Discipline in the "*Medicare Workforce*" - Commonwealth Professional Disciplinary Tribunals for Australian Medical Professionals

A paper delivered by Mark Robinson SC to a Conference held in New York on 17 September 2013

I am asked to speak to you on the topic of Commonwealth disciplinary tribunals as they are applied to Medicare registered Australian medical practitioners.

I have had most of my experience in this area with general practitioners. However the Commonwealth disciplinary system applies to all specialist practitioners equally as well as to GPs. There are about 24,000 Medicare registered GPs practicing in Australia, and they have received the bulk of the Commonwealth's attention in this area to date.

They are also the busiest and the naughtiest doctors (that we know of).

I will say nothing of the many State-based (now National) schemes that are in place. For example, the former NSW Medical Board, now, the Medical Council of NSW and the Medical Tribunal of NSW are governed by the *Health Practitioner Regulation National Law* (NSW).

There is also the Australian Health Practitioner Regulation Agency (AHPRA), which is the organisation responsible for the implementation of the National Registration and Accreditation Scheme across Australia.

It covers 580,000 health practitioners across Australia. It provides for registration and regulation of all health practitioners.

In NSW, medical practitioners will be most familiar with the operation of the Health Care Complaints Commission ("HCCC"), the Medical Council of NSW and the Medical Tribunal of NSW.

That is where very naughty doctors go in NSW.

The NSW Coroners Court also deals with doctors who have (unwittingly or not) killed their patients. Their actions are scrutinised in considerable detail in public hearings and reported on there. Coroners in NSW investigate about 6,000 reportable deaths annually.

From January 2014, the Medical Tribunal of NSW will be folded into a new "super tribunal" styled the NSW Civil and Administrative Tribunal.

See the discussion at http://www.tribunals.lawlink.nsw.gov.au/tribunals/index.html

On top of all this State regulation, is the Commonwealth's own Medicare system styled "*Professional Services Review*" or "PSR".

It is governed by Part VAA of the *Health Insurance Act 1973* (Cth) (ss 79A to 106ZR) ("**the Act**").

This is the present system.

The title of my paper the "*Medicare workforce*" is an accurate description of how the Commonwealth truly sees health care providers in Australia (as its own "workforce") and it is derived from the Commonwealth's publication "*General Practice in Australia: 2004*" (2005) Department of Health and Ageing, Commonwealth of Australia, Canberra at page 46).

The old Commonwealth system was as follows.

Systems were in place in the Act to detect and to deal with only "*excessive servicing*" and "*fraud*" by Medicare doctors in Australia.

It was as simple as that.

It only applied to the provision of Medicare services.

Have you ever met a non-Medicare registered doctor in Australia (a doctor without a Medicare provider number)? It is highly unlikely.

Perhaps you met one on a cruise ship or in a prison or you met an Eastern Suburbs cosmetics doctor?

Medicare does *not* provide services for the following:

(a) Patients who qualify for benefits under the *Veterans' Entitlements Act 1986* (Cth);
(b) Patients whose treatment is covered by a workers' compensation scheme or other compensation scheme or by insurance;
(c) Patients who are not eligible for Medicare benefits - for example, some overseas visitors;
(d) As a medical officer in a public hospital treating inpatients or outpatients;
(e) As a medical officer contracted to the Australian Defence Force;
(f) As a medical officer in the Health Services Australia, or any similar State or Territory Government health service;
(g) As a medical officer employed by a corporation, such as a large industrial corporation or a mining company;
(h) As a medical officer in a specialty clinic dealing with such issues as obesity, or providing cosmetic surgery, or in a "*wellness clinic*" offering health checks and alternative treatments in areas such as cancer, cardiac, osteoporosis, and menopause, where these services are not covered by Medicare;
(i) As a medical officer in a correctional institution;
(j) As a medical officer on a cruise ship;
(k) As a medical officer to a professional sports team;
(l) Medical examinations for the purpose of insurance, commercial drivers' licences, and some other forms of licences;
(m) Health screening and fitness tests for fitness programs and activities such as scuba diving and weight reduction programs.

All the rest have a Medicare provider number.

In 1993, fraud and excessive servicing changed, and an entirely new concept of "*inappropriate practice*" was enacted in the form of section 82 of the Act.

Fraud and excessive servicing (or "*over-servicing*" as it came to be known) were ditched entirely.

The Origins of Part VAA of the Act

As to the origins of Part VAA of the Act in 1993 and the introduction of the expression "*inappropriate practice*" in section 82 of the *Health Insurance Act 1973* (Cth) there was an "*Audit Report*" of the Commonwealth Auditor-General's Report No 17 titled Medifraud and Excessive Servicing dated 16 December 1992. It was referred to in Parliament at pages 2 to 4 of the second reading speech to the *Health Legislation (Professional Services Review) Bill 1993* ("**the 1993 Bill**") (which became Act No 22 of 1994) (and which introduced Part VAA and section 82) (House of Representatives Hansard on 30 September 1993, pages 1555 to 1557).

The full title of Audit Report is Project Audit: Medifraud and Excessive Servicing: Health Insurance Commission by the Australian National Audit Office, Report No 17, 1992-3.

By dint of the second reading speech, the Audit Report became "*extrinsic material*" in the drawing of the 1993 Bill that introduced this new concept of "*inappropriate practice*". That meant it was an aid to the interpretation of the provisions (section 15AB of the *Acts Interpretation Act 1901*(Cth)).

The Audit Report is most interesting for what it does *not* contain.

It does not contain any reference to a concept of "inappropriate practice". However, it does contain many references to "*overservicing*" and "*excessive servicing*" and "*fraud*". It is these matters that primarily moved Parliament to make the changes to the Act in the 1993 Bill.

A close reading of the second reading speech of 30 September 1993 also bears that out.

Incredibly, there was no clear mischief that was sought to be achieved by Parliament in the introduction of the new concept of "*inappropriate practice*" in the Act.

The real reasons for its introduction is therefore somewhat of a mystery.

The new Part contains an objects provision (section 79A). It was not inserted in 1993. It commenced on 18 December 2002 (after some Federal Court challenges) with the amending Act, the *Health Insurance Amendment (Professional Services Review and Other Matters) Act 2002* (Cth).

It now provides:

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

Thus the purpose of Part VAA is to protect the revenue and 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.

Objectively, determination of whether or not a practitioner has engaged in inappropriate practice falls to a review of his or her medical records and ultimately, whether or not they are sufficient in quality and detail so as to enable another practitioner to take over the care of the patient. This is a very high standard. It is the largest hurdle, in my experience of the system.

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).

The starting point in Part VAA is the definition of "*inappropriate practice*" in section 82, which is most relevantly[1]:

> "(1) A practitioner engages in inappropriate practice if the practitioner's conduct in connection with rendering or initiating services is such that a Committee could reasonably conclude that:
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> (a) if the practitioner rendered or initiated the services as a general practitioner – the conduct would be unacceptable to the general body of general practitioners;
>
> ...
>
> (3) A Committee must, in determining whether a practitioner's conduct in connection with rendering or initiating services was inappropriate practice, have regard to (as well as to other relevant matters) whether or not the practitioner kept adequate and contemporaneous records of the rendering or initiation of the services."

The "*Committee*" is a Professional Services Review Committee set up under section 93: see section 81(1). By section 86(1) the Medicare Australia is empowered to refer to the Director of Professional Services Review appointed under section 83, the conduct of a person relating to whether the person has engaged in connection with the rendering or initiation of services. That was known in the past as an "*investigative referral*": see section 81(1) – it is now known since the 2002 amendments as a *Request to the Director to Review Services* (section 86(1)).

By section 93(1) the Director may then:

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[1] Subsection 82(3) and the definition of "adequate and contemporaneous records in s.81(1) did not come into the Act until 1 November 1999.

(a) set up a Professional Services Review Committee; and

(b) make a referral, defined by section 81(1) as an "*adjudicative referral*", to such Committee (post 2002, styled simply as a *Referral to a Committee*: section 93) to consider whether conduct by the person under review in connection with rendering or initiating services specified in such adjudicative referral constituted engaging in "*inappropriate practice*".

On an adjudicative referral or a Referral to a Committee, the Committee is to prepare a final report: section 106L. The Committee conducts hearings where the doctor may be represented by a lawyer and present evidence and make submissions. They generally last no less than three days. The final report is to go to the Determining Authority established by s.106Q. If the report contains a unanimous or majority finding of inappropriate practice, the Determining Authority by draft (section 106T) and then final, determination (section 106TA) must adopt one or more of the courses set out in section 106U. They include reprimand and disqualification from provisions of specified services and "*repayment*" of monetary benefits under the Medicare scheme.

Medicare benefits are not payable in respect of services provided by a medical practitioner disqualified under section 106U: see section 19B.

The current penalties also include full or partial disqualification (s 106U) for a period of not more than 3 years and, for a second or more "offences" the penalty is up to 5 years.

Sample Services and Patterns and the 80-20 Rule

Note should be made of the deeming and extrapolation provisions in sections 106K, 106KA and 106KB.

Together with the *Health Insurance (Professional Services Review) Regulations 1999* (Cth), these provisions have proved to be a powerful weapon against alleged over-servicing.

In short, if a doctor renders 80 or more professional services on over 20 or more days within a given year, they are deemed to have engaged in inappropriate practice. This reform was worked out with the assistance of the AMA. It was considered that if doctors worked harder, they were unlikely to provide sufficient clinical input to their patient's need (and the minimum Medicare requirements).

"*Exceptional circumstances*" is provided for in the regulations in cases of an unusual occurrence causing an unusual level of need for professional attendances; or, an absence of other medical services, for patients of the doctor during the relevant period, having regard to (i) the location of the practice of the doctor; and (ii) characteristics of the patients of the doctor. There is also a general test for exceptional circumstances in section 106KA(2) of the Act.

In these cases, the doctor's individual medical records are not examined at all. Only to the extent so as to establish the number of patients he or she saw on the relevant given days.

There are many cases that have tested the limits of these provisions – see, eg: *Oreb v Wilcock* (2005) 146 FCR 237 and *Tisdall v Webber* (2011) 193 FCR 260.

The sampling provisions can also give rise to manifest unfairness. A sample is taken and, say, 30 medical records are subpoenaed and examined. Any bad or negative findings made against a doctor (from bad handwriting to "*insufficient clinical input*" or "*insufficient compliance with the Medicare descriptors*") are then extrapolated by a complex formula created by an actuary to cover the whole of the doctor's practice.

Repayment of up to one year of Medicare payments and, sometimes, disqualification then ensues.

The sampling provisions have also been tested in the Federal Court a number of times – see eg: *Matthews v Health Insurance Commission* (2006) 90 ALD 49 (Edmonds J)

Also, while a Committee is hearing a matter, it can (and the Director can) (s 106KC) refer a doctor to a State-based medical authority, such as the Medical Council or the HCCC.

The Director does this regularly, in my experience.

The Problem with *Inappropriate Practice* as the Touchstone

The problem is that the concept is significantly wider than the concept of excessive servicing.

It goes both into the manner in which professional medical services are actually provided and the actual medical services provided, rather than regulation of the number of services provided, or administrative incidents of medical practice.

It affects the practitioner's clinical decision as to whether to provide a particular service.

This feature alone distinguishes the present system from the former system.

The Report of the Review Committee of the Professional Services Review Scheme (Commonwealth, 1999) referred to in *Selim v Lele* (2006) 150 FCR 83 at [90] (Stone J) and by the Full Court in *Selim v Lele* (2008)167 FCR 61 at [6] and see, *Wong v Commonwealth* (2009) 236 CLR 573 at [214]-[215] (per Hayne, Crennan and Kiefel JJ) list a number of matters that section 82 was designed to cover.

This list demonstrates that many such matters are capable of affecting the actual services a medical practitioner provides. For example:

(a) Concerns about the manner of the "*performance*" of a practitioner's practice may cause that practitioner to cease or modify the provision of that medical service.
(b) Concerns about the "*unusual incidence of specific types of services*" may cause a practitioner to, for example, cease home visits or long consultations altogether or reduce them (an "*inappropriate*" mix of short, long, and home visits appears on the Commonwealth's software statistics system and could cause a referral to a Committee).
(c) Concerns about alleged different, new or emerging medical approaches or treatments (for example, the promotion or provision of cultural, herbal or complementary medicines) might be labelled "*aberrant professional behaviour or beliefs*" by a Committee. Similarly, the provision of particular

> prescription medication may be the subject of scrutiny under the guise of inappropriate prescribing (as in *Selim*).

Due to the pervasive effect of Part VAA, the Commonwealth can now be regarded as being present, "*in between*", as it were, the general practitioner and his or her patient during actual consultations. The kind of medical service delivered with the practitioner, or whether such a service is delivered at all, is undertaken by the practitioner having to have strict regard to (or at least an eye on) the Commonwealth's requirements as to the manner of the delivery of his or her professional services. The Commonwealth is therefore intervening in the actual professional delivery of clinical medical services and care.

It is a fair reading of Part VAA as a whole that the provisions relating to "*inappropriate practice*" operate, in effect, as a prohibition on many medical services being provided by general practitioners. It is also properly characterised as a compulsion (in real and practical terms) to conform to a particular mode of provision of medical services and a compulsion to provide services perceived as appropriate to patients. Viewed in this fashion, it is an impermissible "*general or universal command*" which offends the Constitution (see Barwick CJ, *General Practitioners Society v The Commonwealth* (1980) 145 CLR 532 at 537.5).

The proceedings before the Committee and the Authority are appropriately described as disciplinary in nature, see:

a. *Wong v Commonwealth* (2009) 236 CLR 573 at [223]-[224] and [248];
b. *Pradhan v Holmes* (2001) 125 FCR 280 at [105], [110], and [121] to [122] (Finn J);
c. *Adams v Yung* (1998) 83 FCR 248 at 294F;
d. *Tankey v Adams* (2000) 104 FCR 152 at 163[27];
e. *Health Insurance Commission v Grey* (2002) 120 FCR 470 at [173].

In *Wong's case* Justice Heydon (in dissent, but not on this point) readily described the 1999 Act Scheme as a "*disciplinary scheme*" (*Wong v Commonwealth* (2009) 236 CLR 573 at [248]).

Since 2002, there have been a number of Federal Court challenges to Part VAA of the Medicare scheme.

One was in 2005, *Oreb v Willcock* (2005) 146 FCR 237 (Black CJ, Wilcox and Lander JJ), where the Full Court identified systemic problems with the Professional Services Review Committees (the tribunals used for Medicare hearings against doctors) and their management of the new concept of "*inappropriate practice*". They failed to understand or apply the correct meaning of the phrase "*exceptional circumstances*" from section 106KA of the Act. This tainted the legality of everything the Committees did and it was set aside.

Also, in *Wong v The Commonwealth* (2009) 236 CLR 573, the High Court of Australia considered the constitutional validity of Medicare and the operation and validity of Part VAA itself. Both were held to be constitutionally valid (Hayden J dissented).

It was argued by a number of general practitioners that, since Medicare was so pervasive in Australia, that the legislative scheme amounted to or authorised "*civil conscription*" of

doctors (which is forbidden by section s.51(xxiiiA) of the Commonwealth *Constitution*). The High Court disagreed.

The High Court did not consider there to be any impermissible intrusion into the private and consensual arrangements between providers and recipients of the services. It held there was no compulsion, legal or practical, under the scheme to perform a professional service. There was only a practical compulsion to conform to professional standards in respect of any services provided.

One of the last major challenges was heard by the Full Federal Court of Australia in *Kutlu v Director of Professional Services Review* (2011) 197 FCR 177; [2011] FCAFC 94 ("**the *Kutlu Case***") and *Lee v Napier* [2013] FCA 236 (Katzmann J) ("***Lee No 3***").

Kutlu concerned an epic fight between the Commonwealth of Australia, Nicola Roxon MP (then Minister for Health, now, Commonwealth Attorney General), five Professional Services Review Committees established pursuant to section 93 of the *Health Insurance Act 1973* (Cth) ("**the Act**") each containing three medical professionals appointed to a Panel, the Professional Services Review Panel pursuant to section 84 of the Act. The Committee is a quasi-judicial body that conducts hearings into Medicare disciplinary matters.

One of the Panel members must also be appointed as Deputy Director of Professional Services Review pursuant to section 85 of the Act. That Deputy Director would, when allocated to a particular Committee, act as Chairperson of that Committee. There was also the Chief Executive Officer of Medicare Australia, the Director of Professional Services Review and the Determining Authority constituted by section 106Q of the Act. The Authority was made up of mostly medical practitioners including a dentist, an optometrist, a midwife, a nurse practitioner, a chiropractor, a physiotherapist, a podiatrist, and an osteopath. The Determining Authority has power to make a determination that (pursuant to 106U of the Act) a medical practitioner be fully or partially disqualified from receiving Medicare payments for up to 3 years. They can also be required to "*repay*" the whole or part of the Medicare payment made to their patients for a period of up to two years (during the "*referral period*").

All of these players were "*respondents*" in the *Kutlu Case* (also known as "*defendants*" in civil cases).

A further two respondents were former Ministers for Health, Nicola Roxon MP (for appointment decisions made in November 2009) and Tony Abbott (for his appointment decision made in January 2005).

They were <u>all</u> sued by the "*applicants*" (or "*plaintiffs*") in the *Kutlu Case.* They were four busy bulk-billing general practitioners in Australia. At the relevant times, one was a general practitioner in Sydney who is always very busy, Dr Lee. He had two matters go up to the Full Federal Court and one matter that then resided in the Federal Court before a single judge (which became *Lee No 3*). Another, Dr Clarke, was practising in private general practice at Port Macquarie in New South Wales. Two more, Dr Kutlu and Dr Condoleon, were employed to act as busy general practitioners in "*HeartCheck*" clinics in Australia. This created a unique set of problems in Queensland and NSW.

Medicare is big business in Australia.

The Commonwealth currently spends nearly $18 billion on Medicare services and $10 billion on pharmaceutical benefits per annum (Hansard, 9 May 2012 Commonwealth House of Representatives, page 120).

The *Kutlu Case* 2011

In the *Kutlu Case*, four applicant doctors each commenced proceedings against their five respective committees and other Commonwealth parties. They commenced proceedings in the Federal Court of Australia seeking remedies in judicial review pursuant to the common law (accessed via s 39B(1A) of the *Judiciary Act* 1903 (Cth)) and the codified statute on judicial review in Australia, sections 5 and 6 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

In each case, the relevant PSR Committee had each conducted a three or four-day hearing in respect of the applicant doctor.

The investigation each time was into alleged inappropriate practice.

Each time the committee hearing was undertaken by the tortuous method of examining the individual patient medical records of the doctor and asking him to comment on them. It is largely a silly exercise because a very busy general practitioner ordinarily cannot remember an individual consultation that occurred several years ago before a quasi-judicial panel of three general practitioners.

In each case, the committee found that the general practitioner had engaged in inappropriate practice within the meaning of the Act and the matter was referred to the Authority. In some cases, the authority was about to hand down its decision when matters went upstairs to the Federal Court.

In the Federal Court, some of the judicial review cases had been fully conducted before Federal Court judges and the parties were waiting for a decision when the matters went upstairs.

On 30 November 2010, the Australian newspaper published an article with the eye-catching headline "*Medicare rorts watchdog put on hold*". (The PSR Committees were the "*watchdog*".)

The newspaper spoke of the committees suspending their operation because of "*irregularities*" over the appointment of their panel members. This was said to jeopardise millions of dollars in government savings.

It reported that the then PSR director, Tony Webber, told The Australian that all the doctors working on panels of the PSR had been asked to resign and nominate for reappointment. "*Some irregularities in the procedures relating to the appointment of a number of panel members were discovered*" he said in a statement. "*The PSR decided to suspend the operation of the committees whilst the implication of those irregularities was explored and remedial action taken*." He later denied saying this in Court (through his counsel).

As the article explained, the crux of the problem was that the Australian Medical Association ("**AMA**"), which was supposed to be consulted under the Act about any appointments to the panel and any appointments as deputy directors of PSR was not receiving any such consultation anymore and they were mad about that fact. They wanted the Minister to recommence consulting before they made appointments, just as the Act provided for.

The four *Kutlu Case* doctors immediately swung into action in the Federal Court (for further action, since they were already in the middle of proceedings there).

In Dr Condoleon's case in Queensland, Justice Logan had conducted a two day hearing in October 2010 and, in December 2010, was about to hand down the final decision. Dr Condoleon asked the Court to hold off and permit him to seek production of documents from the Commonwealth to find out the truth of the AMA's allegations as reported in the Australian.

The Federal Court permitted that to happen, and also permitted the other doctors to seek production of documents and amend their pleadings.

The documents thus obtained in all five matters revealed the Australian newspaper article was largely true.

Several judges of the Court expressed the view that the questions raised were most appropriately considered, at first instance, by a Full Bench of the Court (specially convened to hear formulated questions).

The matters were all case-managed in January 2011 by Justice Flick in order to have them ready for a Full Court sitting in May 2011 and the matter was heard in Sydney. On 28 July 2011 the Full Court handed down its decision.

In short, ultimately, the four doctors enjoyed a complete victory by the judgment of the Federal Court. The Court also ordered that the Commonwealth pay their legal costs.

The Federal Court held that, because the Minister responsible failed to consult the AMA, the panel appointments were invalid, that the deputy director appointments were invalid, that the committees which had contained one or more of these persons were invalidly constituted and that the committees' reports were invalid and any report of the determining authority was also invalid and of no effect.

The four doctors were very pleased.

The Principles Derived from the Case

Sections 84 and 85 were inserted into the Act in substantially their present form in 1994 by the *Health Legislation (Professional Services Review) Amendment Act 1994* (Cth) ("**the 1994 Amending Act**"). They provided:

> "**84 – The Professional Services Review Panel**
>
> (1) The Professional Services Review Panel is established.
>
> (2) It consists of practitioners appointed by the Minister.

> (3) Before appointing a medical practitioner to be a Panel member, the Minister must consult the AMA. The Minister must make an arrangement with the AMA under which the AMA consults other specified organisations and associations before advising the Minister on the appointment.
>
> (4) Before appointing a practitioner other than a medical practitioner to be a Panel member, the Minister must consult such organisations and associations, representing the interests of the profession to which the practitioner belongs, as the Minister thinks appropriate.
>
> **85 – Deputy Directors of Professional Services Review**
>
> (1) The Minister may appoint Panel members to be Deputy Directors of Professional Services Review.
>
> (2) The maximum number of Deputy Directors is 15.
>
> (3) Before appointing a medical practitioner to be a Deputy Director, the Minister must consult the AMA. The Minister must make an arrangement with the AMA under which the AMA consults other specified organisations and associations before advising the Minister on the appointment.
>
> (4) Before appointing a practitioner other than a medical practitioner to be a Deputy Director, the Minister must consult such organisations and associations, representing the interests of the profession to which the practitioner belongs, as the Minister thinks appropriate."

The applicants contended that application of the common law doctrines of simple *ultra vires* and procedural *ultra vires*, together with the principles in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 ("***Project Blue Sky***") compelled a finding that these failures to consult necessarily result in the invalidity of the purported appointments, for the reasons that follow.

Sections 84 and 85, and the requirements therein to consult the AMA before the appointments of Deputy Directors and Panel members, must be construed by reference to the language of those provisions and in the light of the purpose of the legislation (*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381.4 [69] per McHugh, Gummow, Kirby and Hayne JJ). This method of statutory interpretation is supported by section 15AA of the *Acts Interpretation Act 1901* (Cth).

The doctors relied on the doctrine of simple *ultra vires*. This is variously described as narrow, simple or substantive *ultra vires* and it involves a complete lack of substantive or incidental power to do an executive act. The cases almost always turn on statutory interpretation. The courts traditionally refer to simple *ultra vires* in respect of decisions of the executive and to "*jurisdictional error*" in respect of judicial and quasi-judicial bodies.

Simple *ultra vires* is where a decision-maker, who is given statutory power, acts outside or in excess of that power. It is usually the case in this area that the decision-maker either simply does not possess the power upon which the decision was based or is arguably not possessed of the power and a court has held that as a matter of construction, the power upon which the decision was purportedly made was not there. An example of a simple ultra vires case is *Hazell v Hammersmith & Fulham London Borough Council* [1992] 2 AC 1. It was held by the House of Lords that numerous types of swap transactions entered into by a local council or authority in England were entered into with the authority having no express power under the relevant

legislation. There was no express prohibition against the swap transactions in the legislation but the court held the transactions were not incidental to the authority's general borrowing powers as they were in the nature of a profit-making venture. The House of Lords declared the transactions to be void for want of power.

Another example is *G J Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 (Kirby P, Hope and McHugh JJA), in which the Tribunal had purported to sit. It published a formal award, covering thousands of retail workers in NSW. The Act required it to sit with a judge and two assessors. In fact, the judge sat in chambers alone and then published the said award (see 511B). The Court of Appeal held that the award was invalid in that it was made "*without jurisdiction*" (see 513D to 514.9, per Kirby P and Hope JA).

Procedural *ultra vires* operates where there is in an enabling statute or regulation some pre-condition or a matter which must be undertaken, decided upon or inquired into, or notice given, before the decision may be lawfully made. Sometimes the courts interpret such provisions as "*directory*" only, that is, the decision is not rendered unlawful or void by the decision-maker having failed to first do what was prescribed. Other times, the courts regard these provisions as "*mandatory*", that is, the procedural provision must be complied with before the decision-maker's power is enlivened. Any decision made in those circumstances is simply *ultra vires*. The issue is often decided by answer to the question: What did Parliament intend should be the result of non-compliance with the provision? See *Accident Compensation Commission v Murphy* [1988] VR 444 at 447; see also *Hatton v Beaumont* (1978) 52 ALJR 589 at 591 per Jacobs J (with Gibbs ACJ, Stephen, Aickin JJ agreeing) affirming *Hatton v Beaumont* [1977] 2 NSWLR 211; and *Tasker v Fullwood* [1978] 1 NSWLR 20. The question of whether a provision is mandatory or directory is best answered by having regard to the whole of the scope, history and purpose of the legislation: *Accident Compensation Commission v Murphy* [1988] VR 444.

In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, the High Court rejected the former and much used language of "*mandatory*" and "*directory*" as being unhelpful.

It adopted the approach in *Tasker v Fullwood* and held that the question must be approached in accordance with the principles set out above.

As for the mandatory requirements that the Minister "*must consult the AMA*" before any appointments are made in sections 84(3) and 85(3) of the Act – it was submitted that these were not simply meaningless words, non-compliance with which may be overridden by some conception of a more important purpose of the Act as a whole. The duty to consult is itself critical in the scheme of the Act. It has content. In *Bannister Quest Pty Ltd v Australian Fisheries Management Authority* (1997) 77 FCR 503, Drummond J held (at 524B-D):

> "Such a duty to consult will ordinarily involve more than the decision-maker telling interested parties what it is going to do; it will usually require the decision-maker to give information to those others and an opportunity to them to respond. The duty will also require the decision-maker to consider the responses and to take them into account, to the extent it considers appropriate, in arriving at the ultimate decision. See *Dixon v Roy* (1996) 5 BPR 11655 at 11658 and the authorities there cited and *Re Aley; Ex parte Sweeney v Aley* (1996) 63 FCR 294 at 302. This duty to consult "*may involve one action of inquiry and one of response, but just as easily can involve an ongoing dialogue over a protracted period*": *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 at 551."

Grammatical Meaning of Provisions

In relation to the AMA involvement, it was submitted that it was significant that each of sections 84(3) and 85(3) provided that the Minister must consult with the AMA before making appointments of Deputy Directors and Panel members.

The use of the word "*must*" in sections 84(3) and 85(3) is a key indication that the Minister's duty to consult is a necessary pre-condition to the valid exercise of the power in sections 84 and 85 to appoint Deputy Directors and Panel members.

In other words, the ordinary grammatical meaning of sections 84(3) and 85(3) is 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.

The concurrent appointment question arises out of the operation of section 85(1), which provides that "*[t]he Minister may appoint Panel members to be Deputy Directors*".

The clear grammatical meaning of section 85(1) connotes:

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

(b) an obligation that the persons so appointed be Panel members; and

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

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.

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

This contention was a simple *ultra vires* argument that relied upon the statute alone.

Purpose of the Act as a Whole

As the majority held in *Project Blue Sky*, the ordinary grammatical meaning of a statutory provision will normally be 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 was so in the *Kutlu case* was confirmed by reference to the purpose of the legislation, both as a whole and in relation to the specific provisions under consideration.

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"*

From this, it could 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.

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 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 Deputy Director, gave further support to the concept that the involvement of the community of practitioners by way of consultation and participation is crucial to the intended scheme.

The AMA, and the other bodies with whom the AMA might consult, represent the capacity of the medical profession to oversee, and participate in, the administration of the disciplinary system established by Part VAA. It is Parliament affording plain recognition to concepts of "*participatory democracy*". Given the evident purpose of Part VAA as described above, it must be accepted that Parliament intended that consultation with the AMA was a critical procedural step in the disciplinary system established by Part VAA. It is a necessary pre-condition to any valid appointment.

In Australia's representative system of democracy, the principle of public participation of "*all interested persons, groups and bodies*" (*Australian Capital Television Ltd v Commonwealth* (1992) 177 CLR 106, 139.6 (Mason CJ); see also 156.4 (Brennan J), 173.2 (Deane and Toohey JJ), 227.4 (McHugh J)) is of fundamental constitutional importance (see generally, for example, *Nationwide News Pty Limited v Wills* (1992) 177 CLR 1; *Australian Capital Television Ltd v Commonwealth* (1992) 177 CLR 106). While participation of the AMA and other persons, groups and bodies in the process of appointing Panel members and Deputy Directors might not attract constitutional protection, it is nevertheless significant that Parliament chose to enshrine such participation in the Act.

In addition, sections 84 and 85 provide a complete account of the Minister's power to appoint Panel members and Deputy Directors respectively (*cf Minister for Immigration and Citizenship v SZKTI* (2009) 238 CLR 489, 503.8-504.3 [45]-[46]), rather than merely "*regulat[ing] the exercise of functions already conferred*" (*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 391.4 [94] per McHugh, Gummow, Kirby and Hayne JJ). This adds further support to the applicants' contention that compliance with sections 84(3) and 85(3), and, in particular, consultation with the AMA, was required in order for appointments made under those provisions to be valid.

Thus, a consideration of the purpose of the legislation 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.

Failure to comply with one of these two sub-sections means that a necessary pre-condition to the exercise of a power has not occurred and that 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 Commonwealth Committee under Part VAA of the Act is void. This is the necessary consequence when essential pre-conditions are not satisfied in the appointment of tribunal members, see, for example, *Tu v University of New South Wales* (2003) 57 NSWLR 376 at 387.4 [25], 388.2 [27] (Sheller JA, with Beazley JA and Tobias JA agreeing).

The Commonwealth sought to make much of the "*flexibility*" said to be granted by Parliament to the Minister pursuant to sections 84 and 85 of the Act and the public inconvenience which, it was said, would result from any adverse court decision.

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

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) 86 ALJR 217; 285 ALR 27; [2012] HCA 3 at [28] per French CJ, Hayne, Kiefel and Bell JJ.

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.

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.

The Full Court accepted all these submissions. It held that:

- the process of panel member appointment was intended by the Parliament to be one for which the persons carrying out the review had been selected only after the Minister had received advice from the AMA and, through it, any other relevant professional organisation or association about a proposed appointee. It follows that the provisions of ss 84(3) and 85(3) provide indicia of a legislative intention that prior consultation by the Minister is an essential pre-requisite to the validity of an appointment of officeholders under those sections (*Kutlu* at [20]).

- As to ss 84(3) and 85(3) they have a rule-like quality which can be easily identified and applied. The Parliament used the words "*must consult*" and "*before advising*" to achieve the Acts purposes (Kutlu at [28]).

- The public inconvenience resulting from a finding of invalidity of the various impugned appointments is likely to be significant. However, the scale of both Ministers' failures to obey simple legislative commands to consult the AMA before making the appointments is not likely to have been a matter that the Parliament anticipated (*Kutlu* at [32]).

- The magnitude of the consequences of the Court finding invalidity here was simply the product of the scale of the breaches of both Ministers' statutory obligations over a considerable period (*Kutlu* at [25]).

The De Facto Officer Doctrine

The special case in the Full Court included a question as to the so-called *de facto officer* doctrine. The Commonwealth had argued that if any of the purported appointments were found to be invalid, the acts of those appointees nevertheless could not be challenged in these proceedings by force of the common law doctrine concerning the validity of acts done by *de facto officers*.

The applicants contended this doctrine did not, in the face of *Project Blue Sky*, operate so as to "*validate*" or otherwise affect the appointments of the subsequent actions here.

It was contended by the Commonwealth (*Kutlu* at [40]) that the doctrine prevented a challenge, such as that made in the *Kutlu* case, to the past acts of a person purporting to occupy an office in apparent execution of that office.

The Commonwealth submitted that three conditions had to be fulfilled in order for the principles to operate. These were, first, a *de jure* office had to exist, secondly, the power exercised by the de facto officer must be within the scope of that *de jure* office's authority and, thirdly, the *de facto* officer must have the "*colour of authority*" in exercising the office's power.

The applicants argued the Full Court should not seek to expand the operation of the common law doctrine, which exists only for a very limited purpose in highly unusual or extraordinary situations and which does not operate at all where its application would defeat a clear statutory policy (as was the case here) (see Enid Campbell, "*De Facto Officers*" (1994) 2 A J Admin L 5 at 6.2, 13.5 and the cases cited there, and 21.3; and *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 155.8 [148]).

Before the *Kutlu* case, the clearest recent statement on the *de facto officer* doctrine came from a bench of five judges of the New South Wales Court of Criminal Appeal in *R v Janceski* (2005) 64 NSWLR 10, in which that Court held unanimously that, while the *de facto officer* doctrine might be applicable in some instances in Australia, it cannot be used to overcome the interpretation of a statute reached by the application of the principles contained in *Project Blue Sky* (*R v Janceski* (2005) 64 NSWLR 10, 34.6 [132] per Spigelman CJ, 40.9-41.1 [208] per Wood CJ at CL, concurring with Spigelman CJ, 57.1 [284] per Howie J, concurring with Spigelman CJ, and with whom Hunt AJA concurred generally, 57.3 [284] per Johnson J). This was entirely in keeping with the comments made by Kirby P and Hope JA in *G J Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503, 519F-G.

This is highly persuasive authority, not even because of the unanimity and the status of the New South Wales Court of Criminal Appeal in the Australian curial hierarchy, but because of the self-evident correctness of the proposition.

The *de facto officer* doctrine is founded in public policy, being the protection of the public and the maintenance of public confidence in the system (*Balmain Association Inc v Planning Administrator for the Leichhardt Council* (1991) 25 NSWLR 615, 639D-E per Kirby P, Priestley and Handley JJA). The protective nature of the doctrine is such that it must apply to prevent the Commonwealth or the Minister "*rely[ing] upon [the Minister's or her predecessor's] own unauthorised appointment of the [Panel members and Deputy Directors] to support or justify any further action under the Act*" (*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).

In any event, public policy considerations already form part of the *Project Blue Sky* test, and so they were and should be counted in the balancing exercise undertaken in construing the legislation in the first place. For this reason, even were the *de facto officer* doctrine to have some never before seen wider operation in this case, in order to support an argument permitting the Commonwealth to rely on acts done by officers who have not lawfully been appointed, it cannot automatically trump the other considerations which form part of an application of *Project Blue Sky*.

The Full Court held that the committee decisions in the *Kutlu* case, were "*no decisions at all*" because a breach of the legislative provisions under the Act (*Kutlu* at [44])

It was held that the *de facto officers* doctrine is a principle of common law and that it could be overridden by statute. It was held that it was overridden in the present case (*Kutlu* at [47]-[48]).

It was held that Parliament did not authorise persons to exercise offices where they were, unknowingly, usurping the public offices in which they purported to act (*Kutlu* at [47]).

It was held that the *de facto officers* doctrine had no application at all to the invalid appointments (*ibid*, [48]).

Justice Flick, in his separate judgment described the *de facto officers* doctrine as the Commonwealth's "*fall-back*" position (*ibid*, [108]). He said (*ibid*, [110]):

> "*Whatever its precise origins, the chains of this ancient ghost continue to be jangled whenever it seems convenient to do so.*"

His Honour noted the rationale for the doctrine which was said to be founded in the public interest and in protecting the public and the individual whose interests was affected (*Kutlu* at [113]).

His Honour analysed the doctrine in considerable detail and considered the authorities in Australia. He ultimately concluded that there was much to be said for confining the doctrine within the "*narrow limits*" (*Kutlu* at [117]) and that times had changed since the origin of the doctrine and that an express legislative provision must operate to the exclusion of the doctrine (*Kutlu* at [119]).

His Honour also contended that the Act may simply leave no room for the operation of the *de facto officers* doctrine (*Kutlu* at [121]).

The Aftermath

The aftermath of the Full Court decision was profound.

On 30 July 2011, The Australian reported the decision under the headline:

> "*The Federal court rules Medicare rorts inquiries invalid*"

On the same day, the Sydney Morning Herald's headline read:

> "*Doctors who rorted may escape penalties*"

Doctors (and lawyers) do not always receive good press. It is hit and miss.

In a marvellous understatement, the latter article said that the Court decision was that "*a procedural glitch*" invalidates the decisions against the doctors.

The Commonwealth filed an application for leave to appeal the decision to the High Court of Australia. Submissions were exchanged and on 10 February 2012, the special leave application was argued in the High Court in Sydney before Justices Gummow and Hayne JJ (at *Commonwealth v Kutlu & Ors* [2012] HCATrans 035).

Special leave to appeal was granted to the Commonwealth and the doctors were permitted to raise a new argument based on section 67 of the Commonwealth *Constitution* (namely, whether the *de facto officers* doctrine was compatible with the constitutional power to appoint officers of the Commonwealth by the Executive).

The matter was fixed for hearing in Canberra before a Full Bench for two days on 29 and 30 May 2012.

Written submissions were exchanged on the final appeal.

On 18 May 2012, just 11 days before the two day High Court appeal hearing in Canberra, the Commonwealth filed and served a Notice of Discontinuance on the four doctors.

The High Court proceedings were now at an end.

The Full Federal Court judgment of 28 July 2011 would be the applicable law of Australia

However, on 9 May 2012, the federal government introduced a bill into Commonwealth Parliament entitled *Health Insurance Amendment (Professional Services Review) Bill 2012* (the **Amending Bill**). The Bill was said (in the second reading speech, 9 May 2012 House of Reps, page 120) to:

- address issues raised by the Federal Court in *Daniel v Health Insurance Commission* ([2003] FCA 772 – Commonwealth appeal dismissed in *Kelly v Daniel* (2004) 134 FCR 64);
- implement recommendations of the review of the PSR scheme, *Report of the Steering Committee* 2007;
- make minor administrative changes to the scheme; and
- introduce amendments in response to the full Federal Court's decisions in *Kutlu v Director of Professional Services Review*.

As to *Kutlu,* the second reading speech recorded (*ibid*):

> "The bill specifically addresses the issues raised in the full Federal Court in relation to *Kutlu v Director of Professional Services Review*, as I have stated, and in that case the full Federal Court held that ***there was a technical problem*** with the appointment of PSR panel members. This bill ensures that the appointments are treated as valid and effective. The coalition does not oppose this bill." (my emphasis)

To say to Parliament that there was a merely a "*technical problem*" exposed in *Kutlu's* Case is not a marvellous understatement. It is to plainly mislead Parliament.

The facts uncovered by the case were an indictment of those who advised the relevant Ministers. It was a catastrophic error, affecting 40 committees and costing millions of dollars. Moreover, it was done knowingly and wilfully by both Ministers, Abbott and Roxon.

The Amending Bill was passed by the House of Representatives on 9 May 2012.

It was introduced into the Senate on 10 May 2012, and second reading moved on that day. Debate was adjourned after the second reading speech was read. The opposition agreed with the government to passing the Amending Bill and to its "*swift passage*" through both Houses (Hansard, House of Representatives, 9 May 2012, at 121, Tanya Plibersek speech).

The Amending Bill was passed by both houses of Parliament on 18 June 2012.

Under the Act (before it was amended by the Amending Bill), section 94 of the Act had the effect that any referral by the Director of Professional Services Review (the Director) to a PSR Committee could only be made in respect of conduct occurring within the period of 12 months before the referral.

If the doctors were successful in relation to the High Court appeals, the practical effect of this provision is that the conduct the subject of the High Court appeal – which occurred more than 12 months ago – would not be capable of being the subject of a referral by the Director to a PSR Committee.

The matters would have been at an end.

However, the Amending Act permits further committee proceedings to be taken against the doctors by the Director, PSR, just because they took the invalidity point in the Courts.

Schedule 1, Item 2(2) of the Amending Act permits the Director to "*set up a Committee*" and refer a matter to it after legal proceedings are finally determined. Even if they travel as far as the High Court of Australia and even if they take many years to prosecute.

Even if the doctors were unsuccessful in relation to the High Court appeal, the PSR Director would still be able to continue to pursue committee proceedings against them (subject to the resolution of their other grounds of judicial review currently outstanding before various judges of the Federal Court).

So, the subject four doctors were facing the commencement of further proceedings before a committee whether they won the High Court appeal or whether they lost the High Court appeal by reason of the legislative amendments.

There were significant validating provisions in the Amending Act at Schedule 1 Item 1. They rendered valid everything said to be invalid that you have heard about in this paper both retrospectively and prospectively concerning the validity of appointments to a panel or the validity of the appointment of a deputy director and things done under those appointments. However the Amending Act did not apply to relate to directly the *Kutlu case* doctors by reason of Item 1(4) which provided:

> "This item does not affect rights or liabilities of ***parties*** to proceedings ***for which leave to appeal to the High Court of Australia has been given*** on or before the day this item commences, if the fact that a person was not appointed or validly appointed as a Panel member or Deputy Director under that Part ***is in issue*** in the proceedings." (my emphasis)

Plainly, Parliament did not wish to offend the Constitutional principle that Parliament should not interfere with or intervene in existing legal proceedings because it might well be invalid under the Commonwealth *Constitution*.

Legislation which directs a particular result in particular proceedings may be invalid on the basis it interferes "*with the functions of the judiciary*": *Liyanage v The Queen* [1967] 1 AC 259, 289E-292A (the Privy Council). This was accepted (at least in principle) in *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88 (**Commonwealth BLF Case**), 96; *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 562-563 [17]; and by at least a majority of the Court in *Nicholas v The Queen* (1998) 193 CLR 173, 188 [20] per Brennan CJ, 203 [57] per Toohey J, 211-212 [83] per Gaudron J, 221 [113] per McHugh J, 233 [147]-[148] per Gummow J, 250 [197] per Kirby J.

However, where legislation "*does not deal with any aspect of the judicial process*" but merely makes "*redundant the legal proceedings which [have been] commenced*", that legislation is not invalid: *Commonwealth BLF Case*, 96. This is so even where "*the motive or purpose of the Minister, the Government and the Parliament in enacting the statute was to circumvent the proceedings and forestall any decision which might be given in those proceedings*": *Commonwealth BLF Case*, 96-97.

The boundary is usefully defined by Street CJ in *Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372 (**NSW BLF Case**), in which his Honour identified what he saw as the relevant differences between the Commonwealth and NSW legislation.

The Commonwealth legislation had provided simply for the cancellation of The Australian Building Construction Employees' and Builders Labourers' Federation: *NSW BLF Case*, 377C-D per Street CJ. The High Court said this was not invalid.

However, the NSW legislation provided that the registration of the Building Construction Employees and Builders' Labourers Federation of NSW "*shall, for all purposes, be taken to have been cancelled on 2 January 1985*": NSW BLF Case, 377D-E per Street CJ. His Honour held that this "*infringed the test laid down by the High Court in the [Commonwealth BLF Case]*" and amounted to "*an exercise by Parliament of judicial power*": NSW BLF Case, 378C-D per Street CJ. Ultimately, his Honour held that the NSW Parliament had power to enact the legislation for reasons not relevant to the subject of this paper.

Lee v Napier **[2013] FCA 236 (Katzmann J)** ("***Lee No 3***")

Dr Lee, one of the Kutlu four, had one remaining judicial review matter to agitate in the Federal Court of Australia. It was a separate matter to the *Kutlu* proceedings. However, it travelled along with the Kutlu proceedings for quite some time while all the matters were getting ready for the Full Federal Court.

It involved a point challenging the validity of the appointment of panel members and a deputy director. Accordingly, by operation of Item 1(1)-(3) of Schedule 1 to the Amending Act, this part of Dr Lee's case was apparently determined by Parliament instead of by the presiding judge (Justice Katzmann).

Item 1(1)-(3) of Schedule 1 to the Amending Act relevantly provide:

> **"1 Validation of acts done under Part VAA, VB or VII of the *Health Insurance Act 1973***
>
> (1) This item applies to a thing purportedly done under Part VAA, VB or VII of the *Health Insurance Act 1973* at any time before the day this item commences, to the extent that the thing purportedly done would, apart from this item, be invalid because a person was not appointed or validly appointed as a Panel member or Deputy Director under Part VAA of that Act.
>
> (2) The thing purportedly done is as valid and effective, and is taken always to have been as valid and effective, as it would have been had the person been validly appointed as a Panel member or Deputy Director under that Part.
>
> (3) All persons are, by force of this sub-item, declared to be, and always to have been, entitled to act on the basis that the thing purportedly done is valid and effective."

Based on the principles in *Liyanage v The Queen* [1967] 1 AC 259, on 26 July 2012, Dr Lee commenced proceedings in the High Court of Australia by filing a writ of summons and statement of claim against the Commonwealth. That summons was remitted to the Federal Court to be heard with the judicial review mater. The matter was listed before the judicial review judge. It was split into two stages, first the factual stage, and the question whether the appointments by Toby Abbott, then Minister for Health, were valid (for failure to consult with the AMA as per section 84, 85 of the Act) and second, the constitutional stage, whether Item 1 of Sch 1 of the Amending Act was valid.

In the first judgment, the Court held (at [79]-[80]that the Panel appointments were in fact invalid:

> "… the purported appointments on 24 January 2005 of Dr Robyn Napier, Dr Rodney McMahon and Dr Huy An to be Panel members were invalid because there had been a failure to consult the AMA about those appointments within the meaning of s 84(3) of the Act. The consultation was still under way when the appointments were made. The Minister pre-empted the outcome.
>
> It follows that the purported appointment on 27 March 2006 of Dr Robyn Napier as a Deputy Director of Professional Services Review was also invalid because Dr Napier was not at that time a Panel member."

The Minister had written to the AMA, but he did bother to wait for an answer before making the appointments. The Commonwealth had forcefully argued this was "consultation" under the Act. The Federal Court disagreed.

The constitutional point as to the validity of the Amending Act will not now be tested by Dr Lee, as the matter settled after that. It will be for another brave doctor to take up this unfinished challenge.

Post Script

All lawyers should inspect the 2011 changes made to the *Acts Interpretation Act 1901* (Cth).

There you will find the *Acts Interpretation Amendment Bill 2011* which passed into law on 15 June 2011 (assent was 27 June 2011). This was after the *Kutlu case* had been conducted in the Full Federal Court and it was six weeks before the decision was handed down.

The amendments bring in, by a side wind, the *de facto officers* doctrine into Australian statute law.

After the amendments section 33AB of the *Acts Interpretation Act 1902* (Cth) now provides:

> **"33AB Validity of things done under appointments under Acts**
>
> Anything done by or in relation to a person purporting to act under an appointment (including an acting appointment) under an Act ***is not invalid*** merely because:
>
> (a) for any appointment—the occasion for the appointment ***had not arisen***; or
>
> (b) for any appointment—there was a ***defect or irregularity*** in connection with the appointment; or
>
> (c) for any appointment—the ***appointment had ceased to have effect***; or
>
> (d) for an acting appointment—***the occasion to act had not arisen or had ceased***." (my emphasis)

The validity of this particular provision will need to be determined in due course.

It must be construed in light of relevant statutory provisions. Section 2(2) of the *Acts Interpretation Act 1902* (Cth) also provides that a provision of that Act is "*subject to a contrary intention*" in other Commonwealth legislation.

Plainly, in the *Kutlu* case, the Full Court decided just this – that the *Health Insurance Act* provisions were contrary to the *de facto officers* doctrine and, presumably, the new interpretation provision (had it been enacted then).

In light of all the above, who would want to practice as a doctor (or a dentist) in this country?

Working without a provider number on the love boat sounds so much easier.

Thank you.