IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S50 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 ESTABLISHED BY SECTION 106Q OF THE HEALTH INSURANCE ACT 1973 (CTH)
Fifth Respondent

Date of Document 16 March 2012

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No. S51 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

DIRECTOR OF PROFESSIONAL SERVICES REVIEW
Fourth Respondent

No. S52 of 2012

BETWEEN:

COMMONWEALTH OF AUSTRALIA
Appellant

and

DR IL-SONG LEE
First Respondent

WAL GRIGOR, PATRICK TAN AND DAVID RIVETT CONSTITUTING THE 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

DIRECTOR OF PROFESSIONAL SERVICES REVIEW
Fifth Respondent

No. S53 of 2012

BETWEEN:

COMMONWEALTH OF AUSTRALIA
Appellant

and

DR IL-SONG LEE
First Respondent

BERNARD KELLY, ELIZABETH MAGASSY AND VAN PHUOC VO CONSTITUTING THE 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. S54 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

WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

PART I: SUITABILITY FOR PUBLICATION

1. This submission is in a form suitable for publication on the Internet.

PART II: STATEMENT OF ASSERTED BASIS OF INTERVENTION

2. The Attorney General of Western Australia seeks leave to intervene in support of the Appellants to contend that the *de facto* officer doctrine applies to preserve the validity of the acts and decisions of the Committees if the Court finds that the impugned appointments were invalidly made.

PART III: BASIS OF INTERVENTION

3. The Attorney General for Western Australia seeks leave to intervene and be heard in these proceedings.

4. Leave to intervene may be granted where a person's legal interests are likely to be substantially affected by the proceedings. In particular, the power to grant leave to the Attorney General for a State to intervene may be exercised where the decision of the Court can, or may, have a bearing upon the legislative or executive powers or other interests of the State.[1]

5. Western Australia's legal interests may be affected by the outcome of these proceedings. The proceedings directly raise for consideration the issue of the application and scope of the *de facto* officer. The application and scope of the *de facto* officer doctrine is of importance to the executive government of Western Australia. If the Commonwealth of Australia is unsuccessful in its appeal before the High Court, this may impact on the validity of actions taken and decisions made by public officers in Western Australia whose appointments are found in the future to be defective. This could negatively impact on the public of Western Australia by creating uncertainty in relation to decisions made by public officers or purported public officers affecting individual members of the public. If actions taken and decisions made by public officers are held to be invalid, such that they need to be performed again, or retrospective validating legislation needs to be enacted, this

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[1] *R v. Anderson; ExParte Ipec-Air Pty Ltd* (1965) 113 CLR 177, at 182 (per Kitto J), *Levy v. Victoria* (1997) 189 CLR 579, at 601-603 (per Brennan CJ).

may also negatively impact on the State's financial capacity and the allocation of its resources.[2]

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

6. Part VAA of the *Health Insurance Act 1973* is in a bundle provided by the Commonwealth[3].

Part V: SUBMISSION

7. The Attorney General for Western Australia seeks leave to address the following issues.

8. *First,* whether non-compliance with statutory conditions of appointment of members of a tribunal that gives rise to "invalidity" of the appointment/s excludes the operation of the "*de facto* officers doctrine". This issue arises from the reasoning below of Rares and Katzmann JJ at [47] and [48] and of Flick J at [119]-[121].

9. *Second,* the scope of the "*de facto* officers doctrine", and whether it applies in these matters to "affect the claim of any applicant to relief in respect of such invalidity [of the appointments of Panel/Committee members]"[4].

10. There are other issues in the appeal that the Attorney General for Western Australia does not seek leave to address. The Attorney General for Western Australia makes no submission as to the issues of whether non-compliance with s.84(3) of the *Health Insurance Act 1973*[5] and non-compliance with s.85(3) of the *Health Insurance Act 1973*[6] gives rise to "invalidity" of the respective appointments[7]. In these submissions it is assumed that the appointments are impeached.

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[2] See Affidavit of Paul Dominic Evans dated 16 March 2012.
[3] See [71] of the Appellant's Submissions.
[4] This formulation is that in the sixth question considered by the Full Court.
[5] That the Minister consult the AMA in respect of appointments of medical practitioners to the Professional Services Review Panel.
[6] That the Minister consult the AMA in respect of appointments of medical practitioners as Deputy Directors of Professional Services Review.
[7] The Court will observe that the definition of *medical practitioner* in s.3 for each of ss.84(3) and 85(3), at (a) and (b) of the definition, limits the field of eligible applicants to registered medical practitioners whose registration has not been suspended, or cancelled, and re-registered formerly suspended or deregistered practitioners. These requirements are central to the qualification. The "AMA" is defined relevantly in

11. The decision of the Full Court did not address the provision in ss.84(3) and 85(3) relating to the Minister making arrangements with the AMA for the AMA to consult other specified organizations and associations before advising the Minister on the appointment; see Judgment [55] (per Flick J).

12. The Attorney General for Western Australia does not seek leave to address issues concerning s.67 of the *Constitution*[8]. If s.67 of the *Constitution* precludes the operation of the *de facto* officers doctrine to appointments to the Executive Government of the Commonwealth then the Court is not required to consider the Attorney General's substantive submissions.

10 **First Issue - whether invalidity excludes the operation of the *de facto* officer doctrine**

13. In these matters, the statutory powers exercised are the powers of the Minister to appoint medical practitioners to the Professional Services Review Panel under ss.84(2) and medical practitioners as Deputy Directors of Professional Services Review under s.85(1).

14. The first question is identification of the consequence of failure by the Minister to undertake the prescribed consultation. In this respect, as was observed by Gaudron and Gummow JJ and Hayne J in *Minister for Immigration and Multicultural Affairs v Bhardwaj*, the ascription of terms such as "invalid", "void", "voidable" and "nullity" as the consequence of administrative error invariably obscures rather than
20 clarifies[9]. This obscurity has also been recognised by the Court of Appeal in New

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s.81(1). In the absence of evidence as to what the Australian Medical Association Limited (A.C.N. 008426793) is and (perhaps) what its objects are and (perhaps) what its membership is and represents, it is difficult to conclude that a failure to consult with it renders an appointment made in the absence of consultation invalid. This is particularly so having regard to the statutory obligation of *consultation* in each of ss.84(3) and 85(3). Any advice provided by the AMA as to appointments could lawfully and properly be rejected by the Minister. Where any advice of the AMA could be rejected, it is difficult to conclude that a failure to so consult renders an appointment made in the absence of consultation invalid.

[8] It is noted that Bray CJ's observations in *R v Cawthrone* (1977) 17 SASR 321 at 330-331, in respect of *Presley v Geraghty* (1921) 29 CLR 154, indicate that it did not occur to Bray CJ that the doctrine was necessarily excluded from application to appointments made by the Executive Government of the Commonwealth.

[9] *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 612-613 ([45]-[46]) per Gaudron and Gummow JJ, at 643 ([144]) per Hayne J. See also *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364 at 369-370 ([10]) per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; *Swansson v R* (2007) 69 NSWLR 406 at 415 ([60]-[69]) per Spigelman CJ and *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2010) 240 CLR 409 at 429 ([61]) per Hayne J. See generally, Hutley "The Cult of Nullification in English Law" (1978) 52 ALJ 8. Similar type issues occur in cases involving civil claims arising from unlawful detention after administratively erroneous surrender;

Zealand, by making reference, as did Hayne J in *Bhardwaj*, to the seminal work of Sir William Wade[10]. This aversion to slogan is in the same manner as the abandonment of the mandatory/directory distinction in *Project Blue Sky Inc v Australian Broadcasting Authority*[11]

15. Once the search for the meaning of words such as "invalid", "void", "voidable", "nullity" and the like is abandoned, the correct inquiry can be seen to be; *first,* what is the consequence of failure by the Minister to undertake the prescribed consultation on the appointments that were made; *second,* if the consequence is that the appointments are "invalid and of no effect"[12] (for want of a better term) what is the consequence of this upon decisions already made by a Professional Services Review Committee comprising members of the Professional Services Review Panel and Deputy Directors of Professional Services Review so appointed.

16. The second inquiry does not necessarily arise. Much depends on the point in time at which the question arises. If the Minister fails to undertake the prescribed consultation prior to appointment and a declaration is sought by a person with standing, certain consequences may flow. If the Minister fails to undertake the prescribed consultation, appointments are made, and (say) declaratory relief is sought or a quashing of the appointment sought, other consequences may flow. Furthermore, even if the Minister fails to undertake prescribed consultation, appointments are made and Panel members "invalidly" appointed sit on a Committee, the consequence of this may depend upon (for instance) whether the invalidly appointed Panel member was one of a Committee of otherwise validly appointed members.

Ruddock v Taylor (2005) 222 CLR 612. Similar again are the consequences of various emanations of "illegality"; most recently see *Equuscorp Pty Ltd v Haxton* [2012] HCA 7.

[10] *Reid v Rowley* [1977] 2 NZLR 472 at 478; Wade, "Unlawful Administrative Action: Void or Voidable?" (1967) 83 LQR 499 (Part 1), and (1968) 84 LQR 95 (Part 2). In festschrift (respectively) for Sir William Wade and Professor Campbell (whose paper "Unconstitutionality and its Consequences" in Lindell (Editor) *Future Direction in Australian Constitutional Law* (1994) at 90 is important in this respect) these themes were re-visited. In respect of Sir William Wade, see Forsyth, "'The Metaphysic of Nullity' – Invalidity, Conceptual Reasoning and the Rule of Law" in Forsyth and Hare (Editors) *The Golden Metwand and the Crooked Cord: Essays in Public Law in Honour of Sir William Wade* (1998) at 141; in respect of Professor Campbell, see Aronson, "Nullity" in Groves (Editor) *Law and Government in Australia* (2005) at 139.

[11] (1998) 194 CLR 355, at 389-391 ([92]-[93]) per McHugh, Gummow, Kirby and Hayne JJ.

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

17. This process of reasoning discloses that it is erroneous to reason that because "invalidity" of appointments had been established *per Project Blue Sky,* that the *de facto* officers doctrine could not apply. Any principle derived from *Project Blue Sky* relates only to the question of the validity of the appointment, not to the effect of invalidity upon decisions made by an invalidly appointed tribunal member.

18. This distinction is crisply expressed by Professor Craig:

> "If the correct person successfully challenges an administrative act in the correct proceedings, within the time limits, and there are no bars to relief then ... the act will be void in the sense of retrospectively null. It should, however, be recognised that the implications which this has for other acts done after the act which was successfully challenged, is a separate conceptual issue, as exemplified by the case law on *de facto* officers .... The initial invalid act will often appear to be factually valid and people may well have acted on that assumption."[13]

19. All of the judges below[14] referred to the reasoning of Spigelman CJ in *R v Janceski* (2005) 64 NSWLR 10 at 34 ([132]) (which was adopted by other members of the Court of Criminal Appeal[15]) where His Honour stated:

> "The de facto officers doctrine is a principle of the common law. It can be overridden by statute. Indeed, in my opinion, where the *Project Blue Sky* test is satisfied, as I have held it is in this case, it is difficult to see that the de facto officers principle could ever be applicable."

20. This reasoning starts from a premise that the *de facto* officers doctrine is a "principle of common law" and, as such, "could be overridden by statute".

21. Little point is served by disputing whether the doctrine is a principle or a rule, nor whether the rule is one of common law or some other phenomenon. Some authorities refer to it as a "rule or doctrine of necessity"[16]; some refer to it as a matter of "public policy" or "policy"[17] and Professor Honore (in his contribution to

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[13] Craig, *Administrative Law*, (Fourth Edition) 1999 p 662. Professor Craig's text is in its sixth edition (2008). This could not be accessed as at the time of preparation of these submissions. It will be accessed and the reference up-dated prior to hearing.

[14] Rares and Katzmann JJ at [47], Flick J at [121].

[15] Wood CJ at CL at 40-41 [208], Hunt A-JA at 41 [212], Howie J at 57 [284] and Johnson J at 57 [287].

[16] *State v Carroll* (1871) 9 Am Rep 409, 423 per Butler CJ approved by Richmond J in *Re Aldridge* (1893) 15 NZLR 361 at 376-377; by Jocelyn Simon P in *Adams v Adams* [1971] P 188 at 213-214; and by McHugh JA in *GJ Coles & Co Ltd v Retail Trade Industry Tribunal* (1986) 7 NSWLR 503 at 526-527: see *MacCarron v Coles Supermarkets Australia Pty Ltd* (2001) 23 WAR 355 at [17]-[20] per Kennedy J. See also *Norton v Shelby County* (1886) 118 US 425, 441.

[17] See *GJ Coles & Co Ltd v Retail Trade Industry Tribunal* (1986) 7 NSWLR 503 at 520 per Kirby P and Hope JA;; *Balmain Association Inc v Planning Administrator for the Leichhardt Council* (1991) 25 NSWLR 615 at 639; *Fawdry & Co (a firm) v Murfitt* [2003] QB 104 at [20] per Hale LJ; *State v Carroll* (1871) 9 Am

the "Rhodesian revolution" conundrum[18]) identified like doctrines in Roman Law, in particular the instance of the fugitive slave Barbarus Phillipus whose unlawful election as praetor of Rome was void but whose acts as praetor were nonetheless upheld.[19]

22. It is uncontroversial that, whatever the status of the doctrine, its operation can be displaced by legislative provision. It is not the custom in Common Law jurisdictions to do this by express provision. The inquiry in each case is whether there can be discerned a legislative purpose to exclude the operation of the doctrine, which inquiry is premised upon the existence of the doctrine as an accepted circumstance against which, or having regard to the existence of which, legislative purpose is to be determined. Of course, in considering matters relevant to such legislative purpose in each case, the scope or parameters of the "doctrine", at least in respect of the circumstance of the case in which the question is considered needs to be understood. Such scope or parameters are considered below commencing at [41].

23. The assertion or conclusion of Spigelman CJ in *R v Janceski* to the effect that where "invalidity had been established in accordance with the principles in *Project Blue Sky* it was difficult to see that the *de facto* officers doctrine could ever be applicable" is erroneous. The doctrine only ever applies where "invalidity had been established in accordance with the principles in *Project Blue Sky*".

24. The assertion of Spigelman CJ in *R v Janceski* cannot be reconciled with the numerous cases in which the doctrine has been applied. An example is *R v Cawthrone*[20], where, although the Full Court concluded that successive appointments purportedly under the *Industrial Conciliation and Arbitration Act 1972-1975* (SA)[21] were invalid[22]; the *de facto* officer doctrine was invoked in

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Rep 409, 423 per Butler CJ. Discussed (and doubted) by Sir Owen Dixon "De Facto Officers" in *Jesting Pilate* at 233.

[18] The subject of numerous papers in successive series of the *Oxford Essays in Jurisprudence.*

[19] Honore, "Reflections on Revolutions" [1967] Irish Jurist 268 at 269. Whether, as Professor Honore speculates, such doctrines are explicable as "principles of law superior to any particular [legal] system – let us call them natural law" (at 273) is to be doubted.

[20] (1977) 17 SASR 321

[21] See, (1977) 17 SASR 321 at 340 per Sangster J.

[22] The first appointment was to a non-existent office - (1977) 17 SASR 321 at 339 per Sangster J with whom Bray CJ agreed at 326. The Public Service Board purported to appoint the respondent as a 'temporary Industrial Registrar'.

refusing to quash the award made by the invalidly appointed Industrial Registrar.[23] Spigelman CJ cited *Cawthrone*[24] but did not seek to reconcile the reasoning and conclusion in that case with his Honour's assertion. A further example is *MacCarron v Coles Supermarkets Australia Pty Ltd*[25] where a delegation of a power to commence a prosecution was made after the expiry of the purported delegator's term of office.[26] Although the Full Court was primarily concerned with whether retrospective legislation validated the purported delegation each of Kennedy, Wallwork and Murray JJ in *obiter dictum* indicated that the *de facto* officer doctrine would otherwise have operated.[27] It would appear that *MacCarron* 10 *v Coles Supermarkets Australia Pty Ltd* was not cited to Spigelman CJ. Likewise, is *Jamieson v McKenna*[28], where the appellant was convicted before a Magistrate who had passed the statutory retirement age[29]. The Full Court refused to impugn the convictions by invoking the doctrine.[30]

25. Both of *MacCarron v Coles Supermarkets Australia Pty Ltd* and *Jamieson v McKenna* were decided after *Project Blue Sky.* That *Cawthrone* was decided before *Project Blue Sky* is not distinguishing.

26. It is submitted that the assertion of Spigelman CJ in *R v Janceski* can not be reconciled with reasoning in *Cassell v .R*[31], *Luff v Oakley*[32], *United Services*

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[23](1977) 17 SASR 321 at 333 per Bray CJ (in relation to the second appointment); at 345 per Sangster J (in relation to both appointments); at 349 per Jacobs J who agreed with Sangster J.
[24] (2005) 64 NSWLR 10 at 33 [126].
[25] (2001) 23 WAR 355,
[26](2001) 23 WAR 355 at 372-373 ([60]) per Wallwork J
[27](2001) 23 WAR 355 at 364-365 ([25]) per Kennedy J, at 377 ([91]) per Wallwork J, at 387 ([150]) per Murray J.
[28] (2002) 136 *A Crim R* 82
[29] Section 5B of the *Stipendiary Magistrates Act 1957* (WA); a magistrate "shall retire from office on the day they attain the age of 65 years."
[30](2002) 136 *A Crim R* 82 at 87 [23] per Anderson J with Templeman J and Sheppard AUJ concurring. The Court distinguished the decision of *GJ Coles* by reasoning that in that case "the circumstances themselves reveal the invalidity" because it could not be reasonably assumed that a person would believe a tribunal consisting of one individual would be valid where the statute provided that the tribunal be composed of three officials. (2002) 136 *A Crim R* 82 at 87 [22]
[31] (2000) 201 CLR 189, at 193 ([19]), where Gleeson CJ, Gaudron, McHugh and Gummow JJ cite with approval the passage from the judgment of McHugh JA in *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 at 525. This passage from *Cassell* is cited in *Re Patterson; ex parte Taylor* (2001) 207 CLR 391 at 456 ([200]) per Gummow and Hayne JJ.
[32] (1986) 82 FLR 91, at 95-97, where the ACT Supreme Court found that a liquor permit issued by a non-existent Acting Registrar was validly issued as a result of the *de facto* officers doctrine.

Transport v Evans[33], *Coppard v Customs Excise Commissioners*[34], *Hughes v Hughes*[35], *Re Aldridge*[36] and *Ellis v Bourke*[37].

27. To reason, as Flick J does, that "...although the doctrine survives, it may be doubted whether some of the earlier decisions would be decided in the same manner today"[38] is unpersuasive without identification of such earlier decisions.

The correct inquiry in these cases

28. The correct inquiry is; can a legislative purpose to render nugatory a decision of the Professional Services Review Committee, where there has been a failure by the Minister to undertake prescribed consultation prior to the appointments of Panel members (from whom Committees are formed), be discerned from the *Health Insurance Act 1973.*[39]

The *Health Insurance Act 1973*

29. Part VAA of the Act is principally relevant. Section 79A focuses attention on protection of patients from inappropriate practice. Divisions 3, 3A, 4 and 5 of Part VAA create a tiered system of investigation and review of "inappropriate practice" (s.82) by "practitioners" (s.81). Division 3A creates a process of review by the Director of Professional Services Review (s.83). Section 90 empowers the Director to consult a member of the Professional Services Review Panel to assist with the decision making jurisdiction of the Director.

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[33] [1992] 1 VR 240, at 248.
[34] [2003] QB 1428, at 1436 ([24]), where the Court of Appeal applied the doctrine to validate a judgment awarding damages by a circuit judge who had no jurisdiction or power to award damages. See (similarly) *Baldock v Webster* [2006] QB 315.
[35] (1971) 2 SASR 368, at 378, where Zelling J held in obiter that if Supreme Court masters lacked jurisdiction to determine applications for the taxation of bill of costs under the Commonwealth *Matrimonial Causes Act,* the *de facto* officers doctrine would operate to validate their orders.
[36] (1893) 15 NZLR 361, where the Court of Appeal applied the doctrine to "validate" a sentence imposed by an invalidly appointed justice of the New Zealand Supreme Court. This case was cited approvingly by McHugh JA in *GJ Coles* at 527 and by Bray CJ and Sangster J in *Cawthrone* at 330 and 343 respectively.
[37] (188 9) 15 VLR 163, at 169, where the Supreme Court applied the doctrine to irregularities in the appointment of particular members of a tribunal. This case was cited approvingly by McHugh JA in *GJ Coles* at 526.
[38] Flick J at [119].
[39] The correlative inquiry is; can a legislative purpose be discerned to render nugatory a decision of a Professional Services Review Committee where in respect of a Deputy Director of Professional Services Review there has been a failure by the Minister to undertake prescribed consultation prior to appointment.

30. The Director may refer an investigation of inappropriate practice by a practitioner to a Professional Services Review Committee (s.93). Committees comprise a presiding Deputy Director and Panel members (s.95). The Panel is a pool from which Committees are drawn.

31. Section 95 is important. It illustrates that a relevant statutory purpose is that, where allegations of inappropriate practice by practitioners are referred to a Committee, the Committee is to comprise Panel members who are professional specialised peers of the practitioner. The section compels a statutory purpose that Committees be specialised and, thereby, best placed by reason of the specialist composition of the Committee (drawn from the Panel) to investigate inappropriate practice.

32. What is central is that Committees comprise Panel members who are professional specialised peers of the practitioner.

33. In these matters, all Committees comprised Panel members who satisfied the requirements of s.95. It is assumed that in all matters, the Panel members were general medical practitioners[40] and all panel members satisfied the requirement of s.95(5).

34. Relevant also is s.96, which provides that a practitioner can challenge the appointment of any Committee member on the basis of actual or apprehended bias. This illustrates a central statutory purpose that Committees comprise professional specialised peers of the practitioner against whom no reasonable allegation of bias can be made.

35. Central to identifying relevant purpose is an appreciation of the jurisdiction of Committees. Sections 106KE and 106L provide that Committees prepare reports, after investigation, making findings as to whether the practitioner has engaged in inappropriate practice. These reports are then referred to a Determining Authority, established pursuant to Division 5 of Part VAA of the Act. The Determining Authority invites submissions from the practitioner (s.106SA) before it makes any determination as provided for in s.106U.

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[40] Inferred from the fact that all Applicants are general medical practitioners.

36. There is no doubt that in this tiered process of investigation and determination, the role of Committees is critical. But the jurisdiction of Committees is to investigate and make findings of whether a practitioner has engaged in inappropriate practice. In these matters, the relevant defined concept of inappropriate practice is that in s.82(1)(a); whether the conduct of the practitioner "would be unacceptable to the general body of general practitioners".

37. Central to the jurisdiction exercised by Committees, is that they comprise professional specialised peers (of the practitioner) who are capable of determining whether particular practice is unacceptable to the general body of (here) general practitioners and against whom no reasonable allegation of bias can be made.

38. There is no basis to conclude that the Minister is incapable of appointing Panel members who are capable of determining whether certain practices are unacceptable to the general body of (here) general practitioners, without consultation with the AMA. This is even more obvious where the role of the AMA is to advise and the obligation of the Minister is to consult with the AMA; and where the AMA has no power of veto.

39. In these matters Committees comprised professional specialised peers (of the practitioner), against whom no allegations of bias were made and in respect of whom it is not contended that they were incapable of determining whether particular practice is unacceptable to the general body of (here) general practitioners.

40. Once these conditions are met, there is no basis to contend that decisions made by Committees so comprised, that are otherwise within jurisdiction and power, can be of no affect simply because in selecting Panel members from whom Committees were formed, the Minister did not consult the AMA.

41. Although s.88A(6) and (7) of the Act are, in effect, express localising type provisions, it ought not to be inferred from their inclusion in the Act, and the absence of express provision dealing with the consequences of failure to comply with the conditions of ss.84(3) and 85(3), a legislative purpose to exclude the operation of the *de facto* officers doctrine in respect of such failure.

Second Issue - operation of the *de facto* officers doctrine

42. General statements of the scope of the doctrine abound. It has been applied in circumstances of defect in an original appointment, where a defect arises subsequently by virtue of disqualification or effluxion of time and sometimes in the case of a usurper or intruder.[41] The doctrine has been applied in instances involving a defect in the appointment of a superior court Justice[42], a defect in the appointment of an Industrial Registrar[43], a defect in the appointment of a Registrar of Liquor Licenses[44], a defect in the appointment of an Industrial Inspector[45], a magistrate who had attained the statutory retiring age and was no longer qualified to hold office[46] and a magistrate who continued to act as a Commissioner after his appointment to that office had expired.[47]

43. Authorities and the extensive literature identify (essentially) three conditions for the operation doctrine once a defect in appointment is established. *First*, that the office occupied and exercised was an office which actually existed; that is that there was an office *de jure*. *Second*, the act done or decision made by the *de facto* officer was within the jurisdiction of the *de jure* office. *Third*, that the *de facto* officer had a colourable title to the office *de jure*[48]; meaning that people dealing with, or coming within the putative jurisdiction of the *de facto* officer do not know that the *de facto* officer is not entitled to hold office and the officer is treated as, and thought to be, an officer *de jure*.[49]

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[41] Sir Owen Dixon "De Facto Officers" in *Jesting Pilate* at 230; *G J Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 at 525 per McHugh JA; *MacCarron v Coles Supermarkets Australia Pty Ltd* (2001) 23 WAR 355 at 362 ([16]-[17]) per Kennedy J, at 376 ([80]-[82]) per Wallwork J.
[42] *Re Aldridge* (1893) 15 NZLR 361.
[43] *R v Cawthorne; Ex Parte Public Service Association of South Australia* (1977) 17 SASR 321.
[44] *Luff v Oakley* (1986) 82 FLR 91.
[45] *Melrose Farm Pty Ltd t/as Milesaway Tours v Milward* (2008) 175 IR 455.
[46] *Jamieson v McKenna* (2002) 136 A Crim R 82.
[47] *MacCarron v Coles Supermarkets Australia Pty Ltd* (2001) 23 WAR 355.
[48] *R v Cawthorne; Ex Parte Public Service Association (SA) Inc* (1977) 17 SASR 321 at 331-333 per Bray CJ, at 352 per Jacobs J; *G J Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 at 520 per Kirby P and Hope JA, at 525-527 per McHugh JA; *Balmain Association Inc v Planning Administrator for the Leichhardt Council* (1991) 25 NSWLR 615 at 639-640 per Kirby P, Priestly JA and Handley JA; E Campbell "De Facto Officers" (1994) 2 *Australian Journal of Administrative Law* 5 at 5 and 7-13; *Jamieson v McKenna* (2002) 136 A Crim R 82 at 85-86 ([13]) per Anderson J, 88 ([27]) per Templeman J, 88 ([28]) per Sheppard AUJ; *R v Janceski* (2005) 64 NSWLR 10 at 29 ([102]) per Spigelman CJ; *Melrose Farm Pty Ltd t/as Milesaway Tours v Milward* (2008) 175 IR 455 at 475 ([83]) per Le Miere J, at 458 ([1]) per Steytler P, at 464 ([31]) per Pullin JA.
[49] O Dixon "De Facto Officers" *Jesting Pilate* at 236; *R v Cawthorne; Ex Parte Public Service Association of South Australia* (1977) 17 SASR 321 at 332-333 per Bray CJ, at 344 per Sangster J; *MacCarron v Coles*

44. In *Re The Governor, Goulbourn Correctional Centre; Ex Parte Eastman*[50], Kirby J, who was the only member of the Court to find the appointment there in question invalid, held that the doctrine did not apply because the first condition was not satisfied, namely, there was no *de jure* office in existence.[51] In *Bond v The Queen*[52] the doctrine was held not to apply as the second condition was not present.[53] The question in that case concerned the powers, not the validity of the appointment, of the officers in question. In *United Transport Services Pty Ltd v Evans*[54], *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal*[55] and *Balmain Association Inc v Planning Administrator for the Leichhardt Council*[56] the doctrine was found not to apply as the third condition was not satisfied.[57]

45. Purpose is also relevant to scope of the doctrine; "... [it] is driven by the sheer chaos which could flow from the ruling that everything done by an official is invalid".[58]

46. In this case, these three conditions were satisfied. This was expressly recognised in the judgment of Flick J.[59] The positions of Panel members and Deputy Directors were offices *de jure*. The acts performed by each of the Committee members were acts done within the scope of the authority of an officer *de jure*. Moreover, the

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Supermarkets Australia Pty Ltd (2001) 23 WAR 355 at 362-363 ([16]-[17]) per Kennedy J, at 375-377 ([78]-[91]) per Wallwork J, at 387 ([150]) per Murray J; *Jamieson v McKenna* (2002) 136 A Crim R 82 at 85-86 ([12]-[13]) per Anderson J, 88 ([27]) per Templeman J, 88 ([28]) per Sheppard AUJ.

[50] (1999) 200 CLR 322.

[51] At 383-384 ([156]-[157]).

[52] (2000) 201 CLR 213.

[53] At 224-225 ([32]-[33]) per Gleeson CJ, Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

[54] [1992] 1 VR 240.

[55] (1986) 7 NSWLR 503.

[56] (1991) 25 NSWLR 615.

[57] *United Transport Services Pty Ltd v Evans*[1992] 1 VR 240 at 249 per Southwell J; *G J Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 at 519-520 per Kirby P and Hope JA; *Jamieson v McKenna* (2002) 136 A Crim R 82 at 86-87 ([17]-[22]) per Anderson J, 88 ([27]) per Templeman J, 88 ([28]) per Sheppard AUJ; *Balmain Association Inc v Planning Administrator for the Leichhardt Council* (1991) 25 NSWLR 615 at 639-640 per Kirby P, Priestly JA and Handley JA; *R v Janceski* (2005) 64 NSWLR 10 at 32-34 ([122]-[130]) per Spigelman CJ, at 40-41 ([208]) per Wood CJ at CL, at 41 ([212]) per Hunt AJA, at 57 ([284]) per Howie J, at 57 ([287]) per Johnson J.

[58] O Dixon :De Facto Officers" in *Jesting Pilate* at 230; E Campbell "De Facto Officers" (1994) 2 *Australian Journal of Administrative Law* 5 at 6-7; *G J Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 at 519-520 per Kirby P and Hope JA, at 526-527 per McHugh JA; *Balmain Association Inc v Planning Administrator for the Leichhardt Council* (1991) 25 NSWLR 615 at 639-640 per Kirby P, Priestly JA and Handley JA; *United Transport Services Pty Ltd v Evans* [1992] 1 VR 240 at 248-249 per Southwell J; *MacCarron v Coles Supermarkets Australia Pty Ltd* (2001) 23 WAR 355 at 363 ([18]-[19]) per Kennedy J, at 377 ([87]) per Wallwork J, at 386 ([149]) per Murray J; *Jamieson v McKenna* (2002) 136 A Crim R 82 at 86 ([14]) per Anderson J, 88 ([27]) per Templeman J, 88 ([28]) per Sheppard AUJ; *State v Carroll* (1871) 9 Am Rep 409, at 423 per Butler CJ.

[59] At 211 ([112]).

defects in the appointments of the Committee members resulted from an incorrect view of the meaning of the consultation taken by those advising the Ministers as opposed to any conscious decision not to comply with the requirements of the Act by either Minister[60] and the irregularities affecting the appointments were unknown at the time when each practitioner appeared before each Committee.[61]

DATED the 16th day of March 2012

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[60] At 187 ([25]) per Rares and Katzmann JJ.
[61] At 211 ([112]) per Flick J.