

GEPI – Status, Construction and Judicial Review

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Introduction

1. Under the Queensland *Workers' Compensation and Rehabilitation Act 2003* (the **Act**), the assessment of permanent impairment resulting from an injury plays a significant role in the workers' compensation scheme. It marks the end of a worker's entitlement to further compensation for the injury;¹ it determines the amount of lump-sum compensation that is payable;² and, without it, a worker cannot sue for common law damages.³ Further, workers who were injured between 15 October 2013 and 31 January 2015 cannot sue for common law damages unless the notice of assessment specifies at least a 6% impairment.⁴
2. Assessments of permanent impairment for the purposes of the Act must be carried out using the Guidelines for the Evaluation of Permanent Impairment (the **GEPI**). This paper provides a general overview of the legal status of the GEPI, the legal rules that apply to its interpretation, and the place of the GEPI in judicial review proceedings.

Status of the GEPI

3. Schedule 6 of the Act tells us that “**GEPI** means the Guidelines for the Evaluation of Permanent Impairment made under section 183”. Section 183 provides that the “Regulator must make guidelines for assessing a worker's degree of permanent impairment for an injury to decide the DPI for the injury” and that the “guidelines are to be called the Guidelines for Evaluation of

1 The Act, s 190.

2 The Act, ss 187, 191-193A.

3 The Act, s 237.

4 See the Act, s 237, as in force at the relevant time.

Permanent Impairment”.⁵

4. The Regulator must publish the GEPI in the Gazette, and the GEPI takes effect upon publication (or such later date as is specified in the Gazette).⁶ The second edition of the GEPI was published in volume 372 of the Queensland Government Gazette on 24 June 2016.⁷ It does not expressly state that the previous edition is repealed, but it does say that “assessors are required to use the version [of the GEPI] current at the time of the assessment”.⁸
5. Plainly enough, the Regulator considers that he has the power not only to make the GEPI but to re-make it from time to time. Section 183(5) of the Act certainly contemplates amendments to the GEPI and s 24AA of the *Acts Interpretation Act 1954* (the **AI Act**) probably puts beyond doubt that the Regulator has the power to amend or repeal the GEPI.
6. The GEPI is a “statutory instrument” for the purposes of the *Statutory Instruments Act 1991* (the **SI Act**). That is, it is a document made under an Act and it is, at least, a “guideline of a public nature” or “instrument of a public nature by which the entity making the instrument unilaterally affects a right or liability”.⁹ The GEPI is not, however, within a “statutory rule” or “subordinate legislation” as defined in the SI Act.¹⁰
7. The GEPI's status as a “statutory instrument” under the SI Act has a number of implications:
 - (a) Under s 23, the GEPI may make provision for a matter by “applying, adopting or incorporating (with or without modification) ... another document”.
 - (b) Under s 26, the GEPI “may authorise any matter to be determined, applied or regulated, from time to time, by any specified person or body”.
 - (c) Under s 28, the GEPI “may make provision with respect to a particular aspect of” the assessment of permanent impairment “despite the fact that provision is made” by the Act

5 The Regulator means, of course, the Workers' Compensation Regulator: s 326.

6 The Act, s 183(3) and (4).

7 I note that the GEPI refers to itself as the “Queensland Guide” or simply the “Guide”.

8 GEPI, para 1.1.

9 SI Act, ss 6 and 7 and Sch 1 (definition of “instrument”).

10 SI Act, ss 8 and 9.

in relation to “another aspect of the matter or in relation to another matter”.

8. Further, the GEPI's status as a “statutory instrument” means that it falls within the operation of s 7(1) of the AI Act; namely:

In an Act, a reference (either generally or specifically) to a law (including the Act), or a provision of a law (including the Act), includes a reference to the statutory instruments made or in force under the law or provision.

9. That does not, however, mean that the GEPI is a “law” in the same way that the Act or the *Workers' Compensation and Rehabilitation Regulation 2003* is law. I do not think it is.¹¹ Rather, my opinion is that one must look to the Act itself to ascertain the consequences of compliance or non-compliance with any aspect of the GEPI.

10. In that regard, s 179(3) of the Act imposes two important requirements:

- (a) First, it provides that the “degree of permanent impairment must be assessed in accordance with the GEPI to decide the DPI for the injury”.¹²
- (b) Secondly, it provides that “a report complying with the GEPI must be given to the insurer”.

11. Thereafter, it seems to me that the insurer's obligation to give a notice of assessment is triggered by (and only by) the insurer's receipt of a valid GEPI report. That is, s 185(1) provides that the insurer must give a notice of assessment “within 10 business days after receiving the assessment of the worker's permanent impairment”. I would read the reference to “the assessment” in s 185(1) as being a reference to the “report” referred to in s 179(3) (or the DPI assessment within that report).

Construing the GEPI

12. The GEPI's status as a “statutory instrument” under the SI Act has implications for the way in

11 See the discussion of McGill DCJ in *Wallace v Queensland Racing* [2007] QDC 168, [21].

12 And, the term “DPI” is correspondingly defined to mean “an estimate, expressed as a percentage, of the degree of the worker's permanent impairment assessed and decided in accordance with the GEPI”: Act, Sch 6.

which the GEPI is to be construed. **First**, the GEPI is to be construed as operating “to the full extent of, but not to exceed, the power conferred by the law under which it is made”.¹³ That is, if any part of the GEPI exceeds the power granted by the Act then it is to be read down so as not to exceed that power.¹⁴

13. **Secondly**, words and expressions that are used in the GEPI have the meanings given to them in the dictionary to the Act (Sch 6)¹⁵ and the meanings that appear in the more general dictionary of commonly used words and expressions in the AI Act (Sch 1).¹⁶

14. **Thirdly**, certain provisions of the AI Act apply to the GEPI as if it were an Act.¹⁷ For example:

(a) Headings, examples, notes (but not footnotes), schedules, appendices and punctuation are all deemed to be part of the GEPI.¹⁸

(b) Any examples used in the GEPI are “not exhaustive” and, whilst they cannot limit the meaning of a provision they “may extend” the meaning (although, in the case of inconsistency, the provision prevails over the example).¹⁹

(c) When interpreting a provision of the GEPI, the interpretation that will best achieve the purpose of the GEPI is to be preferred to any other interpretation.²⁰

(d) When interpreting a provision of the GEPI, consideration may be given to “extrinsic material” so as to interpret an “ambiguous or obscure” provision; to provide an interpretation that avoids a “manifestly absurd” or unreasonable result obtained from the “ordinary meaning” of the provision; or to confirm the interpretation conveyed by the ordinary meaning.²¹

(e) If the GEPI requires a person making a decision to “give written reasons for the decision

13 SI Act, s 21(1); *Kelsall v State of Queensland* [2011] QSC 321, [24].

14 *Queensland Law Society Incorporated v Sande (No 2)* [1998] 1 Qd R 273, 291.

15 SI Act, s 37.

16 SI Act, ss 14, 17 and 36 and Sch 1.

17 SI Act, s 14 and Sch 1 (and compare s 19 and Sch 2).

18 AI Act, s 14 and SI Act, s 14B. As to headings, see also AI Act, s 35C(1).

19 AI Act, s 14D.

20 AI Act, s 14A.

21 AI Act, s 14B and SI Act, s 15.

(whether the expression 'reasons', 'grounds' or another expression is used)", then the person "must also ... set out the findings on material questions of fact; and ... refer to the evidence or other material on which those findings were based".²²

- (f) Part 8 of the AI Act, which deals with various terms and references, governs the interpretation of the GEPI. This includes the principles that "words in the singular include the plural" (and vice versa),²³ reference to a person generally includes reference to a corporation,²⁴ references to an office or jurisdiction is impliedly a reference to that office or jurisdiction in Queensland,²⁵ and (in relation to powers) "may" means a discretion and "must" means the "power is required to be exercised."²⁶
- (g) The AI Act concepts of distance, time and age are applicable to the GEPI.²⁷
- (h) If a form is prescribed or approved under the GEPI, strict compliance with the form is not necessary and substantial compliance is sufficient.²⁸

15. The GEPI deals, of course, with detailed medical matters (and, to some extent, incorporates aspects of the AMA Guides, 5th Edition). For that reason, it may be that the interpretation of some of its language might depend upon technical medical knowledge and such evidence could be relevant to a court or tribunal that is called upon to carry out that interpretation.²⁹ Ultimately, however, the GEPI is a legal document and its interpretation is a legal task.³⁰

Judicial review

16. There may be several circumstances in which interpretation of the GEPI becomes important in judicial review proceedings:

22 AI Act, s 27B.

23 AI Act, s 32C.

24 AI Act, s 32C.

25 AI Act, s 35.

26 AI Act, s 32CA.

27 AI Act, Part 9.

28 AI Act, s 48A.

29 *Woodward v Repatriation Commission* (2003) 131 FCR 473, 493-4; *Vic WorkCover Authority v Elsdon* [2013] VSCA 235, [84].

30 See, for example, *Collector of Customs v Agfa Gevaert Ltd* (1996) 186 CLR 389 (where the interpretation of the phrase "silver dye bleach reversal process" was in issue).

- (a) Where a worker is attempting to obtain a 6% impairment rating as a prerequisite to seeking common law damages.
- (b) Where a worker is attempting to obtain a 20% or higher impairment rating for the purposes of lump sum compensation.
- (c) Where the worker will be unable to establish common law liability, and so is seeking to maximise compensation through the permanent impairment assessment.
- (d) Where there is a dispute between a worker and an insurer as to whether a permanent impairment assessment (or subsequently issued notice of assessment is valid). One example is where an insurer refuses to issue a notice of assessment because it has formed the view that the assessor has failed to comply with the GEPI.

17. There might, of course, be other relevant scenarios.

18. As noted, s 179(3) of the Act makes it clear that assessments of permanent impairment must be made in accordance with the GEPI. In judicial review terms, the GEPI provides several fertile areas for potential review:

- (a) The GEPI contains procedures which the decision-maker is required by law (ie, s 179(3)) to observe.³¹ A failure to observe those procedures might justify setting aside a decision or assessment purporting to be made under the GEPI.³²
- (b) The Medical Assessment Tribunal is statutorily required to give a statement of reasons for its decision,³³ and the GEPI itself arguably requires assessing doctors to do the same.³⁴ There may be reviewable error if the Tribunal (or an assessing doctor) fails to adequately set out its actual path of reasoning in sufficient detail to enable a Court to discern whether or not the opinion involves any error of law.³⁵

31 See *Judicial Review Act 1991*, s 20(2)(b).

32 See *Griffin v State of Queensland* [2016] QSC 43, [17] re procedures for apportionment where there is pre-existing impairment.

33 The Act, s 516.

34 See GEPI, paras 1.31 and 1.56.

35 See *Griffin v State of Queensland* [2016] QSC 43, [28]; *Willis v State of Queensland* [2016] QSC 80, [11].

(c) The GEPI uses complex phrases and expressions. The interpretation of many such phrases and expressions will involve questions of law, and an error by the Tribunal or an assessing doctor in that interpretation may amount to an error of law justifying setting aside the decision or assessment.

19. This list is not, of course, intended to be conclusive.

20. Useful discussions of the GEPI in the context of judicial review appear in *Griffin v State of Queensland* [2016] QSC 43 and *Willis v State of Queensland* [2016] QSC 80. In both cases, Medical Assessment Tribunal decisions were set aside in the context of non-compliance with GEPI requirements. In *Willis* in particular, the Court held that there was reviewable error if the Tribunal failed to include in its decision the type of content required by the GEPI (see *Willis* at [21] and *Griffin* at [27]).

Summary

21. When undertaking assessments for the purposes of the GEPI, the Medical Assessment Tribunal and assessing doctors utilise specialist medical knowledge. They exercise elements of judgement and discretion. Often, the assessments are brief and couched in terms that suggest that the opinion is beyond challenge. It is not.

22. If an assessment has not been done “in accordance with the GEPI”, or a “report complying with the GEPI” has not been provided, there will have been non-compliance with s 179(3) of the Act. If that non-compliance can be established, then there will likely be grounds to challenge the assessment. The question of compliance with the GEPI is one of law, rather than one of medical expertise.

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