IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

ON APPEAL FROM THE
FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

No. S50 of 2012

BETWEEN:

COMMONWEALTH OF AUSTRALIA
Appellant

and

ALI KUTLU
First Respondent

THE 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

No. S51 of 2012

BETWEEN:

COMMONWEALTH OF AUSTRALIA
Appellant

and

DR ROBERT CLARKE
First Respondent

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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

10

THE DIRECTOR OF PROFESSIONAL SERVICES REVIEW
Fourth Respondent

No. S52 of 2012

BETWEEN: COMMONWEALTH OF AUSTRALIA
Appellant

20 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

30 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

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No. S53 of 2012

BETWEEN: COMMONWEALTH OF AUSTRALIA
Appellant

and

DR IL-SONG LEE
First Respondent

50

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. S54 of 2012

BETWEEN:

THE MINISTER OF STATE FOR HEALTH
Appellant

and

PAUL CONDOLEON
First Respondent

THE 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

IN EACH MATTER:

FIRST RESPONDENTS' SUBMISSIONS

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. The first respondent in each matter accepts the statement of the issues set out in [2]-[3] of the appellants' written submissions in relation to the notice of appeal in each matter.

3. Ground 1 of the first respondents' notice of contention in each matter [**AB** 209, 227, 245, 264, 282] raises the following question: is application of the "*de facto* officer" doctrine in the instant matters contrary to section 67 of the *Constitution* in that application of that doctrine would purport to validate acts done by a person purportedly, but not lawfully, appointed to be a member of the Professional Services Review Panel (**a Panel member**) or Deputy Director of Professional Services Review (**a Deputy Director**) pursuant to sections 84 and 85 of the *Health Insurance Act 1973* (Cth) (**the Act**) respectively, and would purport to operate to authorise the exercise of executive power of the Commonwealth by a person who is not an officer of the Commonwealth?

4. Ground 2 of the notice of contention in each matter (other than in S52 of 2012) [**AB** 209, 227, 264, 282] only arises if the appellants are successful on the appeals. It raises similar issues to those set out in [2]-[3] of the appellants' written submissions, except a different question of statutory non-compliance must be addressed. That question concerns the failure of the Minister of State for Health and Ageing (**the Minister**), in seeking to appoint Deputy Directors, to ensure those persons were first appointed to be Panel members.

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

5. The first respondent in each matter certifies that he has given notice in compliance with section 78B of the *Judiciary Act 1903* (Cth) in relation to ground 1 of the notice of contention in each matter [**AB** 204, 222, 240, 258, 277].

Part IV: Facts

6. The statement of facts at [7]-[13] inclusive of the appellants' written submissions is accepted. However, some additional comments must be made.

7. The facts on which the Court below based its reasons were the subject of a statement of facts agreed between the parties [**AB** 58-65].

8. Further, questions 4 and 5 of the questions referred to the Full Court of the Federal Court [**AB** 57.12-57.33] are the subject of ground 2 of the notice of contention in each matter (except in S52 of 2012). These questions relate to [12] of the statement of agreed facts [**AB** 60.49-60.54], that is, the purported appointment on about 23 November 2009 of Bruce Ingram, Bernard Kelly and Leon Shapero to be Deputy Directors without any first or separate purported appointment of those persons to be Panel members.

9. Question 4 [**AB** 57.12-57.18] required the Court below to consider whether the instrument dated 23 November 2009 by which Bruce Ingram, Bernard Kelly and Leon Shapero were purportedly appointed to be Deputy Directors had the effect of appointing those persons to be Panel members. If the answer to that question was "No", question 5 [**AB** 57.19-57.33] required the Court below to consider the same sub-questions set out at [9] of the appellants' written submissions.

10. Justices Rares and Katzmann considered it unnecessary to answer questions 4 and 5: at 191 [38] of the reported decision below [**AB** 125.30-125.40]. Justice Flick held, correctly, that a person could not be appointed to be a Deputy Director unless he or she was a Panel member, and a person could not be appointed to be a Panel member except "*in accordance with law*": at 210 [106] of the reported decision below [**AB** 152.52-153.12]. Accordingly, his Honour would have answered "No" to question 4 and "Yes" to each of the sub-questions in question 5: at 216 [122] of the reported decision below [**AB** 159.20-159.25].

Part V: Applicable legislative and Constitutional provisions

11. The first respondent in each matter accepts [71]-[72] of the appellants' written submissions as to the applicable legislative provisions.

12. Attention is directed in particular to sections 79A, 82, 84 and 85 of the Act.

13. Further, Chapter II of the *Constitution*, and section 67 in particular, is relevant to the determination of ground 1 of the notice of contention in each matter.

Part VI: Argument on notices of appeal

Statutory interpretation

14. The issue of statutory interpretation here is a straightforward one: does the failure of the Minister to comply with a mandatorily expressed statutory requirement result in the invalidity of appointments made following that failure and, accordingly, the

invalidity of certain other acts undertaken as a result of those purported appointments?

15. Application of *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 leads to the conclusion that both the appointments and the consequent acts were invalid.

16. The appellants conceded below that the Ministers failed to consult with the Australian Medical Association (**the AMA**) prior to making the impugned appointments: statement of agreed facts at [5], [8], [12] [**AB** 59.33-59.39, 60.10-60.13, 60.42-60.47]. This was a complete and total failure on the part of the Ministers to comply with the statutory requirements.

17. The appellants' written submissions make much of the "*flexibility*" said to be granted by Parliament to the Minister pursuant to sections 84 and 85 of the Act (see, for example, at [32]) and the public inconvenience which, it is said, will result from the decision of the Court below (see from [44] and following).

18. While these might be factors to be taken into account in interpreting statutory language which is otherwise uncertain, they cannot be the primary considerations.

19. To place too great a weight on such factors would, "*emphasis[e] a judicially constructed policy at the expense of the requisite consideration of the statutory text and its relatively clear purpose*": *Australian Education Union v Department of Education and Children's Services* [2012] HCA 3 at [28] per French CJ, Hayne, Kiefel and Bell JJ.

20. Accordingly, before determining the effect of factors such as flexibility and public inconvenience, it is necessary to consider and apply the statutory text.

Statutory interpretation – Statutory text

21. The statutory text in sections 84 and 85 of the Act is not uncertain. Rather, it is plain and simple: the Minister is required to ("*must*") consult with the AMA before making certain appointments.

22. The temporal and logical operation of this expression is self-evident and compelling.

23. The appellants would have the Court, in effect, impermissibly read out the word "*before*".

24. The ordinary grammatical meaning of sections 84(3) and 85(3) of the Act is to effect that, were the Minister to fail to consult with the AMA before purporting to make appointments of Deputy Directors and Panel members, those appointments would simply not be valid. They would never have occurred and they would have no operation in fact or in law.

25. The appellants' concession that the Ministers did not consult the AMA at all before making the impugned appointments has the result that, whatever "*consult*" means, the Ministers failed to do it, and thereby failed to comply with the necessary statutory requirements.

26. It is not necessary in the present matters to consider the definition of the word "*consult*" for all purposes. It is not a word with a technical legal meaning, nor does it require to be ascribed one. It might be useful for limited purposes to briefly consider the meaning of "*consult*" in the legislation at issue.

27. The word "*consult*" has a broader meaning than that given to it by the appellants. Both the *Macquarie Dictionary* and the *Oxford English Dictionary* define the word "*consult*" by reference to a process, which involves some concept of an exchange of views or advice. This process-oriented definition requires something more than merely information flowing from the Minister to the AMA that the appointments are proposed. That this two-way concept of "*consult*" is correct is supported by consideration of sections 84(3) and 85(3) in full, which explicitly state that the AMA is to "*advise*" the Minister on the relevant appointments.

28. In light of this, the appellants' suggestion (at [28] of the appellants' written submissions) that "*consult*" in sections 84(3) and 85(3) does "*not require the Minister to receive any response from the AMA*" would give the word "*consult*" the same meaning as the words "*inform*" or "*notify*". This definition cannot be sustained.

29. If the appellants are correct, then, on their own submissions, the meaning of "*consult*" is plain and not uncertain – and even on the basis of the minimalistic requirements of the appellants' definition of "*consult*", the Minister totally failed to comply with the statutory obligations imposed.

30. Further, the appellants' written submissions at [33] apply an impermissible gloss to the principles arising out of *Project Blue Sky*.

31. The appellants seek to draw an analogy with *Project Blue Sky* by reference to the statutory obligations imposed. However, in *Project Blue Sky*, the nature and content of the statutory obligations were very different from those in issue here. In that case, section 161 of the *Broadcasting Services Act 1992* (Cth) required the Australian Broadcasting Authority "*to perform its functions in a manner consistent with*" a number of factors, including the objects of the legislation, regulatory policy, certain "*general policies of the Government*", directions given by the relevant minister, and "*Australia's obligations under any convention to which Australia is a party or any agreement between Australia and a foreign country*": *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 360.4-360.7 [1] per Brennan CJ.

32. It was in the context of those obligations – broad, policy-laden, unable to be clearly defined and potentially contradictory – that the decision in *Project Blue Sky* was made: see in particular *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 391.4-392.4 [95]-[97] per McHugh, Gummow, Kirby and Hayne JJ. Their Honours' reasons must not be divorced from their context.

33. The nature of the statutory obligations in *Project Blue Sky* serves only to highlight and emphasise the clarity of the statutory requirement in sections 84(3) and 85(3) of the Act.

Statutory interpretation – Statutory purpose and context

34. As the majority held in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, the ordinary grammatical meaning of a statutory provision will normally comprise the legal meaning as well: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384.2 [78] per McHugh, Gummow, Kirby and Hayne JJ. That this is so in the present matter is confirmed by reference to the purpose of the legislation, both as a whole and in relation to the specific provisions under consideration.

35. The Act has no overall objects section, but its long title provides a concise statement of the purpose of the Act:

> *An Act providing for Payments by way of Medical Benefits and Payments for Hospital Services and for other purposes*

36. From this, it can be seen that the primary purpose of the Act is to regulate the funding of medical services by Medicare Australia. The "*other purposes*" are incidental to that, and are not unimportant. One such purpose, critical to the regulation of Medicare, is the disciplinary and revenue protection purpose behind Part VAA. This Part does contain an objects provision (section 79A), which provides:

> ***Section 79A – Object of this Part***
>
> *The object of this Part 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.*

37. Thus the statutory purpose behind Part VAA is to establish a disciplinary system to investigate alleged "*inappropriate practice ... in connection with rendering or initiating services*" (section 82(1)). Importantly, "*inappropriate practice*" is

defined by reference to whether "*the conduct would be unacceptable to*" practitioners in the same field as the relevant practitioner. Involvement of the community of practitioners in the process is therefore a key to determining what might constitute "*inappropriate practice*" in particular cases, and thus, such involvement is critical to the operation of Part VAA as a whole (see, for example, *Report of the Review Committee of the PSR Scheme*, March 1999, Commonwealth of Australia, referred to in *Wong v Commonwealth* (2009) 236 CLR 573, 637.6-638.8 [221]-[224] per Hayne, Crennan and Kiefel JJ; see also 645.6 [248] per Heydon J).

10 38. The requirements in sections 84 and 85 that the Minister must consult the AMA "*[b]efore appointing a medical practitioner to be a Panel member*", or a Panel member to be a Deputy Director, and that the Minister must make arrangements for the AMA to consult other relevant professional associations "*[b]efore appointing a medical practitioner to be a Panel member*", or a Panel member to be a Deputy Director, provides further support for the concept that the active and meaningful involvement of the community of practitioners by way of consultation and participation is crucial to the intended scheme.

39. In essence, the AMA, and the other bodies with whom the AMA might consult, represent the capacity of the medical profession to have oversight of the
20 administration of the disciplinary system established by Part VAA.

40. In addition, it cannot simply be said that sub-section (3) of each section merely "*regulates the exercise of functions already conferred*" by sections 84(2) and 85(1): *cf Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 391.4 [94]. Rather, each of sections 84 and 85 must be read as a whole, and each provision, read as a whole, confers a function on the Minister: respectively, the functions of appointing Panel members and Deputy Directors. Further, each of sections 84 and 85 provide a complete account of the respective functions: *cf Minister for Immigration and Citizenship v SZKTI* (2009) 238 CLR 489, 503.8-504.3 [45]-[46].

30 41. Further, had Parliament intended that failure by the Minister to comply with the requirement to consult the AMA should not lead to invalidity, it could have said so explicitly. Moreover, the statutory context as a whole suggests it <u>would</u> have done so. A significant number of provisions in Part VAA of the Act alone provide that failure to comply with a provision does <u>not</u> lead to invalidity: sections 87(2), 88A(5), (7), 89B(5), 93(7D), 97(4), 105A(5), 106G(5), 106R(5), 106T(5) and 106TA(2).

42. That sections 84 and 85 contain no such savings provision, especially in the context of the many savings provisions in Part VAA of the Act, is a strong indication that the statutory purpose was such that a failure by the Minister to consult the AMA

before making appointments of Panel members and Deputy Directors leads to the invalidity of those appointments.

43. Finally, the statutory text provides evidence that Parliament did consider what should happen in circumstances where a member of a PSR Committee "*ceases to be a Panel member or, for any other reason, is unable to take any further part in the*" work of the Committee: see section 96A(1). In this section, Parliament provided that, for the continuation of the Committee to be lawful in such circumstances, the practitioner's consent must first be obtained: section 96A(2). Without that consent, the Committee falls and cannot continue: section 96A(3). It is inconsistent with the import of section 96A to find that a Committee could be constituted, or continue to be constituted, where one or more of the persons purportedly appointed to that Committee was not validly appointed to be a Panel member or Deputy Director, as the case may be.

Statutory interpretation – appellants' reliance on public inconvenience and public confidence

44. The reliance placed by the appellants on the public inconvenience they contend will result from the decision of the Court below is overstated. This puts the policy cart before the statutory purpose horse.

45. The approach taken in both judgments of the Court below – to consider the text of the statutory provisions before considering consequences such as public inconvenience – is precisely consistent with the Court's recent declaration as to the correct approach to statutory construction: *Australian Education Union v Department of Education and Children's Services* [2012] HCA 3 at [28] per French CJ, Hayne, Kiefel and Bell JJ.

46. The appellants contend "*the avoidance of public inconvenience ... does not come into play only after consideration of other factors and/or in the event of ambiguity*": at [48] of the appellants' written submissions. However, even in *Project Blue Sky*, public inconvenience was a factor to be considered subsequent to a consideration of the statutory text in the context of the statute as a whole. The reasons of the majority in *Project Blue Sky* demonstrate this, even if regard is had only to the discussion of public inconvenience: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 392.2-392.8 [97]-[98] per McHugh, Gummow, Kirby and Hayne JJ. Specifically, their Honours held (at 392.3 [97]):

> *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 ... members of the public ...*
>
> *[emphasis added]*

47. The concept of public inconvenience was not a factor to be taken into account in a manner completely distinct from the prior task of construing the statutory language. It is only to be undertaken if it is required.

48. The finding in *Project Blue Sky* that "*the likelihood of that body breaching its obligations under s 160 is far from fanciful*" was a key finding. In essence, the statutory obligations in that case were so uncertain and so complex that it was implicit that Parliament must have had in mind that there would or could be some non-compliance.

49. Not so, here. For the reasons discussed above, the Minister's obligations were straightforward, not complex. The Minister made no attempt to comply with those requirements. Parliament cannot be taken to have expected that a Minister of State would fail so completely to comply with such plain statutory requirements. In this context, such reliance on public inconvenience as the appellants assert would require the Court to make a judgment as to the desirable outcome without proper regard to the statutory text.

50. Finally, the appellants place weight on the proposition that "*public confidence in the scheme would be seriously undermined*" if the appointments are confirmed as invalid: at [49] of the appellants' written submissions.

51. There are three answers to this.

52. First, it is not apparent that public confidence in the scheme is a factor which requires consideration, especially in light of the reasons in *Australian Education Union*.

53. Further, any undermining of public confidence to which the appellants refer would not be caused by a finding that the Minister's failure to comply with statutory requirements led to the invalidity of the relevant appointments, but rather, by reason of the failure to comply itself. Where invalidity results from the considered acts of a Minister based on advice received, it is proper that any effect on public confidence be considered in this light.

54. This is particularly so when it is recalled that the "*public*" includes the many medical practitioners who are overseen or regulated by virtue of the operation of Part VAA of the Act.

55. In any event, if public confidence is a relevant factor here, which is denied, it must include concepts of accountability and it would be undermined by a conclusion that a total failure by the Minister to comply with a straightforward statutory requirement in making appointments of Panel members and Deputy Directors has no effect (in that it does not lead to invalidity).

Statutory interpretation – Consequences

56. A consideration of the purpose of the legislation, as outlined above, confirms that the ordinary grammatical meaning of each of sections 84(3) and 85(3) is also the legal meaning of each of those provisions.

57. Failure to comply with one of these sub-sections means a necessary pre-condition to the valid exercise of a power has not occurred and the relevant medical practitioners have not been appointed to any Panel or to any office. Accordingly, any purported power they exercise in any office or as a member of any Panel or on any Professional Services Review Committee pursuant Part VAA of the Act is void: see, for example, *Tu v University of New South Wales* (2003) 57 NSWLR 376 at 387.4 [25], 388.2 [27] per Sheller JA, Beazley JA and Tobias JA agreeing.

"De facto *officer" doctrine*

58. As the appellants note in their written submissions (at [54]), the question of the application of the so-called "*de facto* officer" doctrine only arises if the appellants are unsuccessful in relation to the statutory interpretation ground of the notices of appeal.

59. Application of the "*de facto* officer" doctrine in the instant matters would circumvent the answer to the statutory interpretation questions which arise.

60. For the reasons outlined above, a finding that the correct interpretation of the relevant statutory provisions results in the invalidity of the appointments of Panel members and Deputy Directors and of the consequent acts and decisions is a result of the proper consideration of the statutory words in the context of the legislation as a whole, including its purpose.

61. If the "*de facto* officer" doctrine applies so as to validate the acts done consequent to invalid appointments, it would defeat the statutory purpose referred to above.

62. This is supported by *R v Janceski* (2005) 64 NSWLR 10, 34.6 [132] per Spigelman CJ and by *G J Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503, 519E-G per Kirby P and Hope JA.

63. As the appellants note, the Court in *R v Janceski* held that the statutory purpose there "*was to invalidate* the act *of signing an indictment*": appellants' written submissions at [63], emphasis in original, with reference to *R v Janceski* (2005) 64 NSWLR 10 at 34 [131]-[132] per Spigelman CJ.

64. The same can be said here. The answer to the statutory construction question necessitates a consideration of the statutory purpose in relation to the consequences of a failure to comply with the statutory requirements, not only in relation to the

impugned appointments themselves but also, inherently, in relation to the acts and decisions consequent upon those purported appointments.

65. The answer to those questions leaves no room for the operation of the "*de facto* officer" doctrine. The statutory construction exercise leads to a finding of validity, in which case there is no work for the doctrine at all. Alternatively, the exercise leads to a finding of invalidity, in which case it would be contrary to accepted principles of law to permit the doctrine to override the parliamentary intention, as expressed by the legislation properly construed.

66. This is especially so in circumstances, such as here, where any invalidity is the direct result of the Minister's failure to comply with an important statutory requirement.[1]

"De facto *officer" doctrine – state of the authorities*

67. The appellants call into aid authorities in this Court and overseas. Such authorities do not provide the support the appellants seek.

68. First, in none of the authorities of this Court to which the appellants refer (*Bond v The Queen* (2000) 201 CLR 213, *Cassell v The Queen* (2000) 201 CLR 189 and *Haskins v Commonwealth* (2011) 279 ALR 434) was the Court required to consider the application of the "*de facto* officers" doctrine. Accordingly, the Court cannot be said to have definitively "*allowed for [the doctrine's] continuing availability*": appellants' written submissions at [59].

69. Further, in *Bond*, the Court did say "*the question of the powers of [a] particular officer of the Commonwealth*" was one "*arising under the Constitution*" which "*cannot be resolved by ignoring the alleged want of power*": *Bond v The Queen* (2000) 201 CLR 213, 225.5 [34] (emphasis added).

70. The Court reiterated this proposition in *Haskins*, where the majority explicitly acknowledged the possibility for a "*limitation on [the* 'de facto *officers'] doctrine where the want of authority is the consequence of the operation of the Constitution*": *Haskins v Commonwealth* (2011) 279 ALR 434, 446 lines 36-37 [46] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

71. In addition, it is far from clear that there is a single and consistent international "*de facto* officers" doctrine. In particular, there are signs that the doctrine is falling out of favour in both the United Kingdom and the United States of America.

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[1] See also *Balmain Association Inc v Planning Administrator for the Leichhardt Council* (1991) 25 NSWLR 615, 639G per Kirby P, Priestley and Handley JJA; see also Enid Campbell, "*De Facto Officers*" (1994) 2 A J Admin L 5.

72. In the United Kingdom, the doctrine has been described as "*sail[ing] close to the wind*" in light of the United Kingdom's European commitments: *Sumukan Ltd v Commonwealth Secretariat (No 2)* [2008] Bus LR 858, 875 [51] per Sedley LJ.

73. In the United States, cases such as *Nguyen v United States* 539 US 69 (2003) and *Ryder v United States* 515 US 177 (1995) suggest the Supreme Court of the United States has been championing a contraction of the doctrine. In *Ryder*, the Court declined to "*extend*" the application of the doctrine beyond the facts of previous authorities: *Ryder v United States* 515 US 177 (1995) 184.1. Further, it was relevant that the claim in that case had a constitutional aspect: *Ryder v United States* 515 US 177 (1995) 180.4, 182.4, 182.9. Similarly, in *Nguyen*, it was relevant that the issues for resolution involved "*weighty congressional policy concerning the proper organization of the federal courts*": *Nguyen v United States* 539 US 69 (2003) 79.8.

74. If the considerations taken into account in the application of statutory interpretation principles are such as to lead to a finding of invalidity, it can be said they are sufficiently "*weighty*" as to deny to the appellants the protection of the "*de facto* officers" doctrine in the present matters.

75. Finally, even in Canada, where the doctrine appears to have the broadest application, it has been held to apply within the principles of statutory interpretation: *Fahrenbruch v British Columbia (Family Maintenance Enforcement Program)*, 2009 BCSC 1128 [54]-[60].

Part VII: Argument on notices of contention

Section 67 of the Constitution

76. Ground 1 of each of the first respondents' notice of contention [**AB** 209, 227, 245, 264, 282] raises the issue of the compatibility or otherwise of the "*de facto* officer" doctrine with the *Constitution*. The first respondents' argument on this ground provides an alternative basis to the submissions above for a conclusion that the "*de facto* officer" doctrine cannot operate to validate the acts done by a Commonwealth officer.

77. The executive power of the Commonwealth is vested in the Crown and is exercisable by the Governor-General: section 61 of the *Constitution*. The scheme of Chapter II of the *Constitution* makes it plain that the executive power of the Commonwealth is not required to be exercised personally by the Governor-General, but rather, will generally be exercised by ministers of state (see especially section 64).

78. Although the scope of the executive power of the Commonwealth might not be settled (*Pape v Commonwealth* (2009) 238 CLR 1, see especially 60.3-60.9 [127]

per French CJ, 87.3-87.4 [227], 89.7-89.8 [234] per Gummow, Crennan and Bell JJ, 121.4-121.6 [343] per Hayne and Kiefel JJ), the manner in which the power is exercised is more certain: *Pape v Commonwealth* (2009) 238 CLR 1, 56.3 [114] per French CJ.

79. It is implied in the *Constitution* that only officers of the executive government of the Commonwealth are permitted to exercise the executive power of the Commonwealth (subject to lawful delegations). This proposition is supported by such authority as *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275.3 per Dixon CJ, McTiernan, Fullagar and Kitto JJ, in which their Honours held that the vesting of power by the *Constitution* must not "*be treated as meaningless and of no legal consequence*", and is consistent with the Court's reasons in *Re Patterson; ex parte Taylor* (2001) 207 CLR 391, see in particular at 452.7-452.10 [187] per Gummow and Hayne JJ.

80. Section 67 of the Constitution provides:

> ***Appointment of civil servants***
>
> *Until the Parliament otherwise provides, the appointment and removal of all other officers of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council, unless the appointment is delegated by the Governor-General in Council or by a law of the Commonwealth to some other authority.*

81. No other provision of the *Constitution* provides for the appointment of officers of the Commonwealth who are not ministers of state or otherwise members of the Federal Executive Council.[2] Further, section 67 leaves no room for any implicit power of appointment of such officers, or for any common law doctrine which would have such a practical effect.

82. Nothing in the Convention Debates sheds any additional light on the interpretation of section 67: see generally *Official Record of the Debates of the Australasian Federal Convention*, Legal Books Pty Ltd, Sydney, 1986. This provides further support for the interpretive approach outlined above.

83. On any view, section 67 is an exclusive provision in relation to the power to appoint officers of the executive government of the Commonwealth. In short, the *Constitution* leaves no room for the "*de facto* officer" doctrine to operate in respect of the Commonwealth. The position might be different in the States.

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[2] While it might be said that the transfer of public service departments from State to Commonwealth control pursuant to section 69 of the *Constitution* implicitly provides for the appointment of the civil servants working in those departments to be officers of the executive government of the Commonwealth, that is a special provision and of no relevance in the instant case.

84. By providing mechanisms for the appointment of officers of the executive government, there is an inference that such officers may exercise the executive power of the Commonwealth where authorised to do so.

85. There is a further – and strong – implication that the executive power of the Commonwealth cannot be exercised except in accordance with Chapter II of the *Constitution*. That is, there is a strong inference that the executive power of the Commonwealth cannot be exercised by a person who is not an officer of the Commonwealth.

86. The application of the "*de facto* officer" doctrine in the present matters would, in practice, circumvent or undermine the operation of the *Constitution*. This result cannot be correct: see, for example, *Ha v New South Wales* (1997) 189 CLR 465, 498.8 per Brennan CJ, McHugh, Gummow and Kirby JJ.

Section 67 – Failure to comply with requirements

87. Under the scheme of Part VAA of the Act, Panel members and Deputy Directors exercise the powers of the executive government of the Commonwealth in investigating the conduct of practitioners referred to Committees and in making determinations. Such power may only be exercised if Panel members and Deputy Directors are properly appointed to be officers of the executive government of the Commonwealth.

88. Parliament has provided for the appointment of Panel members and Deputy Directors in sections 84 and 85 of the Act respectively. Where there has been compliance with those provisions in making appointments of Panel members or Deputy Directors, such persons are officers of the executive government of the Commonwealth, appointed in accordance with section 67 of the *Constitution*, and, accordingly, able to exercise the executive power of the Commonwealth.

89. In the instant case, the Ministers failed to comply with sections 84 and 85 of the Act in appointing certain persons to be Panel members and Deputy Directors. So much is admitted. Where the failures to comply with those provisions intervened in the appointment process, those persons were not appointed in accordance with section 67 of the *Constitution*.

90. Accordingly, persons who were not properly appointed to be Panel members or Deputy Directors are not officers of the executive government of the Commonwealth within the meaning given to that term in section 67 of the Commonwealth.

91. A purported officer of the Commonwealth is not an officer of the Commonwealth.

92. To hold that the acts done by such persons are valid, even if the appointments are invalid, by applying the "*de facto* officer" doctrine would, in effect, authorise the

exercise of the executive power of the Commonwealth by a person who was not an officer of the Commonwealth.

93. This would circumvent or undermine section 67 of the *Constitution.*

Questions 4 and 5 of the special case in the Court below

94. Ground 2 of the notice of contention in each matter (other than S52 of 2012) [**AB** 209, 227, 264, 282] only requires consideration if the appellants are successful on the appeals.

95. The ground concerns questions 4 and 5 of the special case in the Court below [**AB** 57.12-57.33]. Those questions relate to the Minister's failure, in appointing persons to be Deputy Directors, to ensure those persons were first appointed to be Panel members. Specifically, by instrument dated 23 November 2009, the Minister purported to appoint Bruce Ingram, Bernard Kelly and Leon Shapero to be Deputy Directors. Those appointments were stated to take effect on and from 25 January 2010. However, the Minister failed to, whether in that instrument or otherwise, appoint Bruce Ingram, Bernard Kelly and Leon Shapero as Panel members.

96. Accordingly, the issues which require determination in order to answer questions 4 and 5 of the special case in the Court below arise out of the operation of section 85(1), which provides that "*[t]he Minister may appoint Panel members to be Deputy Directors*".

97. The submissions outlined above in relation to the construction of the Act and the application of the "*de facto* officers" doctrine apply to a large extent to these questions. However, whereas questions 1, 2 and 3 of the special case [**AB** 55.48-57.11] concern the effect of the Minister's failure to comply with a statutory requirement in making an appointment, questions 4 and 5 concern the very foundation of the power.

98. The plain grammatical meaning of section 85(1) connotes:

a. a power, conferred on the Minister, to appoint persons to be Deputy Directors;

b. a requirement that the persons so appointed be Panel members; and

c. a discretion in relation to those appointments, which discretion is limited by the requirement stated above.

99. Further, section 85 is the exclusive location of the power to appoint persons to be Deputy Directors. Likewise, section 84 is the exclusive location of the power to appoint persons to be Panel members. In other words, section 85 contains no power to appoint persons to be Panel members.

100. Thus the logical, grammatical and proper interpretation of section 85(1) is that, if a person is not appointed to be a Panel member, he or she is not eligible for appointment to be a Deputy Director. There is therefore no power to appoint him or her to be a Deputy Director.

101. It is a simple ultra vires point.

102. This is not merely a failure by the Minister to comply with an essential pre-condition to the making of an appointment, but it constitutes a complete incapacity to appoint, as Deputy Directors, persons who are not Panel members.

103. Accordingly, questions 4 and 5 of the special case in the Court below should be answered as follows:

Question 4: No

Question 5: Yes, all were.

Dated 30 March 2012

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

ON APPEAL FROM THE
FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

No. S50 of 2012

BETWEEN: COMMONWEALTH OF AUSTRALIA
Appellant

and

ALI KUTLU
First Respondent

THE 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

No. S51 of 2012

BETWEEN: COMMONWEALTH OF AUSTRALIA
Appellant

and

DR ROBERT CLARKE
First Respondent

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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

10

THE DIRECTOR OF PROFESSIONAL SERVICES REVIEW
Fourth Respondent

No. S52 of 2012

BETWEEN: COMMONWEALTH OF AUSTRALIA
Appellant

20 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

30 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

40

No. S53 of 2012

BETWEEN: COMMONWEALTH OF AUSTRALIA
Appellant

and

DR IL-SONG LEE
First Respondent

50

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. S54 of 2012

BETWEEN:

THE MINISTER OF STATE FOR HEALTH
Appellant

and

PAUL CONDOLEON
First Respondent

THE 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

ANNEXURE TO THE FIRST RESPONDENTS' SUBMISSIONS IN EACH MATTER

Commonwealth of Australia Constitution Act

(The Constitution)

This compilation was prepared on 25 July 2003
taking into account alterations up to Act No. 84 of 1977

[Note: This compilation contains all amendments to the Constitution made by the Constitution Alterations specified in Note 1
Additions to the text are shown in bold type
Omitted text is shown as ruled through]

Prepared by the Office of Legislative Drafting,
Attorney-General's Department, Canberra

Chapter II—The Executive Government

61 Executive power

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

62 Federal Executive Council

There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

63 Provisions referring to Governor-General

The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

64 Ministers of State

The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

Ministers to sit in Parliament

After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

65 Number of Ministers

Until the Parliament otherwise provides, the Ministers of State shall not exceed seven in number, and shall hold such offices as the Parliament prescribes, or, in the absence of provision, as the Governor-General directs.

66 Salaries of Ministers

There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, an annual sum which, until the Parliament otherwise provides, shall not exceed twelve thousand pounds a year.

67 Appointment of civil servants

Until the Parliament otherwise provides, the appointment and removal of all other officers of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council, unless the appointment is delegated by the Governor-General in Council or by a law of the Commonwealth to some other authority.

68 Command of naval and military forces

The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

69 Transfer of certain departments

On a date or dates to be proclaimed by the Governor-General after the establishment of the Commonwealth the following departments of the public service in each State shall become transferred to the Commonwealth:

posts, telegraphs, and telephones;
naval and military defence;
lighthouses, lightships, beacons, and buoys;
quarantine.

But the departments of customs and of excise in each State shall become transferred to the Commonwealth on its establishment.

70 Certain powers of Governors to vest in Governor-General

In respect of matters which, under this Constitution, pass to the Executive Government of the Commonwealth, all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a Colony, or in the Governor of a Colony with the advice of his Executive Council, or in any authority of a Colony, shall vest in the Governor-General, or in the Governor-General in Council, or in the authority exercising similar powers under the Commonwealth, as the case requires.