IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO 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 10 April 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 IN REPLY

Certification for publication on the internet

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

The effect of non-compliance with sections 84(3) and 85(3) of the Act

2. The first respondent in each matter (hereafter 'the first respondent') has characterised the appellant's submissions in relation to the flexibility inherent in ss 84(3) and 85(3) of the Act as resorting to matters of policy at the expense of the text (RS [17]-[19]). To the contrary, the appellant's approach is text based: (i) sections 84(2) and 85(1) deal in terms with conferral of power, whereas ss 84(3), 84(4), 85(3) and 85(4) are directed to the manner of exercise of the powers in question; (ii) the rule-like quality of the text of s 83(2) can be starkly contrasted with the text of ss 84(3), 84(4), 85(3) and 85(4); (iii) the appearance of the word 'appropriate' in each of ss 84(4) and 85(4) reflects a legislative view that, in relation to medical practitioners, consultation with the AMA is an 'appropriate' procedure (as opposed to something of such fundamental importance as to pre-condition the very existence of power).

3. The first respondent's submission that 'consultation' necessarily involves an actual exchange of views or advice (RS [27]) ought not be accepted. Ordinarily, much will depend upon the facts and circumstances surrounding engagement with the consultee, thereby illustrating that the precise content of the obligations imposed is not easily identified and enforced.

4. It is the generality with which the requirement of consultation is expressed, when considered with other matters including the text of the surrounding provisions, the context of the Part as a whole, the consequences (or lack thereof) of non-compliance and the issue of public inconvenience, which the appellant relies upon as indicative of a Parliamentary intention not to invalidate appointments made by the Minister without complying with the requirement. In so far as context is concerned, the first respondent overstates the role of consultation under ss 84 and 85. (RS [37]-[38]). The first respondent's description of the role of the AMA and other bodies who might be consulted as one of 'overseeing' the administration of the disciplinary system established by Part VAA (RS [39]) also overstates that role. In this regard, it is important to note that Ministerial appointees are merely eligible for subsequent appointment to a PSR Committee. Those subsequent appointments are made by a Director, who cannot be appointed without AMA agreement. In constituting a particular PSR Committee the Director is subject to the constraints imposed by s 95. Whilst it can be expected that the Director will be familiar with the peer-review aspects of the scheme, he/she is not required to consult the AMA before setting up a particular PSR Committee. Even in the absence of consultation by the Minister under ss 84 and 85, a PSR Committee which is selected and set up by the Director in accordance with s 95 is one that is equipped to review the question of whether a peer has engaged in 'inappropriate practice'.

5. As to the emphasis that the first respondent places upon the presence in the Act of provisions which expressly provide that failure to comply does not lead to invalidity (RS [41]), the presence of such provisions is not immaterial to the

Project Blue Sky analysis but it is only one factor and will not, of itself, be determinative, particularly in the face of other, stronger countervailing factors such as exist in the present case. Further, caution should be exercised when evaluating the argument, which involves the *expressio unius est exclusio alterius* principle – a valuable servant but a dangerous master[1] – particularly in circumstances where:

5.1. none of the identified subsections containing a 'no invalidity clause' were introduced into the Act at the same time as ss 84 and 85 (the identified subsections were all introduced at various earlier and later times); and

5.2. each of the identified subsections deals with a different issue to ss 84 and 85, and none of them deals with appointments.[2]

6. This Court's analysis in *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454 should also be noted in this context. It concerned whether a contract entered into by the ABC without the Minister's approval under s 25(1)(a) of the *Australian Broadcasting Corporation Act 1983* (Cth) was beyond the Corporation's power. Notwithstanding that ss 19(4), 20(9) and 21(6), as in force at the relevant time, contained express 'no invalidity clauses', in conducting its mandatory/directory analysis the Court did not rely on those clauses or the absence of a comparable clause in s 25(1)(a).

Notice of contention: de facto officer doctrine

7. Subject to qualifications which are not presently relevant, section 67 of the Constitution vests the appointment and removal of officers of the Executive Government of the Commonwealth (other than those expressly mentioned in other provisions of Ch II) in the Governor-General in Council 'until the Parliament otherwise provides'. The section expressly contemplates that the Parliament will enact legislation, such as the Act here in question, which makes provision for the appointment and removal of persons to exercise the executive power of the Commonwealth.

8. Where Parliament has, to use the language of s 67, 'otherwise provided', and enacted legislation providing for the appointment of officers to exercise executive power or functions, a defective appointment under that legislation does not necessitate a conclusion of invalidity with respect to all acts done in the purported exercise of those powers and functions. Rather, the effect of a purported but legally defective appointment must be resolved by construction of the statute in question.

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1 Eg: *Houssein v Under Secretary, Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 94.

2 Most of the 'no invalidity' clauses referred to operate to save a particular notice, either by reason of a defect in form (ss 88A(7), 89B(5), 93(7D), 105A(5), 106R(5)) or by reason of a failure to provide a notice or report, within the requisite timeframe or otherwise (ss 87(2), 88A(5), 106G(5), 106R(5), 106T(4)). Section 97(4) of the Act addresses a failure to call a first meeting of a PSR Committee within the requisite period of 14 days after its members are appointed, while s 106TA(2) addresses a failure on the part of the Determining Authority to make a final determination within the one month period stipulated in s 106TA(1).

9. If the statute, properly construed, does not exclude the application of the de facto officers doctrine, for the limited purpose of protecting the acts of de facto appointees from collateral challenge, s 67 of the Constitution does not compel a contrary outcome. Even assuming that s 67 continued to have some application in the circumstances (noting the supervening enactment governs the appointments in question), its mere existence does not generate any conflict with the doctrine. In particular, s 67 does not compel any conclusion as to the effect given by statute to actions taken by a person purportedly, but invalidly, appointed to an office under a statute. In this regard the first respondent's
10 contention that allowing for the operation of the doctrine in the face of s 67 would 'circumvent or undermine the operation of the Constitution' as a matter of course (RS [86]) is formulated at too high a level of generality and should be rejected. Furthermore, the first respondent's contention that the executive power can only be exercised by an officer of the Executive Government of the Commonwealth (RS [79], [85]) is not to the point, the Commonwealth Parliament having the recognised capacity to confer functions on, and give legal effect to, the decisions of persons not appointed under s 67.[3]

10. For the reasons outlined in the appellant's earlier submissions, the provisions of the Act do not evince an intention to exclude the operation of the common law
20 de facto officer doctrine (AS [68]ff). Where a decision of a PSR Committee (being a creature of the statute) is collaterally challenged on the basis that the appointment of one or more of its members is invalid, the application of the doctrine in construing the Act presents a basis on which a court can refuse to grant relief and thereby preserve the effect of decisions which have otherwise been made in accordance with the terms of the Act. There is nothing in the terms of s 67 which displaces the availability of the doctrine for this limited purpose.

Notice of contention: appointment of Deputy Directors

11. The fourth and fifth questions which were reserved for consideration by the
30 court below arose in relation to four of the five matters.[4] As noted in the appellant's written submissions in chief (at [11]), Rares and Katzmann JJ found it unnecessary to answer those questions (at [38], AB 125), while Flick J expressed an obiter view in favour of the first respondent in each case (at [106]-[107], AB 152-3).

12. The first respondent's submissions suggest that the answer to those questions depends only upon construction of ss 84 and 85 of the Act (RS [96]-[101]). However, the appellant contended below that resolution of questions 4 and 5 involved construing the instrument by which the named persons were

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3 *O'Donoghue v Ireland; Zentai v Republic of Hungary; Williams v United States of America* (2008) 238 CLR 599; in relation to Commonwealth statutory bodies see eg *Re Residential Tenancies Tribunal of NSW v Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410; *Saitta Pty Ltd v The Commonwealth* (2000) 106 FCR 554 at 573 [91] and the cases there cited; *Electricity Supply Association of Australia Ltd v ACCC* (2001) 113 FCR 230 at 257 [96]; *McGowan v Migration Agents Registration Authority* (2003) 129 FCR 118 at 126 [26].

4 One of the two proceedings involving Dr Lee, now constituted as No S52 of 2012 (NSD 989/2010), did not involve those questions: see AB 57.

appointed, including by reference to extrinsic factual material.[5] The relevance of the material on which the appellant sought to rely was the subject of argument. However, the argument concerning relevance was not resolved by the Court. Instead, the Court took the view that questions 4 and 5 did not need to be resolved in light of the view the Court took on the other questions. In these circumstances, if the appeal is allowed, the most appropriate course would be to remit the two outstanding questions for consideration by the Full Court, as the appellant seeks in its proposed orders.

10 Dated: 10 April 2012

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5 The extrinsic materials were relied upon to support an argument that the appointment of the Deputy Directors as Panel members was inadvertently overlooked; in circumstances where the clear purpose of the instrument was to validly appoint Deputy Directors, the appellant argued that the Court should construe the instrument so as to repair the defect, relying on authority to the effect that where a draftsman has inadvertently overlooked something which he would have dealt with had his attention been drawn to it, the Court should repair the defect if it is possible as a matter of construction to do so: *Mills v Meeking* (1990) 169 CLR 14 at 215, referred to with approval in *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813 at [56] per French J; see also *Comcare v Broadhurst* [2011] FCAFC 39 at [72] per Tracey and Flick JJ.