IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S ECI 2020 04119

MUNICIPAL ASSOCIATION OF VICTORIA — Plaintiff

v

VICTORIAN WORKCOVER AUTHORITY — Defendant

JUDGE:	Gorton J
WHERE HELD:	Melbourne
DATES OF HEARING:	1–2 March 2021
DATE OF JUDGMENT:	19 March 2021
CASE MAY BE CITED AS:	Municipal Association of Victoria v Victorian WorkCover Authority
MEDIUM NEUTRAL CITATION:	[2021] VSC 128

ADMINISTRATIVE LAW – Judicial review – Authority's decision that MAV not fit and proper to be a self-insurer – Whether Authority failed to afford procedural fairness, failed to have regard to relevant considerations, or had regard to irrelevant considerations – Whether Authority's decision legally unreasonable or irrational – Where no *Jones v Dunkel* inference drawn – *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) pt 8 – Application dismissed.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr P Solomon QC and Mr B Jellis	Sparke Helmore
For the Defendant	Mr J Pizer QC and Mr M Hoyne	Corrs Chambers Westgarth

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HIS HONOUR:

1 The *Workplace Injury and Rehabilitation and Compensation Act 2013* ('the Act') creates a statutory workplace compensation scheme that is managed by the defendant ('the Authority'). Under that scheme, the Authority is obliged to indemnify an employer in respect of the employer's liability to pay compensation or damages under the Act[1] and has the power to manage claims for compensation or damages.[2] In return, employers are obliged to pay premiums to the Authority.[3] The Act permits a body corporate to apply to the Authority for approval as a 'self-insurer'.[4] A self-insurer remains liable to pay to its workers the compensation or other payments provided for under the Act,[5] for which it has no entitlement to be indemnified by the Authority. However, it does not pay premiums to the Authority,[6] and has the ability to manage its own claims.[7]

2 On 20 May 2016, the Municipal Association of Victoria ('MAV') applied to the Authority for approval as a self-insurer and, on 3 May 2017, the Authority provided that approval, albeit that the Authority imposed a condition. The approval was for a three-year period. On 13 March 2020, MAV applied for a renewal of that approval. On 20 August 2020, the Authority wrote to MAV notifying it of its intention to refuse MAV's application. This was a statutory requirement and compels a conclusion (were there any doubt) that the Authority was obliged to accord MAV procedural fairness. There were then further communications between the parties, including a submission from MAV dated 7 September 2020, and subsequent email correspondence. On 15 October 2020, the Authority refused MAV's application and provided written reasons for doing so. MAV now applies to have the decision to refuse its application quashed.

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1 *Workplace Injury and Rehabilitation and Compensation Act 2013* (Vic) s 71 (*'WIRC Act'*).
2 Ibid s 71(4).
3 Ibid s 430, pt 10.
4 Ibid pt 8.
5 Ibid ss 70, 391.
6 Ibid s 429(1)(a).
7 Or to appoint an agent to do so — ibid s 392.

Preliminary Matters

3 Before turning to the various grounds of appeal, it is useful to identify some matters that set the context for the parties' arguments.

There was an obligation on the Authority to determine whether MAV was 'fit and proper to be a self-insurer'

4 Section 379(3) of the Act required the Authority to refuse to approve an employer as a self-insurer if it was not satisfied that the employer was 'fit and proper to be a self-insurer'. Section 379(4) set out a series of matters to which the Authority must have regard in making that determination. These included:

(a) whether the employer is, and is likely to continue to be, able to meet its liabilities as and when they fall due (s 379(4)(a));

(b) the safety of the working conditions for workers (s 379(4)(d));

(c) if the application is for renewal of approval as a self-insurer, whether the employer has at any time failed to comply with any terms or conditions of its approval (s 379(4)(e)(ii)); and

(d) such other matters as the Authority thinks fit (s 379(4)(f)).

MAV was an unusual self-insurer

5 Ordinarily, a self-insurer will be a corporation with many employees, significant capital, a significant business turnover, and direct control over its own occupational health and safety processes. Well-known examples include Alcoa of Australia Limited, Toyota Motor Corporation Australia Limited, and Woolworths Group Ltd.[8] But MAV is not like that. MAV was formed as an organisation in 1879 and was incorporated pursuant to the *Municipal Association Act 1907*. The preamble to that Act states that MAV was established 'for the purpose of promoting the efficient carrying out of municipal government throughout the State of Victoria'. Each council in Victoria is able to appoint a councillor to be the representative of that

[8] Woolworths Group Ltd's status as a self-insurer was raised during the hearing. The Authority publishes on its website a list of the current self-insurers: <https://www.worksafe.vic.gov.au/list-current-self-insurers>.

council and the representatives so appointed constitute MAV.[9] Each of the 79 Victorian local councils are in this way members of MAV. As a self-insurer, its role was and would be to administer a scheme that covered not just its own employees but also the employees of those of its member councils that chose to participate in the scheme. Whilst it operated as a self-insurer, 30 of the 79 local councils had participated in the scheme. By the time the application for renewal of the approval to operate as a self-insurer came to be decided, 29 of the 79 local councils had decided to be involved, with the balance of some 50 councils choosing to remain outside the proposed scheme and thus to remain in the scheme operated by the Authority under the Act. This, of course, involves paying premiums to the Authority.

6 As a consequence of these matters, in contrast to the usual self-insurer:

(a) Although MAV had direct control over the occupational health and safety systems that applied to its own employees, it did not have direct control over the occupational health and safety systems that applied to the employees of the individual councils, as those were the immediate responsibility of each separate council as the employer of those employees.

(b) Rather than funding its self-insurance scheme entirely from its own business income, MAV had to fund the scheme from moneys obtained, one way or another, from its member councils. It set the premiums that participating councils had to pay it. To the extent that MAV were to seek to fund its self-insurance scheme by imposing a levy on its members generally, rather than solely from premiums raised from the participating councils, it would create a situation where the non-participating councils would be funding the participating councils' insurance, whilst also paying their own premiums to the Authority. The same would apply to the extent that MAV applied its own accrued funds to operate the self-insurance scheme if those funds had been

9 *Municipal Association Act 1907* (Vic) s 2(2).

raised from all councils or would otherwise be available to promote the interests of all councils.

7 Also, it is significant that the Act specifically permitted MAV to apply for approval as a self-insurer for workers employed by it and for workers employed by local councils that it was proposed would participate in the scheme.[10] However, the Act imposed obligations on MAV that were not imposed on other potential self-insurers. Section 376(5) of the Act required MAV to provide a copy of the 'proposed scheme of self-insurance' with its application and the names of the councils that it is proposed would be participating in the scheme. Further, s 374 provided as follows:

> **374 Municipal Association of Victoria as self-insurer**
>
> (1) If the MAV is approved as a self-insurer under this Part, the MAV must establish a local government workers compensation self-insurance scheme for the benefit of—
>
> (a) the MAV; and
>
> (b) participating corporations—
>
> on such terms and conditions, subject to this Act, that the MAV determines.
>
> (2) The MAV must keep separate accounts of money received or expended with respect to the operation of the self-insurance scheme referred to in subsection (1).[11]
>
> (3) This section must be read as one with the *Municipal Association Act 1907*.

The MAV WorkCare Scheme

8 When making its 20 March 2016 application for approval as a self-insurer, MAV identified the corporate structure it would put in place to manage its scheme: there would be a 'MAV WorkCare Board' that reported to the MAV Board, and a 'MAV WorkCare Management Unit' reporting to the MAV WorkCare Board. There would be a Scheme Manager, and then various employees such as an OHS Co-ordinator and a Claims Manager reporting to the Scheme Manager. I have assumed that the

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10 *WIRC Act* (n 1) s 376(3). The Act uses the phrase 'local government corporations'. In argument, the parties used the word 'councils'. I will also use the word 'councils'.

11 Emphasis added.

proposed structures were implemented, with the result that there was a separate organisational structure set up within MAV to operate the proposed scheme. Similarly, it seems clear that MAV operated a distinct set of accounts that related to the self-insurance scheme.

9 Accordingly, what the Act refers to as a 'scheme of self-insurance', and what the parties referred to as 'the MAV WorkCare Scheme' or 'the MAV Scheme', may be conceptualised as a distinct organisational structure within MAV, with its own management structure, employees and accounts, that operated as an independent business unit.

The National Audit Tool ('NAT')

10 Since 2005, there has been a National Self-Insurer OHS Management System Audit Tool, known as 'the NAT'. The NAT defines the criteria that regulators will use to assess a self-insurer's Occupational Health and Safety Management System ('OHSMS'). Importantly, the NAT is not a measure of the incidence of injury as such, but is a measure of the OHSMS system in place at a worksite. The audit considers matters such as:

- whether there is a documented and adequate health and safety policy in place that has the support of senior management;
- the availability of the policy;
- whether it is regularly maintained and reviewed;
- whether work procedures and practices reflect the relevant health and safety standards and are kept up to date;
- whether measurable targets have been set;
- whether its progress against targets is monitored;
- whether sufficient financial resources have been allocated;
- whether there are sufficient qualified persons implementing the health and safety management system;
- whether there is sufficient senior management involvement and responsibility; and, speaking even more generally,

- whether workers are properly trained to perform their work safely and involved in hazard identification.

11 Because the NAT is an audit of the system in place, a 100% compliance is possible.

Ground 1: Did the Authority fail to have regard to MAV's offer to subject itself, if required, to conditions if approval were to be granted?

12 In its 7 September 2020 submission, MAV said:[12]

> 76. If WorkSafe considers it necessary to ameliorate any residual concern, or otherwise, MAV will submit to any one or more of the following conditions:
>
> a. MAV provide to WorkSafe at half-yearly intervals comprehensive details of the MAV's investment performance in relation to its asset collections and returns and any changes to its funds managers;
>
> b. MAV provide to WorkSafe at half-yearly intervals comprehensive details of MAV's funding ratio as it applies to the MAV WorkCare Scheme including any action taken should the funding ratio of the Scheme drop below 85%;
>
> c. MAV provide to WorkSafe at half-yearly intervals comprehensive details of the MAV Scheme members' progress towards MAV's aspirational business objective of achieving 100% conformance to the NAT;
>
> d. That by 31 December 2020, MAV will take all reasonable steps to procure that MAV WorkCare, the City of Melton and Swan Hill Rural City Council will, as far as reasonably practicable (acknowledging COVID-19 restrictions and any other significant business-impacting events) remediate any remaining non-conformances identified in the accepted [Remedial Action Plans] for each;
>
> e. That by 31 March 2021, MAV will take all reasonable steps to procure that the City of Port Phillip will, as far as reasonably practicable (acknowledging COVID-19 restrictions and any other significant business-impacting events) remediate the remaining non-conformances identified in the [Remedial Action Plan] accepted by WorkSafe; and that if by 31 March 2021, the City of Port Phillip has not met this requirement, that the MAV Board will commence internal governance processes to exit the City of Port Phillip from the MAV WorkCare Scheme.

13 MAV also said in the same document:

> 79. If Worksafe requires modification of these conditions or [to] impose

[12] The submission sought approval for both six years and, in the alternative, for four years. The same offer was made in both.

> further or alternate conditions for granting approval for 4 or 6 years, WorkSafe is invited to propose those modifications and/or conditions urgently.
>
> 80. If WorkSafe declines to accede to the First Requested decision, notwithstanding the conditions proposed, and the offer further to consider alternate conditions, MAV requests full reasons for doing so.

14 Later, in a letter dated 13 October 2020, following the discovery by the Authority that the level of NAT compliance among the participating councils was significantly lower than had been suggested in MAV's 7 September 2020 submission, MAV said:

> The review of WorkSafe's feedback has disclosed the need for additional remediations. With the exception of Warrnambool City Council, such remediations are encompassed by the conditions proposed in MAV's letter of 7 September 2020 at paragraphs 76 and 78.
>
> Therefore, with respect to the ***First Requested Decision***, in addition to the conditions listed at paragraph 76 a–e, the MAV will also submit to the condition:
>
> f. That by 31 December 2020, MAV will take all reasonable steps to procure that Warrnambool City Council will, as far as reasonably practicable (acknowledging COVID-19 restrictions and any other significant business impacting events), remediate any remaining non-conformances identified in the accepted [Remedial Action Plan] for Warrnambool City Council.

15 The Authority did not enter into any discussions with MAV in relation to the proposed conditions or suggest any alternate conditions or otherwise respond to MAV's proposal prior to making its decision. Although the Authority's 15 October 2020 decision letter said that the Authority had 'considered the matters raised in the MAV's submission', the letter did not in terms refer to MAV's offer to submit to these conditions, nor to its request that if those conditions were thought inadequate that the Authority propose modifications to those conditions or alternate conditions. MAV contended that, as a consequence, the Authority had failed to have regard to relevant considerations and/or had failed to accord MAV procedural fairness.

16 The Authority accepted that the fact that MAV had proposed the conditions was a matter that the Authority was required to consider when deciding whether or not to approve MAV's application. It also accepted that, if it had failed to do so, then that failure would have been material to its decision. Accordingly, the dispute between

the parties was in this respect limited to whether or not I should infer that the decision-maker had considered the fact that MAV had proposed the conditions when he decided to refuse MAV's application.

17 A failure to refer to a matter in a set of reasons may justify, but does not compel, an inference that the matter was not considered, and whether or not the inference should be drawn depends on all the circumstances of the case.[13] The fact that the decision-maker said that he had considered the matters raised in MAV's submission is relevant but not conclusive.[14]

18 MAV contended that the proposed conditions were of sufficient significance in the context of its application that the absence of reference to them in otherwise careful and thorough reasons for decision justifies a conclusion that they were simply not considered; had they been considered, they would have been mentioned in the reasons. MAV also asked me to draw a *Jones v Dunkel*[15] inference from the failure by the Authority to call evidence from Mr Radford himself, the actual decision-maker.

19 The Authority took almost the opposite approach. It contended that, seen in the context of the prior dealings between the parties and the other issues in play, the proposed conditions were likely of such little consequence to the evaluative process required of the decision-maker that their absence from the reasons is at least as consistent with them having been considered, but not referred to in the reasons. Related to this submission is its contention that the other factors — such as the expressed concern that the MAV Scheme was not independently able to meet its debts as and when they fell due and that MAV had not achieved a situation where the participating councils had performed adequately on the NAT audits — were of effectively overwhelming significance. The Authority also relied on the fact that the decision-maker said that he had 'considered the matters raised in MAV's

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13 *BAT Advocacy NSW v Minister for Environment Protection, Heritage & the Arts* (2011) 180 LGERA 99, 112–13 [44]–[47] (Emmett, McKerracher and Foster JJ); *Soliman v University of Technology, Sydney* (2012) 207 FCR 277, 295 [55] (Marshall, North and Flick JJ).

14 Cf *Haq v Dodghsun* [2015] VSC 450, [45] (John Dixon J).

15 (1959) 101 CLR 298.

submission', and contended that there was no reason to doubt that assertion.

The context in which the decision is to be assessed

20 The following circumstances are needed to put in context the significance to the decision-maker of the proposed conditions (and these matters will be relevant also to the other grounds of appeal considered later in these reasons).

MAV had failed in an earlier application due to concerns about financial viability and OH&S

21 MAV had earlier applied for approval as a self-insurer in 1997. That application was refused due to concerns about the proposed scheme's financial viability and the proposed scheme's ability 'to drive sustained improvements in OHS performance across local government'. In 2001, MAV expressed an interest in becoming a self-insurer, but this was rejected on the grounds that it had not taken steps to address those concerns.

The Authority had published guidelines that emphasised the need for 100% compliance with NAT

22 Section 410 of the Act empowered the Authority to make guidelines to provide guidance to self-insurers that, among other things, may indicate the way in which the Authority would form an opinion, attain a state of mind, make a determination or exercise a discretion. When MAV applied for approval as a self-insurer in May 2016, External Guideline #2 — Assessment of Initial Application for Approval as a Self-Insurer — had been published. That Guideline said it provided an 'overview of the performance expectations and indicators adopted by WorkSafe when assessing whether an employer is fit and proper to be a self-insurer'. It said:

> WorkSafe expects all self-insurers to maintain their OHSMS to a level that conforms to the NAT as a minimum standard. It also expects self-insurers to develop and implement a corrective action plan to address any non-conformances identified during an audit in a timely manner to ensure 100% conformance with the NAT at the time of the approval decision.[16]

23 At the time of MAV's application in 2020 for renewal of its approval, External

[16] Emphasis added.

Guideline #3 — Assessment of Application for Renewal of Approval as a Self-Insurer — was in place. It, too, said it provided an overview of the performance expectations and indicators for assessing whether a self-insurer was fit and proper. That Guideline stated that the Authority would consider indicators including:

> whether the self-insurer has developed and fully implemented remedial action plans within agreed timeframes which effectively address any non-conformance/s, mitigates the risk of recurrence and delivers continuous improvement…

24 Significantly, it also stated:

> WorkSafe expects all self-insurers to:
>
> - maintain their OHSMS(s) to a level that conforms to the NAT as a minimum standard
> - investigate and determine the root cause of any non-conformance/s; and
> - develop and implement a remedial action plan within agreed timeframes which addresses any non-conformances to ensure 100% conformance with the NAT at the time of the approval decision.[17]

25 The Guideline also said that the Authority would conduct an OHSMS audit using the NAT prior to renewal of approval, and that it would 'consider whether there has been 100% conformance with the NAT at the time the application for renewal of approval is determined'.

A prior communication had emphasised the need to achieve 100% compliance

26 On 20 March 2015, which was prior to MAV's formal application, the Authority emailed MAV confirming what its 'requirements/expectations' were relating to OHSMS performance. The email stated:

> WorkSafe is expecting MAV to provide significant detail, as part of its application, in terms of *how* it will achieve its 'high performance' target of 100% compliance with the NAT across all scheme participants during the first term of approval.

MAV's 20 May 2016 application made certain representations

27 In its 20 May 2016 application for approval as a self-insurer, MAV indicated that,

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[17] Emphasis added.

upon approval, it would commit $4 million of upfront capital to the scheme, and that it forecast operating the scheme with a surplus for each of the first four years. It also indicated that 'full conformance with relevant criteria of the NAT within 3 years' was one of the 'primary goals'.

Subsequent communications emphasised the expected 100% NAT compliance

28 On 1 December 2016, which was after its application but before its approval, MAV emailed the Authority its 'MAV Workcare 3 Year Safety Improvement Program'. The document noted the historic poor OHS performance of local councils, and said:

> As articulated in the MAV application the development of the 3 Year Performance Improvement Program encompassing OHS, injury management and an employee well-being program will deliver full conformance with the NAT at the end of year 3 of the licence period and an overall improvement in safety performance.[18]
>
> …
>
> Given the requirement of 100% conformance with the NAT within the three year period, our targets on a year by year basis are as follows:
>
> - Year 1 — at least 50%
> - Year 2 — at least 75%
> - Year 3 — 100%

29 The document also referred to 'remedial action plans'[19] that were to be implemented, and acknowledged in that context an 'obligation' to achieve 100% NAT compliance.

30 Shortly afterwards, on 14 December 2016, the Authority emailed MAV with a number of questions, which MAV answered. In this document, MAV again indicated that it realistically expected to achieve 'full NAT compliance by the end of year three'.

The 2017 approval had imposed similar conditions to those later offered

31 As noted above, MAV's 2016 application for approval as a self-insurer was successful. In its 9 May 2017 letter granting that approval, the Authority imposed a

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18 Emphasis added.

19 In the material and during the trial, these were interchangeably referred to as variants of 'remediation/remedial action/work plans'. I will refer to them as 'remedial action plans'.

condition in the following terms:[20]

> MAV must provide WorkSafe with the following information, at half-yearly intervals (ie by 30 June and 31 December) in each year of the approval:
>
> > comprehensive details of the MAV Scheme's claims experience, including highlighting any potential deterioration and/or issues with the Scheme's financial viability;
> >
> > comprehensive details of the MAV Scheme's investment performance in relation to its asset allocation and returns, as well as any changes in the fund manager;
> >
> > comprehensive details of the MAV Scheme's funding ratio and trigger points as per the Scheme' s prudential plan, including any actions taken/to be taken should the funding range drop below 100% or the lower end of the Scheme's operating range of 85%; and
> >
> > comprehensive details of the MAV Scheme's performance against the objectives and targets outlined in the 'MAV WorkCare three-year safety improvement program', including progress against the target of achieving 100% conformance to the NAT across all members of the Scheme within three years.

32 The letter further stated:

> Should MAV fail, at any time, to meet the requirements of the term and condition, WorkSafe may review MAV's approval as self-insurer and, based on the findings of the review, elect to impose further performance-based terms and conditions or, alternatively, revoke the approval.

There were, in fact, financial losses, and there was poor NAT conformance and incorrect evaluation of NAT conformance, during MAV's initial period as a self-insurer

33 In October and November 2019, audits performed of a selection of the participating councils revealed an average NAT compliance of only 55%. Following this, it seems that various 'remediation action plans' to 'remediate non-performances' were entered into.[21]

34 MAV, in its 13 March 2020 application for renewal, advised the Authority that the MAV Scheme had lost money and had a negative equity position of $4.627 million as at 20 June 2019. It also advised that 'supporting and assisting' the participating councils to improve their occupational health and safety management systems and

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20 The Authority had the power to impose conditions under s 380(1)(a)(ii) of the Act.

21 These were acknowledged in MAV's submissions.

their NAT conformance levels had been 'particularly challenging', and that it had shifted from a 'blanket position' of full NAT compliance to a focus on 'continuous improvement'.

35 On 8 July 2020, MAV reported to the Authority that significant progress had been made with the remedial action plans relating to the councils that were the subject of the October and November 2019 audits. MAV's assertions were then to the effect that very significant progress had been made towards 100% conformance.

36 On 20 August 2020, the Authority wrote to MAV advising that it intended to refuse its application for renewal. It will be necessary to refer to this letter in more detail later as MAV contends that it was denied procedural fairness to the extent that the ultimate decision to refuse its application relied on matters not foreshadowed in this letter. For present purposes, its significance is that this letter stated that the Authority was concerned with: the financial viability of MAV and the MAV Scheme; the fact that MAV was not meeting the 'requirements for the safety of working conditions for workers employed by the MAV members'; and that MAV had not met the terms and conditions of its initial approval in that it would not achieve 100% NAT conformance across all Scheme members by 31 October 2020.

37 On 7 September 2020, MAV provided submissions to the Authority responding to the Authority's 20 August 2020 letter. MAV contended, in short, that MAV itself was solvent and that it was MAV's financial position that mattered, not the financial position of the MAV Scheme. This was because MAV could and would finance the scheme and, if necessary, raise funds by raising premiums or making a call on its member councils. MAV contended that, in any event, the MAV Scheme was financially viable. It asserted that the very significant progress made towards 100% conformance since the 2019 audits made the Authority's conclusion that MAV was not meeting the requirements for the safety of working conditions for workers employed by MAV members unreasonable and irrational. It also observed that the condition imposed was merely an obligation to provide information, not an obligation to achieve 100% NAT conformance.

38 There was then a series of investigations and communications between MAV and the Authority about the actual level of NAT conformance. The Authority reviewed the material provided by MAV, came to a different view, and sought MAV's response. On 12 October 2020, MAV provided an 'update'. That update revealed that the assertions made by MAV on 8 July 2020, and repeated in its 7 September 2020 submission, were wrong. The average percentage conformance across the eight audited councils was, in fact, only 71%.

39 This was then acknowledged by MAV in a letter to the Authority dated 13 October 2020, in which MAV accepted that 'WorkSafe's feedback has disclosed the need for additional remediations'. MAV offered to submit to the further condition:

> That by 31 December 2020, MAV will take all reasonable steps to procure that Warrnambool City Council will, as far as reasonably practicable (acknowledging COVID-19 restrictions and any other significant business impacting events), remediate any remaining non-conformances identified in the accepted [Remedial Action Plan] for Warrnambool City Council.

The Authority's 15 October 2020 decision

40 Shortly after, on 15 October 2020, the Authority made its decision to refuse MAV's application for renewal. Contrary to the position taken in its 28 August 2020 letter, the Authority accepted that MAV itself was able to meet its liabilities as and when they fell due by reason of its ability to call on its members. However, it expressed 'broader concerns as to the financial performance of the MAV WorkCare Scheme'. The Authority's concerns in this regard included a concern that, although MAV could call on funds from councils, that might adversely impact on those councils. It also advised that it was not satisfied that MAV was meeting the requirements for the safety of working conditions for workers employed by members of the Scheme. In this context, it noted that MAV had not been able to demonstrate 100% conformance with the NAT, with the conformance rates across the audited councils ranging from 53% to 88%, with an average of only 71%. It further referred to the expectation contained in the Guideline that all self-insurers would have developed plans in order to ensure 100% compliance with the NAT at the time of the approval decision. It said:

> WorkSafe is not satisfied that MAV will meet the specific term and condition of its initial approval pursuant to sub-section 379(4)(e), in that MAV will not achieve 100% conformance to the National self-insurer OHS management system audit tool v3 (NAT) across all Scheme members by 31 October 2020 as outlined in its OHS three-year Improvement Program.

41 The 15 October 2020 decision was made by the Authority's Mr Radford, who had delegated authority from the Authority's board. Prior to him making his decision, he was provided with a 'decision brief' prepared by persons within the Authority. The Authority sought to tender the decision brief. MAV did not object to the tender of the communications that had passed between it and the Authority prior to the decision being made (and indeed tendered some of them itself), but objected to the tender of the decision brief. The parties agreed that I would rule on the admissibility of the decision brief, if required, when giving judgment.

Analysis — Did the Authority fail to have regard to MAV's offer to subject itself, if required, to conditions if approval were to be granted?

42 As noted above, it was accepted by the Authority that the decision-maker was required to have regard to the fact that MAV had offered to subject itself to the conditions. But, if he did, the weight that the decision-maker gave to that fact was a matter for him.

43 On balance, I am not persuaded that the decision-maker more likely than not failed to have regard to the fact that MAV had offered to subject itself to the conditions when he made his decision to refuse MAV's application. I prefer the Authority's submission on this point.

44 When the decision is seen in context, it is at least as likely that there was no reference to the offered conditions in the decision-maker's reasons because the offered conditions were in all the circumstances of insufficient consequence to warrant making reference to them; that is, that the decision-maker had regard to the offered conditions in his decision-making process, but did not consider them of sufficient significance to record that fact specifically in his reasons. The reasons make it clear that the decision-maker was very concerned about both the financial viability of the MAV Scheme and the potential impact on councils if levies had to be raised or

premiums increased, and the fact that MAV had been unable to effect sufficient improvement in the occupational health and safety systems of its participating councils. In those circumstances, the offered conditions could well (and in my mind probably would) have been treated as being of little significance. MAV submitted that the import of the proposed conditions 'would, within a very short period, have been to ensure compliance with each of the issues identified by the Authority' in the 20 August 2020 letter. I do not accept this. They were, after all, essentially only offers to provide information and to take 'reasonable steps' to procure action, largely by others, over the proposed period of self-insurance. There was no offer, for example, to put capital up front into the MAV Scheme, and no offer that would clearly ensure that MAV would achieve substantially better NAT audit compliance on the part of its participating councils. The proposed conditions referred only to an 'aspirational business objective' of achieving 100% conformance to the NAT.

45 Further, the decision-maker said that he had considered the matters raised in MAV's submission, which itself contained the proposed conditions. I see no reason to doubt this. Clearly, it would have been better had the decision-maker referred to that particular part of the submission in his reasons, but the failure to do so does not, to my mind, justify a conclusion that he did not have regard to the whole of MAV's submissions, including the proposed conditions.

46 MAV relied on *Quinn v Law Institute of Victoria Ltd*.[22] Mr Quinn pleaded guilty to charging grossly excessive legal costs. He offered an undertaking to the Legal Profession Tribunal that, in any matter where his costs could exceed $20,000, he would have his bill independently assessed by a recognised costs consultant before the account was rendered. The Tribunal suspended his licence for 12 months. The suspension was set aside on appeal because the Tribunal did not make any reference to the offered undertaking in its reasons. The appeal succeeded, it seems, on the basis that the Tribunal's reasons were deficient, rather than because the Court of Appeal drew an inference from the failure by the Tribunal to refer to the proposed

[22] (2007) 27 VAR 1.

undertaking that it had not had regard to a relevant consideration.[23] But be that as it may, to my mind this case does not assist MAV. In *Quinn*, the offered undertaking would have been effective to remove the risk of the relevant event occurring again. This puts it in a different category to the proposed conditions in this case, and indeed, by way of contrast, highlights the modesty of the proposed conditions here.

47 I do not overlook the fact that MAV also invited the Authority to propose modifications to the conditions or different conditions. But this fact does not sway the matter. For reasons developed below, I do not consider that procedural fairness required the Authority to engage in a negotiating process with MAV in relation to conditions; MAV's invitation did not create an obligation on the Authority to redraft the proposed conditions or to draft alternate conditions before making its decision. As with the conditions themselves, it is at least as likely that there was no reference to the offer to engage in a process in relation to the conditions because the decision-maker did not consider that offer to be of sufficient significance in his reasoning process to refer to it.

The admissibility of the briefing note

48 As noted above, the Authority sought to tender the Authority's internal briefing document that was before the decision-maker. The Authority contended that it was relevant because it made further reference to the conditions and thus made it more likely that the decision-maker had regard to them. MAV objected to the tender. I have formed the above opinion without having regard to this briefing document, and accordingly there is no need for me to rule on its admissibility.

Jones v Dunkel

49 The logic of the *Jones v Dunkel* inference is that it can be drawn in circumstances where it can be assumed that a decision was made not to call a witness for the reason that the witness' evidence would not have assisted. I am not minded to draw a *Jones v Dunkel* inference from the failure of the Authority to call evidence from

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[23] Ibid [42], [45], cf [34].

Mr Radford, its CEO and the person who signed the 15 October 2020 decision, for the following reasons:

(a) First, it is not at all clear that evidence from Mr Radford as to his reasoning process would have been admissible. *East Melbourne Group Inc v Minister for Planning*,[24] and the cases discussed in that decision, suggest that it may not have been, but the position is far from clear.[25] So much seems to have been accepted by MAV,[26] and, to its credit, it did not assert that it would not have objected to the Authority calling him. Also, as stated, MAV objected to the tender of the internal briefing document on the basis that it was an inadmissible attempt to supplement the provided reasons. It seems likely that the admissibility of any evidence from Mr Radford as to his reasoning process would have been the subject of considerable dispute. Accordingly, it cannot be said, in my view, that Mr Radford was a witness who clearly should have been called, or that he was a witness who would ordinarily be called in a case such as this.

(b) Second, MAV did not suggest that a *Jones v Dunkel* inference should be drawn in its written submissions filed in advance of the hearing, or in its oral address, but only for the first time in the course of its reply. Typically, in a trial context, evidence will be extracted about the availability of a potential

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24 (2008) 23 VR 605, [308] (Ashley and Redlich JJA) ('*East Melbourne Group*').

25 I note that *Jones v Dunkel* inferences have been drawn in other judicial review cases, including: *ARM Constructions Pty Ltd v Commissioner of Taxation* (1986) 10 FCR 197 ('*Arm Constructions*'); *The Lebanese Moslem Association v Minister for Immigration and Ethnic Affairs* (1986) 11 FCR 543; *Citibank v Federal Commissioner of Taxation* (1988) 83 ALR 144; *Minister for Aboriginal and Torres Strait Islander Affairs v Western Australia* (1996) 67 FCR 40; *Chetcuti v Minister for Immigration and Border Protection* (2019) 270 FCR 335 ('*Chetcuti*'). But, with the possible exception of *ARM Constructions*, it is not clear that the factual circumstances in those cases are similar to the factual circumstances of this case, nor is it clear how these cases sit with *East Melbourne Group* (n 24). *East Melbourne Group* cited *ARM Constructions* and *Minister for Aboriginal and Torres Strait Islander Affairs v Western Australia*, but not the other cases from this list that predated it, and *East Melbourne Group* was not considered in *Chetcuti*, which succeeded it. Neither party directed me to any cases where a *Jones v Dunkel* inference has been drawn in circumstances where there was a real issue as to the admissibility of the evidence it was said was available to be called.

26 Counsel for MAV, in response to a suggestion from me that there would be an argument that the evidence would not be admissible, said that 'there'd be a good argument'. MAV was in a difficult position in this respect, as it relied on *East Melbourne Group* in support of its contention that the Authority's internal briefing document was inadmissible.

witness in the course of cross-examination of other witnesses, and in that sense the other party is put on notice. The fact that the issue did not arise in this case until after the parties had closed their cases means that the Authority was not aware, prior to that time, that anything would be sought to be made by MAV of the Authority's failure to call evidence from Mr Radford himself. This is also consistent with the fact that Mr Radford was not, in fact, seen in advance by either side to be a witness who should have given evidence.

Analysis — procedural fairness

50 MAV also contended that the failure to refer to the offered conditions and the offered invitation to the Authority to propose modifications or alternate conditions amounted to a breach of procedural fairness. As I understood it, the contention was that procedural fairness required the Authority to respond to the offer or to enter into a negotiation process with MAV in order to achieve conditions that were satisfactory to it. I do not accept this submission. Although the content of the obligation to provide procedural fairness is malleable and depends on what is 'fair' in the particular circumstances of each case[27] in order to prevent 'practical injustice',[28] MAV was unable to direct me to any case where the obligation to accord procedural fairness had required steps of this type to be taken. MAV submitted it was 'an incident of the process, the heart of which is s 381' of the Act. But although that section required the Authority to give MAV notice of its intention to refuse approval and to consider any written submission received in response, it did not require any subsequent negotiation process. In the circumstances, I do not consider that there was anything procedurally unfair in the Authority making its decision without first responding to MAV's invitation to propose different conditions.

Ground 2: Did the Authority refuse the application for reasons that MAV had not had a fair opportunity to address?

51 Section 381 of the Act prevented the Authority from refusing to approve MAV as a

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27 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 160–1 [26] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ) ('*SZBEL*').

28 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 21 CLR 1, 13–14 [37] (Gleeson CJ).

self-insurer without first: (a) giving 28 days' notice in writing of its reasons for the intended refusal; (b) giving MAV a right to make a submission in further support of its application; and (c) considering any submission received before deciding whether or not to refuse to approve MAV as a self-insurer. This provision was complied with, in the sense that the Authority sent MAV a letter dated 20 August 2020, in which it indicated that it intended to refuse to approve MAV as a self-insurer and invited MAV to make a written submission in response within 28 days. MAV provided such a submission by letter dated 7 September 2020. As noted above, the actual decision was then made on 15 October 2020.

52 The Authority identified three reasons in its 20 August 2020 letter for which it was not satisfied that MAV was 'fit and proper' to be a self-insurer. One of these was that the Authority was not satisfied that 'the MAV' was, and was likely to continue to be, able to meet its liabilities as and when they fell due. Another was that the Authority was not satisfied that MAV was 'meeting the requirements for the safety of working conditions for workers employed by the MAV members' (which must be a reference to the participating councils). MAV submitted that the Authority had breached the obligation set out above by having regard in its 15 October 2020 decision to: (a) 'broader concerns' in relation to the financial viability of the MAV Scheme, rather than limiting its concern to the financial viability of MAV itself; (b) MAV's safety performance during the period after its 20 August 2020 letter and prior to its 15 October 2020 decision; and (c) the 2019/2020 trends relating to claims frequency.

53 I accept that procedural fairness, operating in the context of this section, precluded the Authority from refusing to approve MAV as a self-insurer for a particular reason unless it had first given MAV sufficient notice of that reason in its 20 August 2020 letter. That is not to say that every detail contained in the 15 October 2020 decision had to be a replicate of detail found in the 20 August 2020 letter. Rather, what was required was that MAV be given notice of the proposed reason in sufficient detail for MAV to be aware of the Authority's concern in that regard, so that it could make

such submissions as it wished in response in order to avoid practical injustice.

The 'broader concerns' about the financial viability of the MAV Scheme

54 There is no doubt that, in its 15 October 2020 decision, the Authority had regard to the financial viability of the MAV Scheme and the associated possible impact on participating councils in the event that MAV had to increase premiums or make calls on councils generally to raise further funds for the scheme. Ground 3, considered below, concerns whether the Authority was permitted to have regard to the financial viability of the MAV Scheme at all, but the present issue is whether, assuming it was, the Authority gave MAV sufficient notice that it might have regard to this issue.

55 Although the 20 August 2020 letter, on its second page, said only that the Authority was not satisfied as to MAV's financial viability, the letter has to be read as a whole, including by reference to its detailed appendices. Read in that way, it is apparent that when the Authority expressed concern about whether 'the MAV' was, and was likely to continue to be, able to meet its liabilities as and when they fell due, it was referring to both MAV itself and also, separately, to the MAV Scheme. Appendix 1 contained separate headings for 'MAV "the Group" — approved self-insurer' and 'MAV WorkCare Scheme'. Under the latter heading were two tables, Table B and Table C. Table B had a sub-heading, 'Consideration of the MAV WorkCover Scheme (as an operating unit of Municipal Association of Victoria)', and then set out the financial position of the MAV Scheme, considered separately from the financial position of MAV itself. Table C set out a numbers of 'factors' relevant to the financial position of the MAV Scheme, including that:

- it had incurred greater expenses than had been included in the initial application documents;
- $1.3 million in application costs had been expensed to the MAV Scheme when that was not set out in the initial assumptions;
- a planned $4 million capital injection was absent;
- it had failed to achieve a projected 15% premium discount;
- it had failed to achieve a targeted 10% reduction in claims; and

- it had had poor investment returns.

56 Immediately below the table, the letter referred to cumulative losses to the MAV WorkCare Scheme projected to amount to $14 million by 30 June 2020. It then said:

> Detail provided by the MAV WorkCare is to call upon council members to provide 'capital recovery contributions' of $2.4m collectively for 5 years, to total $12m. There is a concern that the step increase to members' contributions will be 21% from this year to next year (7% removal of the initial discount and 14% per annum to recoup their losses), which is likely to cause significant concern with members.[29]

57 The letter then expressed the conclusion that 'WorkSafe has not been able to gain comfort that the WorkCare scheme will be able to pay its debts as and when they fall due'.

58 In my opinion, the above references in the 20 August 2020 letter put MAV on notice that the Authority was intending to refuse its application for reasons including its concerns that:

(a) the MAV Scheme, considered separately from MAV, was not established on a sound financial basis and might not be able to fund itself; and

(b) if MAV had to raise further funds from member councils to support the MAV Scheme, that would likely cause those councils significant concern.

59 In its decision letter dated 15 October 2020, where the Authority said that it refused MAV's application in part because of its broader concerns as to the financial performance of the Scheme, it set out those concerns in a table with two columns, one headed 'Area of Review' and the other headed 'Commentary'. It seems to me that the areas of review, with one exception, were sufficiently anticipated in the 20 August 2020 letter, as they all related to the performance or viability of the MAV Scheme and the associated potential concern of councils if MAV had to obtain additional funds from councils to support the scheme.

60 The exception was an area of review headed 'AFSL requirements', which referred to

[29] Emphasis added.

MAV's earlier communication that its Australian Financial Services Licence had a condition that MAV maintain a positive net asset position. I do not consider the reference to this to be a breach of the obligation to be procedurally fair, as this was simply a reference to information that had previously been provided by MAV, and concluded with the comment: 'The MAV has not provided any updates on this requirement as part of the submission.'

61 To the extent that MAV complained about matters set out in the column headed 'Commentary', I accept the Authority's submission that this column set out the decision-maker's evaluation of the material provided, and that the Authority was not required by the obligations of procedural fairness to give MAV prior notice of its evaluation of the material provided by MAV, as compared to giving prior notice of the areas for consideration.[30]

62 Accordingly, in my view, the Authority provided MAV procedural fairness.

63 I am comforted in this conclusion by the fact that MAV itself seems to have interpreted the 20 August 2020 letter as conveying the Authority's concerns about the financial viability of both MAV and the MAV Scheme considered separately, and its concern about MAV having to raise additional funds from councils to fund the MAV Scheme. I say this because MAV's 7 September 2020 submission responded to these concerns. MAV set out its assertion that the MAV Scheme was financially viable, referred to its ability to increase premiums or make calls on councils, and asserted that '[t]he MAV has no concern regarding the owner's (member's) ability to fund the [planned capital recovery contribution]'. It was open to MAV to further develop this submission, having regard to the Authority's concern about the impact this might have on the councils, but it did not do so. The letter also enclosed the MAV WorkCare Financial Report for 2018–19 and an actuarial report from Finity, which referred to MAV WorkCare's 'ability to improve the longer term funding of the scheme via premiums from its captive client base' in support of its assertion that

30 *SZBEL* (n 27) 165–6 [47]–[49] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ); *Robb v Chief Commissioner of Police* [2005] VSC 310, [70]–[71] (Smith J).

MAV WorkCare would continue to be able to meet its liabilities as and when they fall due.

MAV's safety performance during the period after the 20 August 2020 letter

64 There was nothing procedurally unfair in the Authority having regard to MAV's safety performance, in terms of the NAT audit compliance of its participating councils, in the period after the 20 August 2020 letter. MAV was on notice that the level of NAT audit compliance of the participating councils was something that the Authority considered relevant, and which it had the opportunity to address. Indeed, as noted in para 38 above, the information as to the NAT audit compliance over that period came from material provided by MAV to the Authority. It was then evaluated by the Authority and addressed by MAV in its 13 October 2020 letter, in which MAV accepted the need for 'additional remediations' and offered to submit to additional conditions. MAV must have anticipated, if not expected, that this material would be considered.

The 2019/20 trends relating to claims frequency

65 The Authority's reference to the MAV Scheme's 2019/20 trends relating to claims frequency was considered by it in that part of its decision that related to whether to approve MAV for six, or only four, years. Given that the application was refused altogether, the reference to the MAV Scheme's 2019/20 claims frequency trends was inconsequential for the same reasons set out in relation to Ground 6 below.

Ground 3: Was the Authority entitled to have regard to the financial circumstances of the proposed scheme, or was it limited to just the financial circumstances of MAV?

66 Section 379(4)(a) of the Act required the Authority to have regard to whether 'the employer' is, and is likely to continue to be, able to meet its liabilities as and when they fall due. Section 379(4)(f) required the Authority also to have regard to 'such other matters as the Authority thinks fit'. MAV contended that s 379(4)(f) should be read down with the result that, on a proper construction, the Authority was not permitted to consider financial performance outside the scope of s 379(4)(a) — that is, that it was not permitted to consider financial performance other than that of 'the

employer', being MAV. Here, the Authority ultimately accepted that MAV itself was and was likely to continue to be able to meet its liabilities as and when they fell due, but also considered the financial performance and viability of the MAV Scheme itself. MAV submitted that, by doing so, the Authority misconstrued s 379 of the Act. MAV also submitted that it was irrational or legally unreasonable for the Authority to have regard to the financial performance and viability of the MAV Scheme. I took this to include the related argument that the financial performance and viability of the MAV Scheme was an irrelevant consideration.

Did section 379(4) of the Act constrain the Authority?

67 In my view, s 379(4) of the Act places no such constraint on the Authority. First, the matters set out are matters that the Authority 'must' consider and are not said to be exhaustive. And second, I see no reason to read down the broad language of s 379(4)(f). Section 374 of the Act anticipates that MAV might apply to be a self-insurer, requires it to establish a 'scheme' for the benefit of itself and participating corporations, and also requires it to keep separate accounts of moneys received or expended with respect to the operation of that self-insurance scheme. This suggests, contrary to MAV's submission, that, if the Authority thought it relevant to do so, it could permissibly have regard to the scheme and its financial viability when deciding whether or not MAV was fit and proper to be a self-insurer. It would be an odd result if the legislation required MAV to produce a scheme and keep separate accounts for the scheme, but at the same time precluded the Authority from having regard to them.

Was the performance of the MAV Scheme otherwise an irrelevant consideration, or was it irrational and/or legally unreasonable for the Authority to have regard to it?

68 It would be a jurisdictional error for the Authority to have regard to the viability of the MAV Scheme if it were was an irrelevant consideration. This would be either from basic principles of judicial review,[31] or because the broad language in s 379(4)(f)

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31 See, eg, *Craig v South Australia* (1995) 184 CLR 163, 179 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

would be limited by the usual implication of legal reasonableness, in that it would not permit the Authority to have regard to matters that were simply of no relevance to the question as to whether or not MAV should be approved as a self-insurer. Given that s 379 is expressed to set out the minimum matters that the Authority must consider, rather than the only matters that the Authority can consider, I prefer the former to the latter. But there is no practical difference.

69 Similarly, I accept that, when the legislature entrusted to the Authority the responsibility to evaluate whether or not an applicant was fit and proper to be a self-insurer, it intended that the Authority act reasonably and rationally in performing that function. Accordingly, in my opinion, it was a condition of the valid exercise of its function that the Authority act reasonably and rationally, and that if it failed to do so it fell into jurisdictional error.[32]

70 There is something to be said for MAV's argument that, because it is the 'self-insurer' and thus the entity responsible for compensation and other payments,[33] if MAV is and is likely to continue to be able to meet its liabilities as and when they fall due, then the separate viability of the MAV Scheme should not matter to the Authority because MAV could always, *ex hypothesi*, supply such additional funds as are required. However, it seems to me that the viability of the MAV Scheme was not an irrelevant consideration and it was legally reasonable, and was not illogical, for the Authority to have regard to it. The Authority has a general interest in schemes operating under the Act being properly funded and financially viable, rather than being underfunded, losing money, and requiring increased premiums or ongoing capital injections on an ad hoc basis. This is particularly so when there is a prospect that any requirement for capital injections might impose obligations on councils, which are themselves employers, and which may or may not be able easily to meet

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32 See, eg, *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 647–8 [130] (Crennan and Bell JJ); *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22, 32 [23] (Gageler and Keane JJ); *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 350–1 [28] (French CJ), 362 [63] (Hayne, Kiefel and Bell JJ); *Ryan v The Grange at Wodonga Pty Ltd* [2015] VSCA 17, [82]–[92] (Neave JA, Santamaria JA and Ginnane AJA agreeing). I respectfully agree with the observations of Richards J in *Schmael v Leach* [2020] VSC 562, [36].

33 *WIRC Act* (n 1) s 391.

any calls for funds, or where unanticipated premium increases might cause councils to leave the scheme. MAV could have established and operated the scheme such that it was sufficiently capitalised and independently viable, but it did not do so. It was not unreasonable or illogical for the Authority to have regard to that fact when deciding whether or not to approve MAV as a self-insurer.

71 Also, the fact that the Act required MAV to keep separate accounts for the MAV Scheme runs against the argument that it was unreasonable for the Authority to have regard to the viability of the scheme independently from MAV itself.

72 It is important to recall that we are here concerned with whether it was legally unreasonable to have regard to a matter, and not with the weight that may be given to the matter. The weight that the Authority chose to put on the viability of the MAV Scheme, in circumstances where MAV was solvent, was a matter for the Authority, and is not amenable to judicial review.

Ground 4: Did the Authority misconstrue the condition that it had placed on MAV in 2017 and, if so, did that matter?

73 The Authority contended that the condition it had imposed in 2017 set out in para 31 above either recognised a pre-existing obligation that had been imposed or, by implication, itself imposed an obligation that MAV in fact achieve 100% NAT compliance. This was said to arise from: (a) the material including the Guidelines and correspondences set out in paras 21 to 39 above, which emphasised the expectation that 100% compliance would be achieved; and (b) the use of the phrase '*further* performance-based terms and conditions'[34] immediately below the listed conditions in the initial approval letter, which was said to indicate that the listed terms and conditions must also be 'performance-based' and thus associated with something other than the provision of information.

74 I do not see it this way. The conditions, which were drawn by the Authority and imposed on MAV, in their plain meaning, did no such thing. Accordingly, I accept

[34] Emphasis added.

MAV's submission that the Authority misconstrued the effect of the conditions when it said in its 15 October 2020 letter that 'MAV will [not] meet the specific term and condition of its initial approval … in that MAV will not achieve 100% conformance … by 31 October 2020'. The Authority was entitled to have the view that MAV would not achieve 100% conformance by 31 October 2020, and that this was contrary to the expectations that the Authority had conveyed and to the indications that MAV had given, but it was not entitled to treat this also as a breach of the imposed condition.

75 It follows that, if this error was material to the Authority's decision to refuse to approve the renewal of MAV as a self-insurer, then MAV would be entitled to have the decision quashed. The onus is on MAV to persuade me that this error was material, in the sense that there is a realistic possibility that without the error the decision could have been different.[35]

76 The Authority was alive to the fact that there was a difference of opinion as to how the condition should be interpreted, because MAV had raised the issue in its 7 September 2020 submissions. In its 15 October 2020 decision letter, the Authority said:

> As outlined in previous correspondence, WorkSafe maintains its position that the term and condition imposed upon the MAV's approval as a self-insurer was intended to be a performance-based condition requiring the MAV to uplift the health and safety performance of the MAV Scheme. In any event and as outlined above, WorkSafe is required to consider the MAV's safety performance for the purposes of section 379(4)(d) as outlined above.[36]

77 In my opinion, the misinterpretation by the Authority of the condition did not affect the decision reached. On a fair reading of the reasons, in context, it is apparent that the decision-maker was principally concerned with the 'financial performance' of the MAV Scheme and MAV's poor conformance with the NAT. Those were reasons (a) and (b) given in the attachment headed 'Reasons for Determination'. The mistaken

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35 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421, 445 [45]–[48] (Bell, Gageler and Keane JJ); *Chang v Neill* [2019] VSCA 151, [94]–[100] (Maxwell ACJ, Beach and Kyrou JJA).

36 Emphasis added.

belief that the poor conformance with the NAT also amounted to a breach of condition was of no real consequence. This conclusion flows both from a consideration of all the material and communications referred to in paras 21 to 39 above, and also from the language used in the passage set out immediately above. I read the underlined sentence, in context, as revealing that the decision-maker was motived by his view that MAV had failed to achieve adequate NAT conformance, and thus was not meeting the Authority's safety expectations, rather than by his (mistaken) view that MAV, by reason of its failure to achieve adequate NAT conformance, was also in breach of the condition.

78 MAV pointed out that, in evaluating whether the decision could realistically have been different, the comparison is between a decision-maker who was approaching the matter on the basis that MAV was in breach of a condition that had been imposed on it, and a decision-maker who was approaching the matter on the basis that MAV was not in breach of a condition that had been imposed on it. In other circumstances, such a submission might be powerful. But in the circumstances of this case, given the emphasis placed by the decision-maker on the MAV Scheme's financial issues and its poor NAT conformance, I remain satisfied that there is no realistic possibility that the decision would have been different, even if the decision-maker had not misconstrued the effect of the condition.

Ground 5: Did the Authority fail to have regard to the remedial plans directed at improving NAT audit compliance that MAV relied on?

79 MAV contended that the Authority was obliged, but failed, to have regard to remedial action plans submitted by MAV. The plans were directed at improving NAT audit compliance. MAV submitted that the remedial action plans had either been achieved, or would soon be achieved, or were detrimentally affected by the Covid-19 restrictions. This was, as I understood it, a reference to the assertion in its 7 September 2020 submission that 'by 20 August 2020, following remediation … four of the five councils had substantially (if not completely) remediated the identified non-conformances', and further, very positive assertions in paras 34 and 39 of that letter.

80 However, MAV's argument was undermined by the fact that the factual assertions made in its 7 September 2020 submissions were shown to be wrong. On 13 October 2020, MAV emailed the Authority noting that information it had since provided superseded the information in its 7 September 2020 submission, and on 14 October 2020, MAV emailed the Authority with an 'update' that revealed conformances ranging from 53% to 88% with an average of 71%. It can hardly, in the circumstances, be said that the Authority failed to have regard to relevant considerations, or acted irrationally or legally unreasonably, because it failed to have regard to incorrect facts but instead had regard to the correct facts.[37]

Ground 6: Did the Authority act irrationally and/or legally unreasonably by having regard to incomplete and outdated information when having regard to the 'comparative claims frequency rate'?

81 Section 382(2)(b) of the Act provides:

> (2) Unless revoked sooner, the approval of an employer as a self-insurer has effect for—
>
> …
>
> (b) in the case of an employer that is a self-insurer immediately before the approval takes effect, a period of 4 years, unless the Authority in its discretion determines that the approval has effect for a period of 6 years.

82 MAV sought approval for a six-year period or alternatively for a four-year period.

83 The error alleged in this ground was made by the Authority in the exercise of its discretion under this section. So much is clear from the fact that the relevant part of the reasons is under para (d), headed: 'The MAV has not met all of the considerations applicable to the exercise of discretion to grant a six year period of approval …'

84 Because this alleged error is independent of the Authority's conclusion that MAV should not be granted approval at all because it was not fit and proper to be a self-insurer, it is not necessary to decide this ground of appeal.

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[37] The parties accepted that I could proceed on the basis that the figures most recently provided and recorded in the decision letter were correct, at least for the purposes of this application.

Conclusion

85 MAV has failed to make good any of its grounds of review, and accordingly the proceeding ought to be dismissed. I will hear the parties on the question of costs.