IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S 50 OF 2012

BETWEEN: **COMMONWEALTH OF AUSTRALIA**
Appellant

AND: **ALI KUTLU**
First Respondent

DIRECTOR OF PROFESSIONAL SERVICES REVIEW
Second Respondent

BRUCE WALLACE INGRAM, PAUL DAVID HANSON AND TIMOTHY JOHN FLANAGAN CONSTITUTING THE PROFESSIONAL SERVICES REVIEW COMMITTEE No 530
Third Respondent

CHIEF EXECUTIVE OFFICER OF MEDICARE AUSTRALIA
Fourth Respondent

DETERMINING AUTHORITY No 530 ESTABLISHED BY SECTION 106Q OF THE HEALTH INSURANCE ACT 1973 (CTH)
Fifth Respondent

NO S 51 OF 2012

BETWEEN: **COMMONWEALTH OF AUSTRALIA**
Appellant

AND: **DR ROBERT CLARKE**
First Respondent

DR LEON SHAPERO, DR RODNEY McMAHON AND DR BRIAN MORTON CONSTITUTING THE PROFESSIONAL SERVICES REVIEW COMMITTEE NO 631
Second Respondent

DETERMINING AUTHORITY ESTABLISHED BY SECTION 106Q OF THE *HEALTH INSURANCE ACT 1973 (Cth)*
Third Respondent

THE DIRECTOR OF PROFESSIONAL SERVICES REVIEW
Fourth Respondent

Filed on behalf of the Appellant on 9 March 2012 by:

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NO S 52 OF 2012

BETWEEN: **COMMONWEALTH OF AUSTRALIA**
Appellant

AND: **DR IL-SONG LEE**
First Respondent

WAL GRIGOR, PATRICK TAN AND DAVID RIVETT IN THEIR CAPACITY AS PROFESSIONAL SERVICES REVIEW COMMITTEE No 292
Second Respondent

CHIEF EXECUTIVE OFFICER OF MEDICARE AUSTRALIA
Third Respondent

DETERMINING AUTHORITY ESTABLISHED BY SECTION 106Q OF THE HEALTH INSURANCE ACT 1973 (CTH)
Fourth Respondent

THE DIRECTOR OF PROFESSIONAL SERVICES REVIEW
Fifth Respondent

NO S 53 OF 2012

BETWEEN: **COMMONWEALTH OF AUSTRALIA**
Appellant

AND: **DR IL-SONG LEE**
First Respondent

BERNARD KELLY, ELIZABETH MAGASSY AND VAN PHUOC VO IN THEIR CAPACITY AS PROFESSIONAL SERVICES REVIEW COMMITTEE NO 348
Second Respondent

CHIEF EXECUTIVE OFFICER OF MEDICARE AUSTRALIA
Third Respondent

DETERMINING AUTHORITY ESTABLISHED BY SECTION 106Q OF THE HEALTH INSURANCE ACT 1973 (CTH)
Fourth Respondent

DIRECTOR OF PROFESSIONAL SERVICES REVIEW
Fifth Respondent

NO S 54 OF 2012

BETWEEN: **THE MINISTER OF STATE FOR HEALTH**
Appellant

AND: **PAUL CONDOLEON**
First Respondent

DIRECTOR OF PROFESSIONAL SERVICES REVIEW
Second Respondent

BRUCE WALLACE INGRAM, PAUL DAVID HANSON AND TIMOTHY JOHN FLANAGAN CONSTITUTING THE PROFESSIONAL SERVICES REVIEW COMMITTEE NO 580
Third Respondent

CHIEF EXECUTIVE OFFICER OF MEDICARE AUSTRALIA
Fourth Respondent

DETERMINING AUTHORITY ESTABLISHED BY SECTION 106Q OF THE HEALTH INSURANCE ACT 1973 (CTH)
Fifth Respondent

SUBMISSIONS OF THE APPELLANT

PART I: CERTIFICATION FOR PUBLICATION ON THE INTERNET

1. These submissions are in a form suitable for publication on the internet.

PART II: THE ISSUES

2. Does the Minister's non-compliance with the statutory requirements for consultation, under ss 84(3) and 85(3) of the *Health Insurance Act 1973* (**the Act**), before appointing medical practitioners:

   (a) to the Professional Services Review Panel (the **PSR Panel**) under s 84(2) of the Act; and

   (b) to the position of Deputy Director of Professional Services Review under s 85(1) of the Act,

   result in the invalidity of (i) those appointments; and (ii) certain other acts and decisions taken under the Act by, or in relation to, those medical practitioners?

3. If the legislature intended that non-compliance with the consultation requirements imposed by ss 84(3) and 85(3) of the Act would result in the invalidity of appointments made under ss 84(2) and 85(1) respectively, does the de facto officer doctrine apply to preserve the validity of certain acts and decisions taken under the Act by, or in relation to, those medical practitioners?

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

4. The appellant certifies that it has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth), and is of the view that no such notice is required for the purposes of its arguments on the appeal.

5. The appellant notes that the first respondent has filed a notice of contention and that a notice under s 78B of the *Judiciary Act* has been served in relation to the argument raised in the notice of contention.

PART IV: CITATION OF REASONS FOR JUDGMENT

6. The reasons for judgment of the Full Court of the Federal Court have been reported as *Kutlu v Director of Professional Services Review* (2011) 197 FCR 177.

PART V: FACTS

7. In 2010, a number of general practitioners commenced proceedings in the Federal Court seeking judicial review of decisions made by Professional Services Review (**PSR**) Committees constituted under Part VAA of the Act.

8. Each of the proceedings challenged the validity of particular appointments that the Minister made to the PSR Panel, from which the relevant PSR Committees were constituted, and/or appointments of persons to the position of Deputy Director of PSR. The basis of the challenge was that the Minister had failed to consult the Australian Medical Association (**AMA**) before making those appointments, as was required by ss 84(3) and 85(3) of the Act. In their joint reasons, Rares and Katzmann JJ summarised the key agreed facts in the five proceedings which were referred to the Full Court as follows (at [3]-[4, emphasis in original):

> In 2005, without first consulting the AMA, the then Minister appointed as Deputy Directors, three medical practitioners, who were also then Panel members. In 2009, the present Minister re-appointed some Panel members without first consulting the AMA on those appointments. In addition, in 2009 the Minister also appointed as Deputy Directors some medical practitioners, who were then Panel members, without first consulting the AMA or expressly re-appointing them as Panel members.
>
> Each of the appointees was a member or Deputy Director of a Professional Services Review Committee (**Committee**) that made adverse findings against each of the five applicant medical practitioners in conducting reviews of those practitioners' rendering of professional services for which the Commonwealth paid Medicare benefits. In late 2010, the Commonwealth made public that the Ministers had not complied with the statutory requirement of prior consultation before making, among others, those appointments. The five medical practitioners contend that the consequence is that the Committees were not validly constituted and the findings by those Committees against them are of no effect.

9. On 8 April 2011, Flick J made orders in each of the five proceedings which are now before this Court, referring six questions for separate determination by the Full Court. The first, second and third questions were concerned with the legal consequences of the failure on the part of the Minister to consult with the AMA in relation to Deputy Director appointments made in 2005 (Q.1) and 2009 (Q.3), and PSR Panel appointments made in 2009 (Q.2). For each of those categories of appointment, the questions respectively asked:

   (a) were the purported appointments of the persons in question invalid and of no effect?

   (b) were the PSR Committees to which one or more such persons was appointed invalidly constituted?

   (c) were purported referrals by the Director of PSR to PSR Committees constituted by one or more such persons invalid and of no effect?

   (d) were any of the purported draft and final reports of PSR Committees constituted by one or more such persons invalid and of no effect?

10. In the case of the Deputy Director appointments made in 2005, a further question was asked as to whether any of the purported draft and final determinations made by the Determining Authority were invalid and of no effect (Q.1(e)).

11. The Full Court answered each of the sub-questions in the first three questions 'Yes'. In light of those responses, the Court found it unnecessary to answer the fourth and fifth questions, which dealt with an alternative basis of invalidity in respect of the 2009 Deputy Director appointments, although Flick J expressed an obiter view on that issue (at [106]-[107]; see the plurality's reasons at [38]).

12. The sixth question asked:

> If any question posed in sub-paragraphs 1(a)-(e), 2(a)-(d), 3(a)-(d) and 5(a)-(d) is answered 'Yes', does the de facto officer doctrine affect the claim of any applicant to relief in respect of any such invalidity and, if so:
>
> a. which applicant(s)? and
>
> b. how is such claim affected?

13. The Full Court concluded that the de facto officer doctrine did not affect the claim of any applicant (at [39]-[48] per Rares and Katzmann JJ, at [108]-[121] per Flick J).

PART VI: ARGUMENT

The legal effect of non-compliance with s 84(3) or s 85(3) of the Act

14. It is well settled that the effect of non-compliance with a condition or procedure regulating the exercise of a statutory power depends on the existence or otherwise of a legislative purpose to invalidate any act that fails to comply with the condition or procedure.[1] The existence of that purpose 'is ascertained by reference to the language of the statute, its subject matter and objects and the consequences for the parties of holding void every act done in breach of the condition'.[2] An obligation imposed in peremptory language may either pre-condition the very existence of statutory power or, alternatively, govern the manner of exercise of the power.

15. The appellant contends that the Full Court erroneously discerned a legislative purpose to invalidate not only the challenged appointments to the PSR Panel, and to the position of Deputy Director, where the Minister had not complied with the consultation requirements in ss 84(3) and 85(3), but also every act of any Committee constituted by one or more of those appointees. In so doing, the Full Court attached undue weight to (i) one aspect of peer review under the PSR Scheme; and (ii) the obligatory language contained within those provisions, at the expense of:

    15.1. clear textual indicators within ss 84(3) and 85(3) (reinforced when compared to other provisions) that the requisite purpose did not exist;

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1 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (*Project Blue Sky*) at 388-389 [91] per McHugh, Gummow, Kirby and Hayne JJ.

2 *Project Blue Sky* at 388-389 [91] per McHugh, Gummow, Kirby and Hayne JJ.

15.2. the public interest objects of the PSR Scheme; and

15.3. the consequences, including to public health and safety, of holding void every act done in breach of the consultation requirements.

Overview of the PSR Scheme

16. Part VAA of the Act establishes the Professional Services Review Scheme (the **PSR Scheme**). The main features of the PSR Scheme are set out in s 80. The object of Part VAA, which is set out in s 79A of the Act, is:

> ...to protect the integrity of the Commonwealth medicare benefits and pharmaceutical benefits programs and, in doing so:
>
> (a) protect patients and the community in general from the risks associated with inappropriate practice; and
>
> (b) protect the Commonwealth from having to meet the cost of services provided as a result of inappropriate practice.

17. The Part performs an important oversight role in the context of the Act, which establishes a regime for the payment of medical benefits and hospital services. Part II of the Act prescribes the processes for the payment of medical benefits, known as 'medicare benefits'.

18. Pursuant to s 10(1) of the Act, a medicare benefit is only payable where medical expenses are incurred in rendering 'a professional service' to an eligible person (which includes all Australian residents). The term 'professional service' is exhaustively defined in s 3 of the Act, and includes, relevantly for present purposes:

> (a) a service (other than a diagnostic imaging service) to which an item relates, being a clinically relevant service that is rendered by or on behalf of a medical practitioner.

19. The definition of that service imports a number of further definitions under the Act, including 'medical practitioner'.[3] That term is relevantly defined in s 3 of the Act to mean 'a person registered or licensed as a medical practitioner under a law of a State or Territory that provides for the registration or licensing of medical practitioners'.

20. The PSR Scheme is described, in s 80(2) of the Act, as one 'for reviewing and investigating the provision of services by a person to determine whether the person has engaged in inappropriate practice'. Its operation is triggered by the

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[3] Other requirements imposed by the definition of 'professional service' are (i) that the service must be one that meets the description of an 'item', being an item in one of the tables which sets out the services for which benefits will be payable (see ss 4ff); and (ii) the service must be a 'clinically relevant service', being one rendered by, relevantly, a medical practitioner, that is generally accepted in that profession as being necessary for the appropriate treatment of the patient to whom it is rendered.

Chief Executive Medicare requesting the Director of PSR to review a person's provision of services (s 86).[4]

21. At the conclusion of a review, the Director may decide to take no further action (s 91), reach an agreement with the person pursuant to s 92, or refer the matter to a PSR Committee (s 93). Pursuant to s 95(1), a PSR Committee is to consist of a Chairperson, being a Deputy Director who is appointed by the Minister under s 85, and at least two but not more than four members of the PSR Panel.

22. The PSR Panel is established under s 84(1) of the Act and consists of 'practitioners appointed by the Minister' (s 84(2)). The definition of 'practitioner' in s 81 covers a wide range of practitioners who may be subject to investigation under Part VAA, and includes medical practitioners. A wide range of appointments must be made to the Panel because (i) if the person under review is the practitioner who initiated or rendered the services the subject of the referral, s 95(2) stipulates that the Chairperson and at least two other members must be practitioners who belong to the *profession* in which the practitioner was practising when the services were rendered or initiated;[5] and (ii) if the practitioner under review was a specialist or general practitioner, the two Panel members (ie. other than the Chairperson) must be similarly qualified. Subsections 95(1)(c) and (6) deal with appointment of additional Panel member(s) to a PSR Committee where the Director thinks it desirable to do so in order to give the Committee a wider range of clinical expertise.

23. Upon referral of a matter to it, a PSR Committee is 'to investigate whether the person under review engaged in inappropriate practice in providing the services specified in the referral' (s 93(1)). A Committee constituted in accordance with s 95 is well placed to determine whether a practitioner has engaged in 'inappropriate practice', as that term is defined in s 82(1), by reference to the standards generally held by the general body of relevant practitioners. A general practitioner will, for example, engage in inappropriate practice 'if the practitioner's conduct in connection with rendering or initiating services is such that a Committee could reasonably conclude that':

    (a) if the practitioner rendered or initiated the services as a general practitioner – the conduct would be unacceptable to the general body of general practitioners.

24. If the Committee finds that the person has engaged in inappropriate practice as defined, it will report that finding to the Determining Authority (s 106L). The Determining Authority then decides what action to take, with the options including a reprimand, repayment of medicare benefits, and, where the person

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4 As at the time the challenged 2005 appointments were made, the Health Insurance Commission referred matters to the Director of PSR under s 86. By the time of the challenged 2009 appointments, it was the Chief Executive Medicare, then known as the 'Medicare Australia CEO'.

5 A person under review may also be a person who knowingly, recklessly or negligently causes, or knowingly, recklessly or negligently permits, a practitioner employed by the person to engage in conduct that constitutes inappropriate practice by the practitioner within the meaning of s 82(1), or an officer of a body corporate whose conduct can be similarly described with respect to a practitioner who is employed by the body corporate: see s 82(2).

is a practitioner, full or partial disqualification from providing services which attract medicare benefits (s 106U). Medicare benefits are not payable in respect of services rendered by a disqualified practitioner (s 19B).

25. Under the PSR Scheme, provision also exists for adverse health and safety issues which come to light to be notified for follow-up: see, for example, ss 106KC, 106M, 106N, 106XA, and 106XB. The significance of these provisions is dealt with below.

Statutory language and subject matter

26. In their joint judgment, Rares and Katzmann JJ attached considerable significance to peer review as an element of the PSR Scheme, as is apparent from the syllogistic reasoning in the following paragraph (at [20]):

> The appointment process contemplated in ss 84 and 85 is intended not only to ensure public confidence in the decisions reached after involvement of Committees, but also to ensure the confidence of the relevant professions, as well as the professional whose conduct is being reviewed. In the case of medical practitioners, that process was intended by the Parliament to be one for which the persons carrying out the review had been selected only after the Minister had received advice from the AMA and, through it, any other relevant professional organisation or association about a proposed appointee. It follows that the provisions of ss 84(3) and 85(3) provide indicia of a legislative intention that prior consultation by the Minister is an essential prerequisite to the validity of an appointment of officeholders under those sections. (Emphasis added)

27. Pre-appointment consultation was undoubtedly seen by the Parliament as important: it is, after all, an express requirement in ss 84(3) and 85(3). However, two errors made by their Honours were (i) interpreting ss 84(3) and 85(3), including the purpose of consultation, as directed to the actual provision of advice from the AMA before the making of any appointment; and (ii) ascribing to various 'consultation' provisions under Part VAA the same general level of importance and then equating that level of importance with intended indispensability. The first stated error appears to have caused or contributed to the second error. Their Honours also attached insufficient weight to a number of other matters which indicate that Parliament did not intend non-compliance with the consultation requirements to invalidate ministerial appointments to the PSR Panel or appointments of Panel members as Deputy Directors.

28. Each of ss 83, 84, 85 and 106ZPB of the Act, which deal with the appointment of the Director of PSR, PSR Panel members, Deputy Directors of PSR, and Determining Authority members respectively, contain a consultation requirement,[6] but s 83 expressly prohibits the Minister appointing a Director of PSR unless the AMA has agreed to the appointment. By contrast, although ss 84(3) and 85(3) impose a requirement to consult with the AMA before making an appointment, the Minister may take this action whether or not the AMA agrees. Indeed, the consultation obligations imposed by ss 84(3) and 85(3) do not require the Minister to receive any response from the AMA, let alone a response which endorses the appointment. Further, unlike ss 83(2)

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[6] The consultation obligation in s 83(2) is implicit rather than express.

and 106ZPB(2), ss 84(3) and 85(3) do not express an emphatic prohibition in easily enforced, rule-like terms.

29. Justices Rares and Katzmann considered that the differently expressed roles played by the AMA in various other appointment processes did 'not gainsay the purpose of requiring the Minister to consult with, *and be advised by*,[7] the AMA before appointing Panel members and Deputy Directors under ss 84(3) and 85(3)' (at [18], emphasis added). It may be readily accepted that consultation is purposive, but consultation obligations may be differently expressed and have different purposes and levels of importance. There is a clear and obvious contrast between the terms in which consultation requirements are expressed in the various provisions which is highly relevant to a *Project Blue Sky* analysis and which their Honours did not properly address. Thus, it is far from self-evident that s 106ZPB(2) merely 'expresses in prohibitory language *the same concept* that ss 84(3) and 85(3) express in positive language' (as found by Rares and Katzmann JJ at [18], emphasis added).

30. The difference between the formulations is certainly not properly addressed or explained by simply attaching a general level of importance to the peer-review purpose underpinning the provisions. Even then, the point remains that if Parliament had intended consultation with the AMA to be an essential precondition to appointments of Panel members and Deputy Directors, it could have used the more emphatic language deployed in ss 83(2) and 106ZPB(2), 'must not appoint ... unless'.[8] Instead, Parliament pointedly chose to use an alternative formula 'before appointing ... the Minister must' – an alternative which is less emphatic and which lacks an easily enforced rule-like quality (noting that the consultation obligations imposed by ss 84(3) and 85(3) are considerably more complicated than those which are stated in ss 83(2) and 106ZPB(2)).

31. There is no requirement that the consultation required by ss 84(3) and 85(3) must be in writing, or any prescribed procedure by which a person can ascertain whether the Minister has undertaken the requisite consultation. In *Australian Broadcasting Corporation v Redmore Pty Ltd*, Mason CJ, Deane and Gaudron JJ considered these factors to be relevant in deciding that breach of an explicit and important statutory stipulation did not sound in invalidity.[9]

32. The language used in s 84(3) and s 85(3) is indeterminate, with flexibility inherent in the terms 'before', 'consult' and 'arrangement'. The indeterminacy of language has added significance where the process contemplated by s 84(3) and s 85(3) includes 'multiple consultation'. In this context the Minister has no readily enforceable control over:

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7 The plurality also referred to provision of actual advice from the AMA at [19], [20], [24], [27], and [33].

8 See *Bond v WorkCover Corporation (SA)* (2005) 93 SASR 315 at 331 [61], 336 [80]; *Attorney-General (NSW); ex rel Franklins Stores Pty Ltd v Lizelle Pty Ltd* [1977] 2 NSWLR 955 at 969.

9 (1989) 166 CLR 454 at 457.

32.1. the nature and extent of the 'arrangement' with the AMA, which must be agreed;

32.2. the timing of a response, if any, from the AMA;

32.3. the AMA's garnering of relevant responses, if any, from other organisations and associations; or

32.4. the AMA's provision of advice, if any, to the Minister.

Indeed, the AMA itself has no enforceable control over the time other organisations and associations may take to respond to any invitation from it to comment; and ss 84(3) and 85(3) do not constrain the Minister from making such appointments in the absence of a response from the AMA. In the absence of any response, difficult evaluative questions will arise as to whether sufficient has been done to satisfy the requirement of consultation.

33. Where a statutory requirement lacks a rule-like quality *which can be easily identified and applied,* it is less likely that the legislature intended the requirement to be a pre-condition to the very existence of the relevant power.[10] Under both ss 84(3) and 85(3), there is room for 'widely differing opinions as to whether or not [the] particular function has been carried out in accordance with' the requirement of consultation.[11] The indeterminacy with which the content of the consultation requirement is formulated is inconsistent with a legislative intention to invalidate appointments made in non-compliance with that requirement.[12]

34. Precisely the same language concerning consultation in ss 84(3) and 85(3) appears in ss 84(4) and 85(4), which impose a consultation requirement on the Minister in relation to the appointment of practitioners other than medical practitioners. By contrast with ss 84(3) and 85(3), however, the organisations and associations to be consulted where other practitioners are concerned are identified only by reference to whether the Minister thinks consultation with them is 'appropriate'. Which, if any, associations or organisations should be consulted in making these appointments is left in the hands of the Minister. With that being the case, it is unlikely that the absence of consultation under

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10 *Project Blue Sky* (1998) 194 CLR 355 at 391 [95] per McHugh, Gummow, Kirby and Hayne JJ.

11 *Project Blue Sky* (1998) 194 CLR 355 at 391 [95]. Even if, as found by Flick J at [72], the meaning of 'consultation' is clear, what amounts to consultation is inherently flexible and will vary according to the nature and circumstances of the case.

12 *Project Blue Sky* (1998) 194 CLR 355 at 391-392 [96]. See also *Yates Security Services v Keating* (1990) 25 FCR 1, in which the Full Court of the Federal Court considered the effect of non-compliance with a requirement that in specified circumstances the Minister 'shall inform' the Australian Heritage Commission of a proposed action. Two members of the Court held that the duty was not enlivened, but Pincus J held that non-compliance with the requirements did not render invalid a decision to revoke a prohibition order made under foreign acquisitions legislation. The provision imposing that and other requirements were, in his Honour's opinion, 'essentially a prescription of administrative procedures to be observed within government and impose[d] no obligation upon citizens, who may be adversely affected by invalidation' (at 27-28).

ss 84(4) and 85(4) was intended to result in invalidity.[13] It is also unlikely, given they both deal with appointments to the same Panel or position, that different consequences (in terms of validity or invalidity) were intended to attend non-compliance with ss 84(3) and 85(3) on the one hand, and ss 84(4) and 85(4) on the other.

35. There are no rights created by ss 84 and 85 which are enforceable at the instigation of a 'person under review'. Indeed, such a person will usually not be ascertainable when the relevant consultation is to be undertaken, and he or she is unlikely, as noted above, to know whether consultation has occurred. In *Attorney-General (NSW); ex rel Franklins Stores Pty Ltd v Lizelle Pty Ltd*, the private nature of the consultation obligation, and the absence of any contemporaneous mechanism for enforcement of that obligation at the instance of a private person, were considered to be indicators against invalidity.[14] Similarly, in *TVW Enterprises Ltd v Duffy & ABT (No 2)*, Toohey J attached significance to the fact that the consultation obligation there in question did not enlarge or enliven any enforceable private right.[15] In upholding his Honour's decision on appeal, and concluding that non-compliance with the consultation requirement did not result in invalidity, Sweeney J, Sheppard J and Beaumont J separately emphasised the significance of the non-public nature of the consultation process.[16]

36. Section 96 of the Act confers an express entitlement on a person under review to challenge the appointment of a Committee member, which is limited to the grounds of bias or likely bias, or reasonable apprehension of bias. The presence of this entitlement suggests that if the legislature had intended non-compliance with the underlying consultation requirement in ss 84(3) or 85(3) to result in invalidity, it would have made express provision for persons under review to mount a challenge to the appointment of Committee members on that basis.

37. The limited statutory functions reposed in a Deputy Director of PSR also tell against an intention to invalidate those appointments in the event of a failure to consult before appointment. A Deputy Director must, of course, be appointed from the Panel and, accordingly, the Minister will already have had to consult with the AMA in relation to the practitioner in question. Although he or she is the Chairperson of a Committee, a Deputy Director is not, in that capacity, the repository of any special powers or responsibilities of a substantive kind. He or she must convene Committee meetings (s 97), and preside at those meetings

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13 See *Australian Broadcasting Corporation v Redmore* (1989) 166 CLR 454 at 457 per Mason CJ, Deane and Gaudron JJ, where their Honours noted that the provision there in question did not 'spell out the effect on third parties of a failure by the ABC to observe its statutory duty to obtain the Minister's prior approval or speak in terms which would be appropriate to refer to a purported or ineffective entry into a contract'.

14 [1977] 2 NSWLR 955 at 964E, 965D per Reynolds JA; at 978B at Hutley JA, Samuels JA agreeing at 989C.

15 (1985) 7 FCR 172 at 182-183.

16 *TVW Enterprises Ltd v Duffy (No 3)* (1985) 8 FCR 93 at 98 per Sweeney J, at 104-5 per Sheppard J, at 114 per Beaumont J. The approach in *Franklins* and *TVW* were referred to with approval in *Project Blue Sky*: (1998) 194 CLR 355 at 390 [93] (footnote 74), and 392 [97] (footnote 82).

when available (s 99(1)), but when it comes to decision-making the Deputy Director has a deliberative vote only (s 99(5)). Both the limited scope of the functions of the Deputy Director, and the fact that they are already a Panel member when so appointed, tell against an intention to invalidate their appointment if the Minister fails to consult in accordance with s 85(3).

38. The presence of provisions in the Act which preserve, on a precautionary basis, the validity of acts done contrary to various procedural stipulations does not mean that the absence of such preservation from ss 84 and 85 is indicative of a legislative intention to invalidate all appointments which do not conform to the requirements of those sections. As Spigelman CJ observed of the legislation at issue in *R v Janceski*, which will be discussed in further detail below, the scope of such provisions is so wide that it can support the proposition that Parliament did not intend that every other defect, however or whenever occurring, should deprive the act or thing in question (in that case, an indictment) of its legal character.[17]

Objects and purpose of ss 84 and 85 and the Act as a whole

39. The general public interest objectives of the scheme tell strongly against discernment of a legislative intention to invalidate appointments under ss 84 and 85 on the basis of non-compliance with subs (3) in each case.[18]

40. The object of Part VAA, as relevantly set out in s 79A (extracted above), is to secure the public interest in the proper administration of the scheme for the payment of medicare benefits under the Act. In so far as PSR Committees are set up under the Part to investigate and report on the provision of professional services provided by a practitioner, including a medical practitioner, the public interest is served to a significant extent by having their conduct reviewed by persons who have qualified in their profession. Moreover, given that appointments are made by a person with Westministerial accountability it cannot readily be supposed that, in the absence of consultation, appointees are likely to be inexperienced, disreputable, or otherwise unsuitable.

41. The key element of peer review is that those undertaking the review are 'peers', in the sense that they are practitioners who are qualified[19] and experienced in the relevant area. That key element does not depend upon consultation - it is substantially delivered by other provisions of Part VAA. That outcome does not deny the importance and value of consultation. But it cannot readily be supposed that Parliament considered that, absent consultation, peer review would be 'defeated', as found by Rares and Katzmann JJ (at [28]).

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17 (2005) 64 NSWLR 10 at [79].

18 See *Clayton v Heffron* (1960) 105 CLR 214 at 247; *TVW Enterprises Ltd v Duffy (No 3)* (1985) 8 FCR 93 at 105 per Sheppard J, at 114 per Beaumont J; *A-G (NSW); ex rel Franklins Stores v Lizelle* [1977] 2 NSWLR 955 at 978B per Reynolds JA, at 980E-G per Hutley JA (Samuels JA agreeing at 989); *Project Blue Sky* (1998) 194 CLR 355 at 391-393 [94]-[100].

19 The persons appointed have to be 'medical practitioners' as that term is defined, irrespective of consultation.

42. The reasoning of Rares and Katzmann JJ concerning peer review was also reflected in the reasons for judgment of Flick J, who was similarly influenced by the fact that the duty to consult was not intended to be empty (at [78]) or 'a mere technicality or mere formality having little significance' (at [81]). However, this reasoning did not find favour in *Project Blue Sky*.[20] In undertaking a *Project Blue Sky* analysis the options presented are not simply a choice between (i) finding invalidity as an intended consequence; or (ii) rendering an obligation pointless, empty, or merely technical.[21]

43. In circumstances where the requirement for consultation is not fundamental to the achievement of the object in s 79A of the Act, the Full Court erred in discerning a legislative intention to invalidate appointments on that basis. The objects of Part VAA are better served if non-compliance with the obligation to undertake pre-appointment consultation is not interpreted as invalidating appointments so affected and all subsequent Committee processes.

The consequences of invalidity and public inconvenience

44. The public consequences of invalidity are a significant factor in construing ss 84(3) and 85(3). As the majority stated in *Project Blue Sky*:[22]

> Courts have always accepted that it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act. Having regard to the obligations imposed on the ABA by s 160, the likelihood of that body breaching its obligations under s 160 is far from fanciful, and, if acts done in breach of s 160 are invalid, it is likely to result in much inconvenience to those members of the public who have acted in reliance on the conduct of the ABA.

45. A number of points may be made in respect of this passage:

    45.1. all of the comments are apposite to non-compliance with ss 84(3) and 85(3) of the Act;

    45.2. in support of the first sentence the majority cited three cases, two of which could broadly be described as 'consultation' cases, and all of which identified public inconvenience as a critical factor on the question of invalidity; and

    45.3. the result in *Project Blue Sky* ultimately turned on an examination of the scope of public inconvenience that may have resulted from a finding of invalidity.[23]

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20 (1998) 194 CLR 355 at 393 [100].

21 If any of the doctors in the present cases had challenged the composition of any of the Committees in the course of the review, on the basis of a failure to comply with the consultation requirement in s 84 or s 85, it would have been open to the Court to grant an injunction.

22 (1998) 194 CLR 355 at 392 [97], citations omitted.

23 See (1998) 194 CLR 355 at 392-393 [97]-[99], particularly the concluding words of [98] and the commencing words of [99].

46. Justices Rares and Katzmann explicitly discounted the significance of public inconvenience on the bases that the magnitude of the consequences were:

46.1. 'simply the product of the scale of the breaches of both Ministers' statutory obligations over a considerable period' (at [25]); and

46.2. unlikely to have been anticipated by Parliament (at [25] and [32]).

Flick J adopted a similar approach (at [98]). In proceeding in this way their Honours distracted themselves from properly construing the statute in accordance with *Project Blue Sky*.

47. Further, Rares and Katzmann JJ explicitly weighed public inconvenience against the effect of the 'express words' of ss 84(3) and 85(3), which their Honours interpreted (absent consideration of public inconvenience) as imposing *essential* preliminaries or *preconditions* to appointments thereunder. Their Honours concluded that the scale and magnitude of public inconvenience did 'not displace the express words of ss 84(3) and 85(3)' (at [27]). Justice Flick adopted a similar approach in finding that the use of 'must' in ss 84(3) and 85(3) (as opposed to 'may' in s 90) was a valuable guide to resolving the issue of statutory construction (at [77]). Further, his Honour held that the text and context of the provisions did not admit of ambiguity so as to permit resort to public inconvenience as an aid to statutory construction (at [97]).

48. In so proceeding, their Honours erred. Whilst the express words of ss 84(3) and 85(3) clearly mean that compliance is not within the discretion of the Minister, those words do not of themselves establish (either in a prima facie sense or conclusively) that consultation was intended to impose a precondition to the existence of power. Further, the avoidance of public inconvenience as a component of a *Project Blue Sky* analysis does not come into play only after consideration of other factors and/or in the event of ambiguity.

49. A finding, in a final report issued by a PSR Committee under s 106L of the Act, that the person under review has engaged in inappropriate practice, enlivens the power of the Determining Authority to issue a draft determination under s 106T, followed by a final determination under s 106TA, that contains directions relating to the person who has been found by the Committee to have engaged in inappropriate practice. Pursuant to s 106U, the sanctions that may be applied include repayment of benefits and/or disqualification of a practitioner, with the consequence that medicare benefits are not payable in respect of services rendered or initiated by that person. If the failure to consult results in the invalidity of an appointment to the Panel, or an appointment to the position of Deputy Director, and a PSR Committee is invalidly constituted because a member of the Committee was not validly appointed, public confidence in the scheme would be seriously undermined. For instance, the legality of a range of important acts and decisions (of the kind in issue in these proceedings), and recovery of medicare benefits, would be subject to uncertainty unless and until the issue was raised and a court ruled on the question of compliance.

50. Other unsatisfactory consequences flowing from invalidity include:

50.1. issues would arise as to the existence of immunity and other protections for Committee members, witnesses and others (see s 106F of the Act, which confers immunities and protections on Committee members);

50.2. the ability to take action in respect of inappropriate practice in the period allowed by the Act may be lost (see ss 86 and 94 of the Act);

50.3. secrecy provisions of the Act may have been breached – resulting in the unintended commission of criminal offences (see s 130(1));

50.4. compulsory processes such as those under ss 102(4), 105(1), 105A and 106B would be confounded;

50.5. criminal prosecutions for breaches of offence provisions (such as ss 106D, 106E and 106EA) would be affected; and

50.6. follow-up action to protect the revenue, and the health and safety of patients, would be compromised (see, for example, ss 106KC, 106M, 106N, 106XA and 106XB).

51. The last of these factors is of particular significance. It is clear that, under the Act, PSR Committees play an important role in identifying practitioners who may be putting patients at risk through poor clinical care. The scale of the potential public health consequences that might flow from the construction adopted by the Full Court are disproportionate to the public interests served by consultation.

52. Aside from the particular statutory context of Part VAA of the Act, the Full Court's approach to the consultation requirement may have consequences for other statutory appointments. A requirement to consult is frequently a feature of appointments made under Commonwealth legislation.[24]

Conclusion on invalidity of appointments and consequences thereof

53. For the reasons outlined above, the Full Court erred in answering in the affirmative each of the first three questions which were raised in respect of each challenged set of appointments.

The de facto officer doctrine

54. The Court would only need to resolve this issue if it were not to accept the Commonwealth's primary argument that the Full Court erred in its application of the principles in *Project Blue Sky* to ss 84(3) and 85(3) of the Act. The arguments below proceed on that basis.

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[24] See for example *Agricultural and Veterinary Chemicals (Administration) Act 1992* (Cth) s 17; *Australian Radiation Protection and Nuclear Safety Act 1998* (Cth) ss 21, 24 and 27; *National Health Act 1953* (Cth) s 98A; *Fisheries Administration Act 1991* (Cth) s 13; *Gene Technology Act 2002* (Cth) ss 100 and 108.

55. The de facto officer doctrine has long been applied in Australia.[25] It also operates in New Zealand,[26] the United States,[27] Canada,[28] and the United Kingdom.[29]

56. In essence, the doctrine provides that 'where an office exists but the title to it of a particular person is defective, "the acts of a de facto officer done in apparent execution of his office cannot be challenged on the ground that he has no title to the office"'.[30] It applies to administrative as well as judicial decision-makers, and it has been accepted that it can apply to protect the acts of a public tribunal that has been improperly constituted.[31]

10 57. The de facto officer doctrine operates to preserve the acts of a de facto officer; it does not operate to confer validity upon the appointment of the officer in question. Indeed, the doctrine is predicated on an invalid appointment, and the distinction between the validity of appointments and the validity of acts done pursuant to an invalid appointment is fundamental to its operation. Further, the doctrine operates only to preclude collateral challenges, such as are involved in

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25 See for example *Hughes v Hughes* (1971) 2 SASR 368 at 378; *Minister for Land v Vaucluse Bowling Club Ltd* [1971] 2 NSWLR 200; *The Queen v Cawthorne; Ex Parte Public Service Association of South Australia Incorporated* (1977) 17 SASR 321 at 333; *Luff v Oakely* (1986) 82 FLR 91; *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503, at 525; *Official Trustee in Bankruptcy v Byrne* (1989) 94 FLR 456 at 476-479; *Balmain Association v Planning Administrator for the Leichhardt Council* (1991) 25 NSWLR 615; *United Services Transport v Evans* [1992] 1 VR 240; *Cassell v The Queen* (2000) 201 CLR 189 at [19]; *MacCarron v Coles Supermarkets Australia Pty Ltd* (2001) 23 WAR 355; *Jamieson v McKenna* (2002) 136 A Crim R 82 at 86; *Giuseppe v Registrar of Aboriginal Corporations* [2006] FCA 1692; *Director of Public Prosecutions (NSW) v Zhang* [2007] NSWSC 308; *Commonwealth v Anti-Discrimination Tribunal (Tasmania)* 2008 169 FCR 85 at 104-105); *Reynolds v Minister for Immigration* (2010) 237 FLR 7.

26 *Re Aldridge* (1893) 15 NZLR 361; *R v Te Kahu* [2006] 1 NZLR 459.

27 *Ball v United States* 140 US 118 (1890); *McDowell v United States* 159 US 596 (1895); *Ex Parte Ward* 19 Scot 459 (1899); *Glidden v Zdanok* 82 S.Ct. 1459 (1962); *Ryder v United States* 115 S.Ct 2031 (1995). Decisions of State Courts include: *State of Louisiana v Smalls* 48 SO 3d 212 (2010); *Florida Bar v Sibley* 95 SO 2d 346; *State v Doyle* 940 A 2d 245 (2007); *County of Los Angeles v California State Water Resources Control Board* 143 Cal.App. 4th (2006); *Marine Forests Society v California Coastal Commission* 113 P 3d 1062 (2005); *Vroman v City of Soldotna* 111 P 3d 343 (2005); *Casamasino v City of New Jersey* 158 N.J. 333 (1999); *Matter of Fichner* 677 A 2d 201 (1996); *R v Smith* 756 P. 2d 1335 (1988); *Murach v Planning and Zoning Commission of the City of New London* 196 Conn 192 (1985); *Mank v Board of Fire and Police Commissioners* 288 N.E. 2d 49 (1972); *Bunker Hill Urban Renewal Project v Goldman* 389 Pacific Reporter 2d 538 (1964).

28 See for example *Reference Re Language Rights under section 23 of the Manitoba Act, and section 133 of the Constitution Act* [1985] 4 W.W.R. 385; *O'Neil v Attorney General of Canada* (1996) 26 S.C.R. 122; *Turigan v R* [1988] 6 W.W.R. 673 (Alberta Court of Appeal); *In re Collings* [1936] D.L.R. 28 (Ontario Court of Appeal).

29 The position in the UK is summarized in Wade and Forsyth, Administrative Law, 10th ed, at 214. See *Coppard v Customs and Excise Commissioners* [2003] QB 1428; *Fawdry & Co v Murfitt* [2003] QB 104; *Baldock v Webster* [2006] QB 315; *Sumukan Ltd v Commonwealth Secretariat (No 2)* [2008] Bus LR 858, wherein the Court of Appeal accepted that the doctrine would have applied but for the fact that the case concerned a private arbitration rather than non-compliance with a public duty under legislation.

30 *Cassell v The Queen* (2000) 201 CLR 189 at 193 [19] per Gleeson CJ, Gaudron, McHugh and Gummow JJ, quoting (with apparent approval) from the judgment of McHugh JA in *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 at 525.

31 *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 at 526-527 per McHugh JA.

the present cases, where the first respondent in each case seeks to impugn the validity of acts already performed by the appointees.[32]

The doctrine is not excluded by the Act

58. Justices Rares and Katzmann were correct to characterise the doctrine as a principle of the common law which can be overridden by statute.[33] However, their Honours went on to state that where, as they found in the present case, invalidity has been established in accordance with the principles in *Project Blue Sky*, the de facto officer doctrine has no application (at [47]-[48]). Justice Flick reached a similar conclusion (at [121]).

59. It does not follow from the possibility of statutory modification or exclusion of the common law de facto officer doctrine that whenever a *Project Blue Sky* analysis indicates a Parliamentary intention to invalidate *an appointment*, the doctrine is excluded and *all acts and decisions* of the de facto officer are necessarily invalid. If that were that the position, the de facto officer doctrine would have no operation at all, under any circumstances, making it unlikely that this Court would have allowed for its continuing availability in cases such as *Cassell v The Queen* (2000) 201 CLR 189 at 193, *Bond v The Queen* (2000) 201 CLR 213 at [32]-[34], and *Haskins v The Commonwealth* [2011] HCA 28 at [46].

60. The appellant contends that even where *an appointment* is invalid, *the acts* of a de facto officer will be preserved from collateral challenge unless an intention to exclude the common law doctrine can be discerned. Further, in accordance with ordinary principles of statutory construction, an intention to exclude a basic common law doctrine requires clear words or necessary implication. That is, exclusion of the doctrine depends on the 'strength of the parliamentary intention'.[34]

61. Thus, in *Jamieson v McKenna*, Anderson J (with whom Templeman J and Sheppard AJ agreed) stated:[35]

> I can see nothing in s 5B of the *Stipendiary Magistrates Act* [*1957* (WA)] which is inimical to the de facto officer doctrine. A statutory requirement that a stipendiary magistrate retire from office at a certain age does not carry the meaning that regardless of established common law doctrines acts done in continued exercise of the office are a nullity.

62. The Full Court's reliance upon *R v Janceski* was, with respect, misplaced. In that case, the Court of Criminal Appeal was concerned with the validity of an indictment presented at trial which was signed by a barrister at the private bar

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32 *The Queen v Cawthorne; Ex Parte Public Service Association of South Australia Incorporated* (1977) 17 SASR 321 at 333-334; *United Services Transport v Evans* [1992] 1 VR 240 at 248-249; *MacCarron v Coles Supermarkets Australia Pty Ltd* (2001) 23 WAR 355 at 364; *Balmain Association v Planning Administrator for the Leichhardt Council* (1991) 25 NSWLR 615 at 639-640.

33 *R v Janceski* (2005) 64 NSWLR 10 at 34 [132]; *World Best Holdings Limited v Sarker* [2004] NSWSC 1164 at [45].

34 See *R v Janceski* (2005) 64 NSWLR 10 at 32 [120].

35 (2002) 136 A Crim R 82 at 87 [23]. See also *Telstra Corporation Ltd v Seven Cable Television* (2000) 102 FCR 517 at 544; and *Hicks v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 146 FCR 427 at 437.

without authority to do so under s 126 of the *Criminal Procedure Act 1986* (NSW). The question before the Court was not whether the barrister's appointment to the office of Crown Prosecutor was valid; it was evident that she had never been appointed, or even purportedly appointed, to that role. The sole question was whether, despite no known appointment, her act of signing the indictment was invalid.

63. The Court held that it was invalid, applying the principles in *Project Blue Sky*, and then addressed the question whether the act of signing the indictment could nevertheless be protected by the de facto officer doctrine. In this context, Spigelman CJ noted a distinction which is important for the purposes of this case.[36] In *Janceski*, the act in question was not undertaken under 'colour' of any appointment as a Crown Prosecutor. The Chief Justice held that Parliament's intention was to invalidate *the act* of signing an indictment by a person not authorised to do so.[37] In those circumstances, the de facto officer doctrine could not be invoked to say that, despite Parliament's intention to invalidate the relevant appointment, the act was not invalid.

64. The Chief Justice did not say, and *Janceski* is not authority for the proposition, that a parliamentary intention to invalidate a defective appointment will necessarily prevent the doctrine from applying to save acts performed pursuant to that appointment. Indeed, his Honour noted that the existence of the doctrine had been affirmed by the High Court in *Cassell*. His Honour further noted that there was some authority (described as 'unsatisfactory') in favour of the proposition 'that a statutory criterion for the occupation of office manifests a parliamentary intention of sufficient strength to override the de facto officer principle', but did not embrace that proposition. Rather, his Honour held that the doctrine 'can be' (but is not always) modified by statute.[38]

65. Thus, *an appointment* may, as a matter of law, be invalid but that does not mean that for all purposes (and in any context) *the acts* of the de facto officer are invalid. Contrary to the approach taken by Rares and Katzmann JJ in paragraphs [44] and [48] of their Honours' reasons (informed perhaps by what their Honours stated at [36]), this proposition is not inconsistent with principles underpinning jurisdictional error under Commonwealth legislation (even assuming those principles have any application in the circumstances). Excess of 'jurisdiction' to *appoint* has never been regarded, of itself, as ordaining the invalidity of all downstream *acts and decisions* of the appointee. Indeed as noted by Hayne J in *Minister for Immigration and Multicultural Affairs v Bhardwaj*:[39]

> More than thirty years ago, H W R Wade pointed out that in considering unlawful administrative action 'there is no such thing as voidness in an absolute sense, for the whole question is, void against whom? It makes no sense to speak of an act being void

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36 (2005) 64 NSWLR 10 at 32 [123].

37 (2005) 64 NSWLR 10 at 34 [131]-[132].

38 (2005) 64 NSWLR 10 at 31-32 [119]-[121].

39 (2002) 209 CLR 597 at 643 [144]. This passage was cited with approval by Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ in *Berowra Holdings v Gordon* (2006) 225 CLR 364 at [10].

unless there is some person to whom the law gives a remedy'. That is why, as Wade went on to say,

> "[i]t may be no more than a truism to point out ... that words such as 'void' and 'nullity' are legally meaningless except in the context of an actual or assumed decision of a court ... But it is an important truism for the present discussion, since a conclusion emerges: 'void' and 'voidable' are in their present application indistinguishable in meaning. The reason is simply that no disputed act of a public authority can safely be treated as void in law unless the court can be persuaded to condemn it."

66. It is submitted that, in collateral proceedings, a court can properly decline to condemn *the acts* of an invalidly appointed officer by resort to the de facto officer doctrine – and so doing is but one illustration of the power of a court to grant or withhold relief on a principled or discretionary basis.

67. Both here and overseas the outer limits of the doctrine may not have been fully resolved, but that fact does not deny the existence of the doctrine. In *Nguyen v United States*, the United States Supreme Court suggested that the de facto officer doctrine did not apply where 'there has been a violation of a statutory provision that embodies weighty congressional policy concerning the proper organisation of the federal courts'.[40] Significantly, the Supreme Court did not overrule, but affirmed, earlier Supreme Court cases in which the doctrine had been applied to preserve the acts of invalidly appointed de facto officers. Instead, the Court drew a distinction between the particular appointment in issue in *Nguyen*, which could never have been made, and an appointment which could have been made if stipulated processes had been followed.[41]

The doctrine operates in the present case

68. In the present context, the de facto officer doctrine has not been excluded by clear words or necessary implication. In circumstances where the relevant appointments are not statutorily impossible, but suffered from a procedural irregularity, a legislative intention to prevent the common law doctrine from applying cannot be discerned.

69. The three preconditions for the operation of the doctrine were satisfied in the present case:[42]

    69.1. the office of Panel member established by ss 84(1) and (2) of the Act, and the office of Deputy Director, established by s 85(1) of the Act, exist at law;

    69.2. none of the acts the validity of which were challenged were outside the scope of the authority of a properly appointed Panel Member or Deputy Director;

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40 539 U.S. 69 at 70.

41 539 U.S. 69 at 79.

42 See, for example, *R v Janceski* (2005) 64 NSWLR 10 at 38-39 [101]-[103]. For a summary of the authorities see E Campbell, 'De Facto Officers' (1994) 2 Australian Journal of Administrative Law 5, at 13.

69.3. it was an agreed fact that it was only after completion of all of the PSR processes referred to in the Special Case that the Minister, the Director, the Committee Members, the Determining Authority, and the medical practitioners became aware that an issue existed as to whether the Panel members and/or Deputy Directors in question had been validly appointed. Accordingly, throughout the course of the PSR processes at issue, each of those persons and bodies proceeded on the basis that the appointments were valid, vesting the Panel Members and Deputy Directors with sufficient 'colour of authority'.

70. Accordingly, the doctrine operated to preserve the validity of the acts carried out by the relevant appointees within the scope of their apparent authority, prior to discovery of the defect. The Full Court erred in concluding to the contrary.

PART VII: APPLICABLE LEGISLATIVE PROVISIONS

71. The relevant provisions of the Act, as in force at the date of the appointments under challenge, are reproduced in a bundle accompanying these submissions.

72. At the date of making these submissions, the provisions remain substantially in force in the same form as the legislation was in 2009.

PART VIII: CHRONOLOGY

73. A chronology of events has been filed separately.

PART XI: ORDERS

74. The appellant seeks the following orders in each of the respective proceedings.

Kutlu S 50 of 2012:

1. The appeal be allowed.

2. The answers given by the Full Court of the Federal Court to all of the questions referred to it be set aside, and:

   2.1 Each of questions 1(a)-(d) be answered 'No'.

   2.2 Each of questions 2(a)-(d) be answered 'No'.

   2.3 Each of questions 3(a)-(d) be answered 'No'.

   2.4 Question 4 be remitted to the Full Court of the Federal Court for answering.

   2.5 Each of questions 5(a)-(d) be remitted to the Full Court of the Federal Court for answering.

2.6 Question 6 be answered, if necessary, in the following terms: The de facto officer doctrine operates to preserve the validity of the acts and decisions referred to in questions 1(b)-(d), 2(b)-(d), and 3(b)-(d).

Clarke, S 51 of 2012:

1. The appeal be allowed.

2. The answers given by the Full Court of the Federal Court to all of the questions referred to it and which relate to the first respondent be set aside, and in lieu thereof:

   2.1 Each of questions 2(a)-(d) be answered 'No'.

   2.2 Each of questions 3(a)-(d) be answered 'No'.

   2.3 Question 4 be remitted to the Full Court of the Federal Court for answering.

   2.4 Each of questions 5(a)-(d) be remitted to the Full Court of the Federal Court for answering.

   2.5 Question 6 be answered, if necessary, in the following terms: The de facto officer doctrine operates to preserve the validity of the acts and decisions referred to in questions 2(b)-(d), and 3(b)-(d).

Lee S 52 of 2012:

1. The appeal be allowed.

2. The answers given by the Full Court of the Federal Court to all of the questions referred to it and which relate to the first respondent be set aside, and:

   2.1 Each of questions 1(a)-(e) be answered 'No'.

   2.2 Question 6 be answered, if necessary, in the following terms: The de facto officer doctrine operates to preserve the validity of the acts and decisions referred to in questions 1(b)-(e).

Lee S 53 of 2012:

1. The appeal be allowed.

2. The answers given by the Full Court of the Federal Court to all of the questions referred to it and which relate to the first respondent be set aside, and in lieu thereof:

   2.1 Each of questions 1(a)-(d) be answered 'No'.

2.2 Each of questions 2(a)-(d) be answered 'No'.

2.3 Each of questions 3(a)-(d) be answered 'No'.

2.4 Question 4 be remitted to the Full Court of the Federal Court for answering.

2.5 Each of questions 5(a)-(d) be remitted to the Full Court of the Federal Court for answering.

2.6 Question 6 be answered, if necessary, in the following terms: The de facto officer doctrine operates to preserve the validity of the acts and decisions referred to in questions 1(b)-(d), 2(b)-(d), and 3(b)-(d).

10 ***Condoleon S 54 of 2012:***

1. The appeal be allowed.

2. The answers given by the Full Court of the Federal Court to all of the questions referred to it and which relate to the first respondent be set aside, and in lieu thereof:

2.1 Each of questions 1(a)-(d) be answered 'No'.

2.2 Each of questions 2(a)-(d) be answered 'No'.

2.3 Each of questions 3(a)-(d) be answered 'No'.

2.4 Question 4 be remitted to the Full Court of the Federal Court for answering.

20 2.5 Each of questions 5(a)-(d) be remitted to the Full Court of the Federal Court for answering.

2.6 Question 6 be answered, if necessary, in the following terms: The de facto officer doctrine operates to preserve the validity of the acts and decisions referred to in questions 1(b)-(d), 2(b)-(d), and 3(b)-(d).

Dated: 9 March 2012

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