

**COMMONWEALTH OF AUSTRALIA v KUTLU & ORS (S50/2012)**  
**COMMONWEALTH OF AUSTRALIA v CLARKE & ORS (S51/2012)**  
**COMMONWEALTH OF AUSTRALIA v LEE & ORS (S52/2012)**  
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**THE MINISTER OF STATE FOR HEALTH AND AGEING v CONDOLEON & ORS (S54/2012)**

Court appealed from: Full Court of the Federal Court of Australia  
[2011] FCAFC 94

Date of judgment: 28 July 2011

Date of special leave: 10 February 2012

Under s 84(2) of the *Health Insurance Act 1973* (Cth) ("the Act") the Minister for Health and Ageing ("the Minister") can appoint health professionals as members of the Professional Services Review ("PSR") Panel for a period of up to five years. From that Panel the Minister can, under s 85(1) of the Act, appoint Deputy Directors to chair PSR Committees. The Committees investigate and report on allegations of inappropriate practice by medical practitioners. In 2005 the Minister appointed certain medical practitioners as Deputy Directors. In 2009 the Minister re-appointed some Panel members and also appointed Deputy Directors without expressly re-appointing them as Panel members. In making those appointments the Minister did not consult the Australian Medical Association ("the AMA") as required by s 85(3) (in relation to Deputy Directors) and s 84(3) (in relation to Panel members). The Commonwealth publicly admitted this non-compliance. The Deputy Directors and Panel members had been members of Committees that made adverse findings against certain medical practitioners. Several such medical practitioners commenced Federal Court proceedings challenging the findings as invalid because the Committees had not been validly constituted under the Act.

Justice Flick referred to the Full Court specific questions on whether the appointments to, and the findings of, the PSR Committees were invalid.

On 28 July 2011 the Full Court (Rares, Flick & Katzmann JJ) unanimously held that the appointments, and therefore the Committees and the Committees' findings, were invalid. Their Honours found that Parliament intended that the public and the health profession have confidence in the appointment process under ss 84 and 85. The Full Court held that the Minister's consulting of the AMA was an essential pre-requisite to a valid PSR appointment. Rares & Katzmann JJ held that by not obtaining the AMA's advice, the Minister fell into jurisdictional error by failing to take into account a relevant consideration. The decisions to appoint were therefore ineffective. All members of the Full Court found that public inconvenience would result from the Committees' findings being invalid. This is because practitioners who had engaged in inappropriate practices would avoid sanction and Commonwealth funds would be misplaced (through unwarranted Medicare payments). The Full Court however held that public inconvenience could not change the interpretation of the unambiguous language of the Act. The Full Court also held that the common law doctrine of *de facto* officers did not operate to validate the Committees' findings, as it had been overcome by sufficiently clear provisions in the Act. Rares & Katzmann JJ further held that because the Committees' decisions had been made by persons who had not been authorised by Parliament, they were invalid.

The grounds of appeal (in matters numbered S50-51/2012 & S53-54/2012) are effectively identical and include:

- The Court erred in finding that, as a matter of statutory construction, because the relevant Minister did not consult with the AMA as required by ss 84(3) and 85(3) of the Act:
  - a) Ministerial appointments (i) in 2009 of certain medical practitioners to the PSR Panel pursuant to s 84(2) of the Act, and (ii) in 2005 and 2009, of a medical practitioner to the office of Deputy Director of the PSR Panel pursuant to s 85(1) were invalid and of no effect;
  - b) a PSR Committee constituted by one or more such medical practitioners was invalidly constituted;
  - c) a referral made by the Director of PSR to that PSR Committee was invalid and of no effect; and
  - d) draft and/or final reports prepared by that PSR Committee were invalid and of no effect.

The grounds of appeal (in matter number S52/2012) include:

- The Court erred in finding that, as a matter of statutory construction, because the relevant Minister did not consult with the AMA as required by s 85(3) of the Act:
  - a) a Ministerial appointment, in 2005, of a medical practitioner to the office of Deputy Director of the PSR Panel pursuant to s 85(1) was invalid and of no effect;
  - b) a PSR Committee constituted by that medical practitioner was invalidly constituted;
  - c) a referral made by the Director of PSR to that PSR Committee was invalid and of no effect;
  - d) draft and/or final reports prepared by that PSR Committee were invalid and of no effect; and
  - e) draft and/or final determinations made by the Determining Authority upon receipt of a report prepared by that PSR Committee were invalid and of no effect.

In all matters “Section 78B Notices” have been filed. The Attorney-General for Western Australia has also filed a summons in each matter, seeking leave to intervene.

Notices of contention have also been filed in each matter, the identical grounds of which include:

- The Court below failed to determine that application of the so-called “de facto officer” doctrine would be contrary to section 67 of the Constitution in that it would purport to validate acts done by a person purportedly, but not lawfully, appointed to be a member of the PSB Panel or Deputy Director of Professional Services Review, and would purport to operate to authorise the executive power of the Commonwealth by a person who is not an officer of the Commonwealth.