLeod, for the appellant
D C Rangiah SC, with M L Grimshaw, for the first respondent

SOLICITORS: Q-Comp for the appellant
Maurice Blackburn for the first respondent

[1] **KEANE JA:** The first respondent, Mr de Ross, was employed as a process worker with Toowoomba Metal Technologies ("the employer") from 11 March 1992 until 1 April 2006. Mr de Ross alleges that during the period of his employment he was required to work in a dusty atmosphere without protective breathing apparatus in consequence of which he ingested various types of dust. He was subsequently diagnosed with silicosis, pneumoconiosis (mixed dust disease) and sarcoidosis. Mr de Ross wishes to bring an action for damages for negligence against the employer for these injuries.

[2] Mr de Ross may not seek damages for his injury, to the extent that the injury occurred after 1 January 1996 unless either the appellant, WorkCover Queensland ("WorkCover") or the second respondent, the General Medical Assessment Tribunal-Thoracic ("the Tribunal"), which did not participate in the argument on appeal, accepts that the condition in question is an "injury" within s 34(1) of the *WorkCover Queensland Act* 1996 (Qld) ("the 1996 Act") or s 32 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) ("the Act").

[3] WorkCover accepted that Mr de Ross' silicosis and mixed dust disease were each an injury within the meaning of s 34(1) of the 1996 Act or s 32 of the Act, but WorkCover rejected the claim that Mr de Ross' employment was a contributing factor to his sarcoidosis. On this basis WorkCover did not accept that it was an injury for which Mr de Ross might seek damages. The question whether Mr de Ross' employment contributed to his sarcoidosis was then referred to the Tribunal by WorkCover.

[4] The Tribunal upheld the view that Mr de Ross' sarcoidosis was not an "injury" because it "has developed independently of work exposures and has not been aggravated by work exposures". In reaching that conclusion the Tribunal said that it was "not aware of any other evidence which might suggest that work exposures similar to those of Mr de Ross have led to an increased incidence of Sarcoidosis …".

[5] Mr de Ross' legal representatives had initially provided to WorkCover a number of articles which supported the contention that there is a causal nexus between occupational exposures to dust and sarcoidosis. These articles included:

- J. Barnard, C. Rose, L. Newman, M. Canner, J. Martyny, C. McCammon, E. Bresnitz, M. Rossman, B. Thompson, B. Rybicki, S.E. Weinberger, D.R. Moller, G. McLennan, G. Hunninghake, L. DePalo, R.P. Baughman, M.C. Iannuzzi, M.A. Judson, G.L. Knatterud, A.S. Teirstein, H. Yeager, Jr., C.J. Johns, D.L. Rabin, R. Cherniak, and the ACCESS Research Group, "Job and Industry Classifications Associated with Sarcoidosis in a Case-Control Etiologic Study of Sarcoidosis" (2005) 47 *Journal of Occupational and Environmental Medicine* 226;

- Edward D. Gorham, Cedric F. Garland, Frank C. Garland, Kevin Kaiser, William D. Travis, and Jose A. Centeno, "Trends and Occupational Associations in Incidence of Hospitalized Pulmonary Sarcoidosis and Other Lung Diseases in Navy Personnel: A 27-Year Historical Prospective Study, 1975-2001" (2004) 126 *Chest* 1431;

- Gena P. Kucera, Benjamin A. Rybicki, Kandace L. Kirkey, Steven W. Coon, Marcie L. Major, May J. Maliarik, and Michael C. Iannuzzi, "Occupational Risk Factors for Sarcoidosis in African-American Siblings" (2003) 123 *Chest* 1527; and

- Lee S. Newman, Cecile S. Rose, Eddy A. Bresnitz, Milton D. Rossman, Juliana Barnard, Margaret Frederick, Michael L. Terrin, Steven E. Weinberger, David R. Moller, Geoffrey McLennan, Gary Hunninghake, Louis DePalo, Robert P. Baughman, Michael C. Iannuzzi, Marc A. Judson, Genell L. Knatterud, Bruce W. Thompson, Alvin S. Teirstein, Henry Yeager, Jr., Carol J. Johns, David L. Rabin, Benjamin A. Rybicki, Reuben Cherniack, and the ACCESS Research Group, "A Case Control Etiologic Study of Sarcoidosis: Environmental and Occupational Risk Factors" (2004) 170 *American Journal of Respiratory and Critical Care Medicine* 1324.

[6] WorkCover concedes that it did not provide copies of these articles to the Tribunal when it referred the matter to the Tribunal. Mr de Ross' lawyers did not realise that these articles were not in the material before the Tribunal when it made its decision.

[7] The legal question which arose before the learned primary judge was whether WorkCover's omission invalidated the Tribunal's decision. The learned primary judge resolved this question in favour of Mr de Ross.[1] From that decision WorkCover appeals to this Court.

[8] In this Court, the arguments which were agitated by the parties were distinctly more sophisticated than those put to the learned primary judge. I will discuss the arguments advanced in this Court after first setting out the relevant provisions of the Act and summarizing the reasons for decision of the learned primary judge.

The Act

[9] Under s 500(1)(c) of the Act, WorkCover, as the employer's insurer, may refer various matters in relation to an injury under the Act to the Tribunal "for decision on the medical matters involved".

[10] Under s 500A(1) of the Act, WorkCover may refer a matter to the Tribunal by:

> "(a) making a reference in the approved form; and
> (b) giving the tribunal a copy of all relevant documents."

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1 *De Ross v General Medical Assessment Tribunal & Anor* [2009] QSC 111 at [5], [16].

[11] Section 500A(2) of the Act provides that WorkCover must give the Tribunal "relevant documents even though otherwise protected by legal professional privilege".

[12] Section 499 of the Act defines the expression "relevant document" as follows:

> "***relevant document*** means a document relevant to a reference of a matter to a tribunal and, in particular, includes the following documents–
>
> (a) an application for compensation;
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> (b) an application for a damages certificate under the *WorkCover Queensland Act 1996*, section 270;
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> (c) a notice of claim;
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> (d) medical reports;
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> (e) investigative or expert reports;
>
> (f) information about medical treatment or investigations;
>
> (g) statements made by a worker, the worker's employer or a witness;
>
> (h) reasons for a decision made by the insurer under the Act or former Act relevant to the reference."

[13] Under s 503 of the Act, on the reference by WorkCover to the Tribunal the Tribunal was obliged to "decide whether the matters alleged for the purpose of seeking damages constitute an injury to [Mr de Ross] and, if so, the nature of the injury".

[14] Section 510(1) of the Act authorises the Tribunal, on a reference, to make "a personal examination of the worker".

[15] Section 510C of the Act provides:

> "**Exchange of relevant documents before tribunal**
>
> (1) After an insurer refers a matter to a tribunal, relevant documents can only be exchanged between an insurer, the worker and the tribunal.
>
> (2) To remove any doubt, it is declared that an employer who is not an insurer or any other person not mentioned in subsection (1) whose interests may be affected by a decision made by a tribunal can not be given copies of relevant documents after a matter is referred to a tribunal.
>
> (3) The tribunal must give the worker a copy of a relevant document given by the insurer to the tribunal–
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> (a) if the document is given under section 500A–within 10 business days after a matter is referred to the tribunal; or
>
> (b) otherwise–within 5 business days after the tribunal receives the document.
>
> (4) At least 10 business days before the worker is scheduled to attend before the tribunal, the worker must give the tribunal and the insurer a copy of any relevant document the worker wants considered by the tribunal.
>
> (5) At least 3 business days before the worker is scheduled to attend before the tribunal, the insurer may give the tribunal

and the worker a written submission on the factual matters referred to in the relevant documents given by the worker under subsection (4).

(6) A tribunal may proceed to decide a matter even though an insurer has not given a written submission to the tribunal and the worker.

(7) A tribunal can not consider or rely on any relevant document given by the insurer or worker that has not been exchanged under this part.

(8) However, subsection (7) does not prevent the tribunal from relying on either of the following–

(a) a report resulting from an examination of a worker by a doctor nominated by the tribunal under section 510(1)(b);
(b) a medical image given to the tribunal by the worker.

Examples of medical images—

CT, MRI, ultrasound scan, X-ray"

[16] Section 515 of the Act provides:

"**Finality of tribunal's decision**

(1) Either of the following decisions of the tribunal is final and can not be questioned in a proceeding before a tribunal or a court, except under section 512–
(a) a decision on a medical matter referred to the tribunal under section 500;
(b) a decision under section 514(1).

(2) Subsection (1) has no effect on the *Judicial Review Act 1991*."

The decision of the learned primary judge

[17] It was common ground before the learned primary judge that the four articles in question were in WorkCover's possession when it purported to refer the matter to the Tribunal under s 500A, that these articles were "relevant documents" within the meaning of s 499 of the Act, and that WorkCover did not give the Tribunal a copy of the articles. It also was accepted by WorkCover that it had not complied with s 500A(1)(b) of the Act.

[18] In these circumstances, the learned primary judge identified the issue for his determination in the following terms:[2]

"The question is whether the statutory non-compliance involves the invalidity of the Tribunal's decision, which was that the applicant's disease was not employment-related. That depends on whether it can be discerned from the Act that it was a purpose of the statute to invalidate a decision of the Tribunal made after such a breach of

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2 [2009] QSC 111 at [5].

> statutory duty (at least one not effectively cured by the subsequent supply of the omitted material to the Tribunal before its decision was made, which did not happen here)."

[19] His Honour resolved this question against WorkCover, concluding that WorkCover's non-compliance with s 500A(1)(b) of the Act was fatal to the validity of the Tribunal's decision. His Honour said:[3]

> "There are inconvenient consequences whatever view is taken of the intention to be imputed to the Parliament.
>
> It is no answer to say that the worker can give the Tribunal documents. Vital information that, in a particular case, WorkCover might even inadvertently withhold would not necessarily come to the worker's attention.
>
> An exchange of material is envisaged by legislative provisions introduced with section 500A. By section 510C(3): 'The tribunal must give the worker a copy of a relevant document given by the insurer to the tribunal...'; and, by subsection (4), within a time nominated, 'the worker must give the tribunal and the insurer a copy of any relevant document the worker wants considered by the tribunal.' But compliance with that arrangement still runs the risk that the worker may not know about information in WorkCover's possession that supports his case.
>
> Inconvenient results of a kind the Parliament is unlikely to have welcomed could well attend the interpretation the applicant propounds. But to reject that interpretation is to impute to the Parliament an unlikely intention: that a breach of the statutory obligation so significant as to render a tribunal's decision unsound is to have no effect upon it.
>
> It must be taken that the Parliament intended that at least where, as here, relevant documents which ought to have been furnished by WorkCover do not reach the Tribunal before its decision is made, such non-compliance with the statutory duty involves the invalidity of the Tribunal's decision."

[20] Before turning to discuss the arguments agitated in this Court, I would observe that there is something to be said for the view that the articles in question were not "relevant documents" for the purposes of s 500A(1)(b) of the Act. It may be that, as defined in s 499, and as used in the context of provisions such as s 500A(1)(b) (and s 510C(3)), the expression "relevant document" describes a document containing information relevant to the particular injury alleged by the particular worker and which is in the possession of WorkCover, as opposed to medical information about a kind of injury which is available generally in the public domain. It may be said that were it otherwise, WorkCover would be obliged to provide the Tribunal with a copy of *Gray's Anatomy* with each reference. This would be a significant oddity bearing in mind the evident intention of the Act that the Tribunal bring its own fund of medical expertise and experience to the task of deciding the matters referred to it. On the other hand, it might also be said that information about the more esoteric

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3 [2009] QSC 111 at [12] – [16].

frontiers of medical research in relation to injury and disease cannot always be presumed to be within the expertise and experience of the Tribunal. It is not necessary to explore these points further, because WorkCover conceded below that it had not complied with s 500A of the Act and did not seek to argue the contrary in this Court. Accordingly, the appeal must be decided on the basis that the articles were relevant documents, which s 500A(1) required to be referred to the Tribunal.

WorkCover's arguments in this Court

[21] WorkCover, in its written submissions in the appeal, attacked the learned primary judge's reasons head on, arguing that it is not the intention of the Act to render invalid a decision of the Tribunal where that decision is made without error on the part of the Tribunal but in circumstances where WorkCover has not complied with s 500A(1)(b) of the Act.

[22] WorkCover cited the decision of the High Court in *Project Blue Sky v Australian Broadcasting Authority*[4] in support of the proposition that it is the legislative purpose, rather than a formal characterization of statutory provisions as mandatory or directory, which is determinative of whether non-compliance with a statutory requirement renders a subsequent act or decision invalid.[5]

[23] One may readily accept the proposition for which *Project Bly Sky* is cited, but nevertheless reject WorkCover's argument. It is not difficult to attribute to the legislature the intention that where, as here, the legislature requires certain materials to be provided to a decision-maker for the purposes of making a decision, a failure to arm the decision-maker with those materials should render the decision invalid. A non-compliance of this kind leads to a decision which is distinctly not a decision of the kind contemplated by the legislature.

[24] In this case, the Tribunal did not have all relevant documents before it when it made its decision adverse to Mr de Ross. The Tribunal's decision was made without information which it is conceded was relevant to that decision. The legislature's intention in this regard having been frustrated, the obvious inference is that the decision should not be regarded as effective. In my respectful opinion the learned primary judge was clearly correct to reject the argument put to him by WorkCover.

[25] In oral argument in this Court, WorkCover developed an argument by reference to s 510C(3) – (7) and s 515 of the Act as well as to the *Judicial Review Act* 1991 (Qld) ("the JR Act"). I turn now to consider that argument.

[26] WorkCover contends that s 515 affords a clear indication that the intention of the legislature is that decisions of the Tribunal shall be subject to challenge only pursuant to the provisions of the JR Act. There is force in this contention. It may be accepted, at least for the sake of argument.

[27] WorkCover then says that, in the circumstances of this case, no provision of the JR Act affords a ground for setting aside a decision of the Tribunal. It is with this step in WorkCover's argument that the difficulty arises.

[28] It is necessary to note that s 20(2) of the JR Act provides that an application for a statutory order of review to set aside a decision may be made on any one or more of the following grounds:

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4 (1998) 194 CLR 355 at 390 – 391 [93].

5 See also *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14 at 26 – 27 [34].

> "(a) that a breach of the rules of natural justice happened in relation to the making of the decision;
> (b) that procedures that were required by law to be observed in relation to the making of the decision were not observed;
> (c) that the person who purported to make the decision did not have jurisdiction to make the decision;
> (d) that the decision was not authorised by the enactment under which it was purported to be made;
> (e) that the making of the decision was an improper exercise of the power conferred by the enactment under which it was purported to be made;
> (f) that the decision involved an error of law (whether or not the error appears on the record of the decision);
> (g) that the decision was induced or affected by fraud;
> (h) that there was no evidence or other material to justify the making of the decision;
> (i) that the decision was otherwise contrary to law."

[29] WorkCover argues that s 20(2)(a) and (b) of the JR Act have no application in the circumstances of this case because s 501 and s 501A of the Act are concerned, not with the making of the decision, but with the referral of the issue to the decision-maker. This argument throws up an interesting question in relation to the scope of the phrase "in relation to the making of the decision" in the context of s 20(2)(a) and (b) of the JR Act, but it is not necessary to resolve that question in this case.

[30] WorkCover also argues that s 20(2)(c) of the JR Act has no application in this case because compliance with s 500A(1)(b) of the Act is not necessary to confer jurisdiction on the Tribunal.

[31] WorkCover supports this argument by noting that an exercise of judgment may be required in any particular case to determine whether a document is indeed a "relevant document", and that it is unlikely that the legislature would have intended that the jurisdiction of the Tribunal should be dependent on the taking of the correct view of such a contestable issue as "relevance" by WorkCover. That view is said to be confirmed by the circumstance that s 510C(4) of the Act presupposes that the Tribunal's jurisdiction has been enlivened even where the insurer has not complied with s 500A(1)(b) of the Act. Once again, I do not consider that it is necessary to come to a final conclusion in respect of this argument. That is because, in my respectful opinion, s 20(2)(d) of the JR Act affords a ground on which the decision of the Tribunal might be set aside.

[32] WorkCover argues that Mr de Ross was in a position to provide the articles in question to the Tribunal, and the circumstance that his legal representative did not appreciate that the articles in question were missing from the material provided to the Tribunal by WorkCover is not something which is apt to affect the proper construction of the Act. WorkCover also says that, in this case, it should have been obvious to Mr de Ross and his legal advisers, after the Tribunal had purported to comply with s 510C(3) without giving Mr de Ross copies of the articles, that WorkCover did not regard the articles as relevant documents. On this view, if Mr de Ross wished the Tribunal to consider the articles in reaching its decision he had an opportunity, and indeed an obligation, under s 510C(4) to give the articles to the Tribunal and WorkCover.

[33] Section 510C(7) excludes from consideration by the Tribunal any document, however relevant it might be said to be, which has not been "exchanged" in conformity with the requirements of sub-sections 510C(3) – (5) of the Act. WorkCover argues that it is only because Mr de Ross did not avail himself of s 510C(4) that s 510C(7) precluded the Tribunal from considering or relying upon the articles. On this basis, so it is said, the validity of the decision cannot now be impugned because, to the extent that the Tribunal did not consider the articles, s 510C(7) required that very result.

[34] Section 510C(7) is concerned only with the documents which may **not** be considered by the Tribunal. It is not concerned to prescribe what documents are to be before the Tribunal: that work is done by other provisions of the Act. WorkCover's argument does not, in my respectful opinion, provide an answer to the point that the Act contemplates that all relevant documents were to be put before the Tribunal save those documents which both parties regard as irrelevant. And in this case it is common ground that the articles were relevant documents.

[35] It is not sufficient for WorkCover to point to Mr de Ross' non-compliance with the provisions of s 510C(4) of the Act. The provisions of s 510C(4) are predicated upon compliance with s 510C(3) which is in turn dependent on compliance by the insurer with s 500A of the Act. To note that this is so is not to become embroiled in metaphysical questions as to whether WorkCover's non-compliance with s 500A(1) means that there has been no reference at all which might lawfully proceed to a decision: it is simply to observe that non-compliance with s 500A(1) is apt to affect the process of "exchange" contemplated by s 510C(3) and (4) of the Act.

[36] In this case that process of exchange was adversely affected by WorkCover's non-compliance with s 500A(1)(b) of the Act. The process contemplated by s 510C was defeated, at least in part, by WorkCover's non-compliance. That is not less the case because the process might arguably have been rescued had Mr de Ross' legal representatives been more alert. The fact is that the decision made by the Tribunal was not authorised by the Act because all relevant documents were not placed before the Tribunal. Accordingly, the Tribunal's decision was apt to be set aside under s 20(2)(d) of the JR Act.

[37] It cannot be said that this result is unacceptable because it is solely the consequence of Mr de Ross' non-compliance with s 510C(4) of the Act. There is no discernible reason to approach the construction of the Act on the basis of a legislative assumption that a worker (who may not have the benefit of legal representation) must ensure that WorkCover has complied with its obligations under s 500A(1) of the Act. Section 500A(1)(b) of the Act clearly intends that WorkCover is bound to ensure that the Tribunal is provided with all "relevant documents". It is more likely that, in an Act intended to provide "benefits for workers who sustain injury in their employment",[6] the legislature would intend that the risk of error leading to the withholding from the Tribunal of a relevant document should be upon WorkCover and not upon the worker at least where the mistake was not solely the fault of the worker or the worker's legal representatives. It may be that there will be cases where a worker's failure to rely upon a relevant document can be seen to be entirely the fault of the worker having nothing to do with any failure on the part of an insurer to perform the functions required of it by the Act. But this is not such a case.

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[6] Section 5(1)(a) of the Act.

[38] In the upshot, I have concluded that the decision which was made by the Tribunal was not authorised by the Act within the meaning of s 20(2)(d) of the JR Act. It was not a decision made by reference to a consideration of all relevant documents. The absence of all relevant documents from the Tribunal was not the result of a deliberate decision by the aggrieved worker not to rely upon the documents but was due, in part at least, to WorkCover's failure to comply with s 500A(1)(b) of the Act.

Conclusion and orders

[39] The decision of the learned primary judge of the issue placed before him by the parties was correct.

[40] Further, the decision in question was not authorised by the Act. Accordingly, it was liable to be set aside under s 20(2)(d) of the JR Act.

[41] The appeal should be dismissed with costs.

[42] **HOLMES JA:** I agree with the reasons of Keane JA and the order he proposes.

[43] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Keane JA. I agree that the appeal should be dismissed with costs for the reasons given by his Honour.