APPLYING *PROJECT BLUE SKY* – WHEN DOES BREACH OF A STATUTORY REQUIREMENT AFFECT THE VALIDITY OF AN ADMINISTRATIVE DECISION?

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The High Court's decision in *Project Blue Sky v Australian Broadcasting Authority*[1] sets out the approach to determine whether a failure to comply with a statutory requirement affects the validity of an administrative decision.[2] A joint judgment of four members of the Court (McHugh, Gummow, Kirby and Hayne JJ) stated:[3]

> An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.

The joint judgment rejected the previous distinction between 'mandatory' and 'directory' statutory requirements, stating that this distinction merely recorded a result that has been reached on other grounds. Instead, their Honours stated that a better test for determining the issue of validity is to ask whether it was 'the purpose of the legislation that an act done in breach of the provision should be invalid'.[4]

This paper attempts to give some content to this rather general test. I will use two cases as illustrations:

- the first is the decision of the Full Court of the Federal Court in *Kutlu v Director of Professional Services Review*.[5] This case held that a failure by the Minister to consult the Australian Medical Association (AMA) before appointing members of various Professional Services Committees meant that the decisions of those committees were invalid; and
- the second is the decision of the Victorian Court of Appeal in *Director of Public Prosecutions v Marijancevic*.[6] That case considered whether a failure to swear an affidavit filed in support of an application for a search warrant meant that any evidence obtained under that warrant was inadmissible.

I should acknowledge that the joint judgment in *Project Blue Sky* itself doubted whether it would be possible to lay down a more specific test. Their Honours stated:[7]

> Unfortunately, a finding of purpose or no purpose [to invalidate a decision] in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.

Moreover, the usual difficulties in ascertaining legislative 'intention'[8] are magnified in this context – very often the courts are imputing a legislative intention to a Parliament that has

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not addressed this issue.[9] For that reason, it could well be said that the *Project Blue Sky* test is no less conclusory than the 'mandatory/directory' test that it rejected.[10] However, while it is not possible to lay down any 'decisive rule', it is possible to draw some themes that emerge from the cases that have applied *Project Blue Sky*.

This discussion assumes that the relevant statute does not make any express provision for the consequences of breaching a statutory requirement and it only considers the position of administrative decision-makers, not courts. The High Court has made it clear that the *Project Blue Sky* approach is not relevant when considering the effect of non-compliance with statutory requirements on the jurisdiction of courts.[11]

Project Blue Sky and case illustrations

The starting point is the factors used in *Project Blue Sky* itself to determine whether the breach of a statutory requirement in that case should lead to the invalidity of the decision under consideration.

Project Blue Sky

The question in *Project Blue Sky* was the legal effectiveness of an Australian content standard made by the Australian Broadcasting Authority,[12] purportedly under s 122(2)(b) of the *Broadcasting Services Act 1992* (Cth) (the *Broadcasting Services Act*). Under cl 9 of that standard, Australian programs had to comprise 55% of all broadcasts between 6am and midnight. Section 160(d) of the *Broadcasting Services Act* required the Australian Broadcasting Authority to perform its functions in a manner consistent with Australia's international obligations. One of those international obligations was a trade agreement between Australia and New Zealand, which provided that Australia and New Zealand would offer equal access and treatment to persons and services of the other country. The Australian content standard (or at least cl 9) clearly did not provide equal treatment for Australian and New Zealand programs. The High Court held that cl 9 of the Australian content standard was contrary to s 160(d) of the *Broadcasting Services Act*.[13]

The question then was, what was the effect of non-compliance with s 160(d) of the *Broadcasting Services Act* on the Australian content standard.

Section 160 provided that the Australian Broadcasting Authority 'is to perform' its functions in a manner consistent with the four listed matters (including Australia's international obligations). The joint judgment does not appear to have given much weight to this apparently mandatory (or obligatory) language. However, in a related context, the High Court has stated that the fact that a statutory requirement is expressed by the use of 'must' is not conclusive.[14]

In *Project Blue Sky*, the joint judgment relied on three other factors to conclude that a breach of s 160(d) of the *Broadcasting Services Act* did not render a decision invalid as such.

Regulation of existing function

The first factor was whether the statutory requirement regulated the exercise of functions already conferred, or was an 'essential preliminary' to the exercise of a function. The joint judgment held that s 160 of the *Broadcasting Services Act* merely regulated an existing function, which 'strongly indicate[d]' that a breach of s 160 should not invalidate a decision.[15]

No 'rule-like quality'

The second factor was the nature of the statutory requirement. In *Project Blue* Sky, the joint judgment considered that the obligations imposed by s 160 of the *Broadcasting Services Act* did not have 'a rule-like quality' that could easily be identified and applied:[16]

- apart from s 160(d), the other considerations listed in s 160 concerned matters of policy.[17] The joint judgment stated that when a function is to be carried out in accordance with matters of policy, ordinarily non-compliance will not affect the validity of any decision;[18] and
- in relation to s 160(d), the joint judgment observed that Australia's international obligations may often be expressed in indeterminate language, that describes goals to be achieved rather than rules to be obeyed.[19]

Public inconvenience

The third factor was the public inconvenience that would result if non-compliance meant that a decision was legally ineffective. The joint judgment:

- considered that, in the light of the indeterminate nature of the obligations in s 160 of the *Broadcasting Services Act*, a finding that non-compliance with s 160(d) invalidated a decision would cause public inconvenience. For example, the Australian Broadcasting Authority's functions include allocating and renewing licences. As part of these functions, the Authority designs and administers price-based systems for allocating licences; and
- stated that non-compliance with s 160 was 'far from fanciful', and it was unlikely that the validity of a licence was to depend on whether the Australian Broadcasting Authority had complied with s 160.[20]

For these reasons, the joint judgment held that the Australian content standard was not invalid, despite the breach of s 160(d) of the *Broadcasting Services Act*.

However, that was not the end of the matter. The joint judgment held that the standard, although not invalid, was unlawful. Accordingly, a person with a sufficient interest could apply for a declaration that the relevant clause of the content standard was unlawful, and in an appropriate case could apply for an injunction to prevent the Australian Broadcasting Authority from taking any further action in reliance on that clause.[21] This approach seems to invalidate the Australian content standard with prospective effect only.[22]

Kutlu – failure to consult before appointing

My first case to illustrate the *Project Blue Sky* test is *Kutlu*.

The issues in *Kutlu* arose because in 2005 and 2009, the Minister did not consult with the Australian Medical Association (AMA) before making various appointments under ss 84 and 85 of the *Health Insurance Act*. The agreed facts established that the Minister had not consulted with the AMA before appointing three persons as Deputy Directors in January 2005, nor before appointing six persons as Panel members and three persons as Deputy Directors in November 2009.[23]

Obligation to consult AMA before appointment (ss 84(3) and 85(3))

Part VAA of the *Health Insurance Act* establishes the Professional Services Review Scheme. In general terms, this scheme reviews and investigates the provision of services by a person to determine whether the person has engaged in 'inappropriate practice'. This investigation is undertaken first by the Director of Professional Services Review (Div 3A), who may refer a matter to a Professional Services Review Committee (Div 4).

Committee members are drawn from a Professional Services Review Panel appointed under s 84. Some panel members are also appointed as Deputy Directors under s 85. Both ss 84 and 85 require the Minister to consult with the AMA before appointing a medical practitioner as a panel member, or as a Deputy Director.

Section 84(3) provided:

> (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.

Section 85(3) imposed the same requirement on appointing a medical practitioner to be a Deputy Director.

Committees and their decisions invalid

The Full Court of the Federal Court held that the failure to consult, as required by ss 84(3) and 85(3) of the *Health Insurance Act*, meant both that the appointment of those Committees was invalid, and that the decisions taken by those Committees were invalid.[24]

Rares and Katzmann JJ reasoned as follows.

- although the Minister was not bound to accept the AMA's advice, the consultation and advice required by ss 84(3) and 85(3) 'can expose significant matters for the Minister to consider about a prospective appointee as part of the deliberative process'.[25] The advice of the AMA is a relevant, though not decisive, consideration for the Minister in deciding who to appoint;[26]
- Part VAA provides for a system of peer review. The appointment process under ss 84 and 85 is intended not only to ensure public confidence in the decisions of Committees, but also to ensure the confidence of the relevant professions and of the person who is being reviewed. This indicated that prior consultation by the Minister was an 'essential pre-requisite' to the validity of the appointment of persons under those sections;[27]
- the fact that s 96A made only limited provision for a Panel to continue without consent when a member is unavailable was an indication that Parliament regarded the valid and proper constitution of a Committee as an essential and indispensible condition of any Committee's exercise of functions under the *Health Insurance Act;*[28] and
- the fact that the invalidity of the appointments would cause public inconvenience was, on its own, suggestive of a legislative intention that failure to consult would not lead to invalidity.[29] However, these considerations did not displace the express words of ss 84(3) and 85(3).[30] The requirements of ss 84(3) and 85(3) had a rule-like quality that could be easily identified and applied.[31] The scale of the Ministers' failures to obey 'simple legislative commands' to consult the AMA was not likely to have been something that the Parliament had anticipated. If the appointments were treated as valid, the unlawfulness of the Minister's conduct would attract no remedy.[32]

Flick J reasoned to similar effect that:

- although the fact that ss 84(3) and 85(3) stated that the Minister 'must' consult was only the beginning of the inquiry,[33] the use of mandatory language was still a 'valuable guide';[34]
- an adverse finding from a Professional Services Review Committee would prejudicially affect the reputation and standing of the practitioner concerned.[35] An 'essential aspect' of the scheme provided for in Pt VAA was that a practitioner's conduct would be reviewed by practitioners who have been appointed after consultation by the Minister.[36] That is, non-compliance with the requirement to consult the AMA is not a mere technicality or mere formality, because the AMA played a 'pivotal role' in the scheme of Pt VAA;[37]
- the medical practitioner whose conduct is being reviewed would be unable to determine whether the necessary consultation had occurred. This was not a case where a practitioner could be expected to conduct his or her own independent investigation as to whether these requirements had been complied with;[38] and
- arguments about 'public inconvenience' had the potential to be 'self-justifying and circular'. Where there was uncertainty as to the presumed legislative intention in circumstances where there has been non-compliance with a statutory provision, it is permissible to take account of the consequences of one interpretation as opposed to another, including a consequence of 'public inconvenience'.[39] In this case, however, the requirements of ss 84(3) and 85(3) were clear, and there was no room to rely on 'public inconvenience' as an aid to statutory construction.[40] Any 'public inconvenience' is something for which the Minister alone must remain accountable.[41]

Committees and decisions validated by legislation

The High Court granted special leave to appeal from the Full Court's decision in February 2012,[42] but those proceedings were discontinued in May 2012.[43]

In June 2012, the Commonwealth Parliament enacted legislation to address the problem identified in *Kutlu*. Schedule 1 of the *Health Insurance Amendment (Professional Services Review) Act 2012* (Cth) applies to a thing purportedly done under Pt VAA, VB or VII of the *Health Insurance Act* to the extent that the thing would be invalid because a person was not appointed or validly appointed as a Panel Member or Deputy Director under Pt VAA of that Act (item 1(1)):

- 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' (item 1(2)); and
- '[a]ll persons are, by force of this subitem, declared to be, and always to have been, entitled to act on the basis that the thing purportedly done is valid and effective' (item 1(3)).

Marijancevic – failure to swear affidavits

The other illustrative case is *Marijancevic*. Unlike *Kutlu*, this was not a case where a person was seeking to invalidate a particular administrative act. Rather, the issue in *Marijancevic* was the admissibility of evidence obtained pursuant to a search warrant, where the statutory requirements for obtaining the warrant had not been complied with. The specific issue was whether that evidence should be admitted under s 138 of the *Evidence Act 2008* (Vic) (the *Evidence Act*).

In *Marijancevic*, the accused were charged in the County Court with various offences relating to drug manufacture and trafficking. Much of the evidence against the accused was obtained from search warrants issued under the *Drugs Poisons and Controlled Substances Act 1981* (Vic) (the *Drugs Act*). During the course of the trial, it was found that the affidavits relied on to obtain the search warrants had not been sworn (as required by s 81 of the *Drugs Act*),[44] but rather had been simply signed in the presence of a police inspector authorised to take affidavits.

The trial judge held that the breach of s 81 of the *Drugs Act* meant that the evidence had been obtained unlawfully and refused, in the exercise of discretion, to permit this evidence to be admitted under s 138 of the *Evidence Act*. An appeal to the Court of Appeal was dismissed.

Evidence Act s 138

Section 138(1) of the *Evidence Act* provides that evidence obtained 'in contravention of an Australian law' is not to be admitted 'unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.' Without limiting the s 138(1) discretion, the court must take into account the matters listed in s 138(3):

(a) the probative value of the evidence;

(b) the importance of the evidence in the proceeding;

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding;

(d) the gravity of the impropriety or contravention;

(e) whether the impropriety or contravention was deliberate or reckless;

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights;

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

On appeal in *Marijancevic*, the areas of dispute were the factors in s 138(3)(d) and (e). It was common ground that the evidence had significant probative value (s 138(3)(a));[45] that the exclusion of the evidence significantly weakened the case against the accused (s 138(3)(b));[46] and that one of the accused was charged with serious offences (s 138(3)(c)).[47] For present purposes, the Court's discussion of s 138(3)(d) – the gravity of the impropriety – is relevant.

Gravity of impropriety (s 138(3)(d))

The trial judge found that the gravity of the impropriety was of the 'highest order' (cf s 138(3)(d)).

The Court of Appeal agreed with the trial judge that failing to swear affidavits (as distinct from merely signing them) was a very serious error. The Court stated that the importance of making an affidavit in support of a search warrant 'can hardly be gainsaid'.[48] A search warrant authorises what would otherwise be a trespass.[49] To proffer to a magistrate material which is not sworn or affirmed in order to obtain a search warrant 'has a tendency to subvert a fundamental principle of our law'.[50]

In assessing s 138(3)(d), the Court made observations on the degree of seriousness of gravity that are potentially of broader application:[51]

- at the least serious end of the spectrum of improper conduct is that 'which did not involve any knowledge or realisation that the conduct was illegal and where no advantage or benefit was gained as a consequence of that impropriety';
- in the middle of the range is conduct 'which was known to be improper but which was not undertaken for the purpose of gaining any advantage or benefit that would not have been obtained had the conduct been legal'; and
- at the most serious end is conduct 'which was known to be illegal and which was pursued for the purpose of obtaining a benefit or advantage that could not be obtained by lawful conduct.'

The conduct in *Marijancevic* was only in the middle range, because it was not undertaken for the purpose of obtaining an advantage that could not by proper conduct be obtained. The Court held that the trial judge's reference to impropriety of the 'highest order' only meant that the conduct was of such a high order as to justify the exclusion of the evidence.[52]

This analysis looks at the extent of and reasons for non-compliance. This analysis raises two factors: (1) the decision-maker's knowledge of the non-compliance; and (2) whether any advantage was obtained from the non-compliance. As discussed below, more recent cases suggest that there may be room to consider the extent and consequences of non-compliance in applying *Project Blue Sky* (at least in some contexts).

In the result, the Court of Appeal refused to interfere with the trial judge's exercise of discretion. However, the Court stated that '[i]t should not be assumed that we would have made like findings or that we would have exercised the discretion in the same way had a finding of inadvertent or careless conduct been made.'[53]

Affidavits validated by legislation

The evidence given in *Marijancevic* indicated that there was a widespread practice within Victoria Police of merely signing, rather than swearing, affidavits. The Victorian Parliament enacted legislation to address this issue. The *Evidence (Miscellaneous Provisions) Amendment (Affidavits) Act 2012* (Vic) (the *2012 Affidavits Act*) inserted a new s 165 into the *Evidence (Miscellaneous Provisions) Act 1958* (Vic). In general terms, the new s 165 provides that:

- if an affidavit signed before 12 November 2011 by a person and by a person duly authorised to administer oaths contains words indicating that the first person states that the affidavit is made on oath or affirmation, then the words indicating that the first person states that the affidavit was made on oath or affirmation are and are taken always to have been effective by way of oath or affirmation even if specified acts (such as making the oath orally) were not done or did not occur (s 165(1));
- a warrant, order, summons or other process issued or made in reliance on such an affidavit 'is not invalid only by reason of the fact that, but for [s 165(1)], the affidavit would not have been duly sworn or affirmed' (s 165(2); and

- for the purposes of the prosecution of an alleged offence, the fact that, but for s 165(1), an affidavit would not have been duly sworn or affirmed 'is to be disregarded in determining whether evidence obtained in reliance, directly or indirectly, on that affidavit ought to be admitted' (s 165(3)).

In *Rich v The Queen*,[54] the Victorian Court of Appeal rejected an argument that the 2012 *Affidavits Act* was contrary to the principle in *Kable v Director of Public Prosecutions (NSW)*.[55]

Kutlu and *Marijancevic* are striking decisions because, first, significant disruption would follow from invalidating the relevant administrative actions and secondly, the breaches did not seem to be ones that would undermine the quality of the final decisions made (that is, the decisions by the Professional Services Committee, or the contents of the affidavits made in support of the applications for search warrants).

Analysis of relevant factors

As with any question of statutory construction, it is necessary to start with the text.[56] However, the fact that a provision is expressed in mandatory language is relevant, but not conclusive (as Flick J observed in *Kutlu*).[57] Several cases have held that non-compliance with a statutory requirement does not lead to invalidity, despite apparently mandatory language, because of other factors such as public inconvenience that would follow from holding decisions to be invalid.[58]

The different judgments in the Full Court in *Lansen*[59] illustrate how different weight may be given to textual and other factors. The issue in that case was the effect of non-compliance with s 134(4)(a) of the *Environment Protection and Biodiversity Act 1999* (Cth) (the *EPBC Act*), which provides that, before attaching conditions to an approval decision under that Act, the Commonwealth Minister 'must consider' any relevant conditions that have been imposed under State or Territory law.[60] The majority justices (Moore and Lander JJ) held that non-compliance with s 134(4)(a) rendered the Minister's approval invalid. Their Honours relied particularly on textual matters, such as the mandatory language of s 134(4)(a),[61] and the fact that other provisions of the *EPBC Act* expressly dealt with the consequences of non-compliance but not s 134(4)(a).[62] The dissenting judgment of Tamberlin J gave more weight to the inconvenience to the proponent of invalidity,[63] which caused his Honour to give less weight to those other textual matters.[64]

I would suggest that a more significant factor than apparently mandatory language is the role that the particular provision plays in the statutory scheme, which is considered below.

'Essential preliminary' to regulation of existing function

The first factor from *Project Blue Sky* is whether the statutory requirement regulates the exercise of functions already conferred, or is an essential preliminary to the exercise of a function.

This factor was referred to in *Fernando v Minister for Immigration and Multicultural Affairs*.[65] The question in that case was whether the Refugee Review Tribunal (the RRT) could determine a review application that was lodged more than 28 days after the person was notified of the decision. Heerey J (with Dowsett J agreeing) stated that making an application within the time limit was an 'essential preliminary' to the exercise of the RRT's function.[66] Accordingly, the RRT could not consider an application that was lodged after 28 days.

I would suggest that the mere timing of a requirement, as a matter of chronology, does not assist greatly in determining whether non-compliance leads to invalidity. Often this factor will only re-state the question of whether non-compliance was intended to deprive a decision of legal effect.[67]

In this context, 'preliminary' does not refer to a chronological sequence of events but rather to a matter that is legally antecedent to the decision-making process.[68] To determine whether a requirement is an 'essential preliminary' requires considering the purpose of the Act and the importance of the error in the circumstances of the case.[69] There is some similarity between this exercise and determining whether a fact is a 'jurisdictional fact' for the purposes of a statutory scheme. In that context, the question is whether, as a matter of statutory construction, the existence of a fact is a precondition to the valid exercise of a power.[70]

At the same time, there are many requirements that seem to regulate an existing power, yet non-compliance with these requirements will mean that a decision is ineffective. An example is a statutory requirement for a decision-maker to notify a person of relevant information.[71] So a requirement may be 'essential' even though it is not 'preliminary'.

In *Kutlu*, the failure to consult occurred before the appointment of the Professional Services Committees. However, the fact that the *Health Insurance Act* required consultation before appointment did not, in itself, make the consultation 'essential' – consultation was essential because of the important role it played in giving effect to the system of peer review. Once the Court found that the Committees were invalidly appointed, it followed that any decisions made by those Committees were invalid as well. The specific provision made in s 96A of the *Health Insurance Act* showed that a Committee could not otherwise validly perform functions under the Act unless all of its members were validly appointed.[72]

In *Marijancevic*, the failure to swear the affidavit occurred before any decision was made whether to grant a search warrant. However, the temporal sequence of events, in itself, was rightly given little significance. The 'essential' nature of the requirement to swear affidavits followed from the role that this requirement played in our system of justice.

Nature of requirement

The second factor drawn from *Project Blue Sky* is the nature of the requirement. As noted, the joint judgment considered that the obligations imposed by s 160 of the *Broadcasting Services Act* did not have 'a rule-like quality' that could easily be identified and applied.

Certainty of application

In *Project Blue Sky*, the nature of the requirement focused on the certainty of application of the relevant statutory provision. I would suggest that this factor (certainty) is a second order consideration in itself, and takes its weight from its combination with other factors.

In *Project Blue Sky*, the indeterminacy of the statutory requirement was significant because of the public inconvenience that would result if non-compliance deprived a decision of legal effect (see below).

A similar approach was taken in *Bare v Small*.[73] In that case, Williams J held that the requirements of s 38(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) lack a 'rule-like quality'.[74] That in turn meant that there was undesirable uncertainty as to whether the decision of an entity was in breach of s 38(1), with the potential for public inconvenience.[75]

Conversely, in *Kutlu*, the major factor was that the consultation requirements in ss 84(3) and 85(3) of the *Health Insurance Act* were central to the system of peer review established by Pt VAA of that Act. The fact that these requirements were 'easily identified and applied'[76] bolstered the conclusion that non-compliance with those provisions should lead to invalidity.[77]

Another relevant factor is the place of the statutory requirement in the legislative scheme. As already noted, a particular statutory requirement might be central to a statutory scheme. For example, *Kutlu* held that the consultation requirement considered in *Kutlu* was central to the system of peer review established by Pt VAA of the *Health Insurance Act*. Non-compliance with a central provision of this sort is likely to lead to invalidity.

Procedural safeguard or effect on private rights

Even if a provision is not central, non-compliance is likely to lead to invalidity if the statutory provision contains a procedural safeguard for persons affected by the scheme, or is a provision that affects private rights.[78]

An example of a procedural safeguard is a statutory provision that mirrors or gives effect to an important administrative law obligation, such as procedural fairness. Non-compliance with a provision of this sort is very likely to lead to the invalidity of the decision.

This point is illustrated by *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*.[79] A majority of the High Court held that non-compliance with a requirement to provide details of adverse information to an applicant in writing[80] invalidated a decision, even if that information had been provided orally. The requirement to provide that information in writing was directed towards complying with the administrative law obligation to provide procedural fairness. Accordingly, the majority justices derived a legislative intention that *any* breach of this requirement should invalidate the decision.[81]

Another example is *Oke*.[82] In that case, the police officer executing a search warrant failed to make available a copy of the warrant to the occupier of premises, as required by s 3H of the *Crimes Act 1914* (Cth). The Full Court of the Federal Court held that this failure invalidated the warrant. One relevant factor was that, unless the occupier has a copy of the warrant, it would be extremely difficult for the occupier to monitor the conduct of those executing the warrant to ensure that nothing is seized in purported reliance on the warrant that is not authorised.[83] It was also relevant that the courts interpret statutory provisions authorising the issue and execution of search warrants strictly, because they authorise the invasion of property rights.[84]

A third example is *Smith v Wyong Shire Council*.[85] In that case, a council had failed to publicly exhibit a Ministerial direction, as required by s 66 of the *Environmental Planning and Assessment Act 1979* (NSW). The NSW Court of Appeal referred to the importance of public consultation in the scheme of the Act in holding that this non-compliance meant that the relevant direction was invalid.[86]

Public inconvenience if decision invalid

The third factor referred to in *Project Blue Sky* is the public inconvenience that would result if non-compliance meant that a decision was invalid.

'Inconvenience'

The first issue is the meaning of 'inconvenience' in this context.[87] The reference to *public* inconvenience seems to exclude any potential inconvenience to the decision-maker that would result from holding the decision to be legally ineffective.[88] (The converse issue is whether the breach of a statutory requirement has caused any inconvenience or prejudice to the person challenging the validity of the decision.)

The courts are particularly concerned with inconvenience to persons who do not have control over whether the error is made. That point appears clearly from the following statement of principle in *Montreal Street Railway Co v Normandin*:[89]

> When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious inconvenience, *or injustice to persons who have no control over those entrusted with the duty*, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only.

In *Project Blue Sky*, the joint judgment was concerned that members of the public should be able to order their affairs on the basis of apparently valid decisions.[90] This is so particularly for people who spend a great deal of money on the purchase of a broadcasting licence, and spend more money in utilising that licence. According to the joint judgment, to hold that a licence could be ineffective as a result of non-compliance by the Australian Broadcasting Authority (when that non-compliance might be difficult to detect) would lead to expense, inconvenience and loss of investor confidence.[91]

Conversely, the courts will be less concerned about inconvenience if compliance with the requirement is within the control of the person affected. For example, in *Fernando*, both Heerey J and Finkelstein J noted that compliance with a 28 day time limit for lodging an application for review would usually be within the control of the applicant. Accordingly, their Honours gave little weight to possible inconvenience to the applicant of finding that the RRT had no jurisdiction to review the application, because in that case the failure to comply with the 28 day limit was the applicant's fault.[92] (Admittedly, Heerey J noted that there might be situations where non-compliance was not the fault of the applicant, and the strict time limit would cause hardship.[93])

Sometimes the potential for inconvenience to the public generally will need to be weighed against the potential for prejudice to the individual. In *Project Blue Sky*, the joint judgment was concerned to avoid the public inconvenience that would follow from a finding that non-compliance with s 160 of the *Broadcasting Services Act* invalidated a decision of the Australian Broadcasting Authority. Imagine, however, that a licensee is prosecuted due to a failure to comply with an additional condition on a licence imposed under s 43 of the *Broadcasting Services Act*.[94] In that situation, the individual licensee may well wish to argue that a failure to comply with s 160 of the Act in imposing that condition would invalidate the decision.[95]

Kutlu provides an example of this point. One of the main purposes of reviews under Pt VAA was to protect the public. Flick J accepted that the invalidity of the appointment of Committee members might mean that practitioners have engaged in 'inappropriate practice' but would escape any sanction because of what some may perceive to be a technicality.[96] However, this inconvenience was one for which the Minister alone must be accountable.[97]

Effect of a finding of potential inconvenience

The second point is how a finding of potential public inconvenience weighs against other factors in determining whether non-compliance with a statutory requirement should lead to an administrative decision being invalid.

It seems clear that a potential for public inconvenience carries little weight if there has been non-compliance with a central provision in a statutory scheme. For example, in *Kutlu*, the Full Court considered that consultation with the AMA was a central part of the statutory scheme of peer review. The admitted inconvenience that would follow from invalidating the Committees could not overcome the requirements of the statutory scheme.[98]

That type of approach is supported by the decision of French J in *Sandvik Australia Pty Ltd v The Commonwealth*.[99] That case considered whether a failure to give notice of a commercial tariff concession order in the Gazette invalidated the order. French J considered that the notice requirement[100] was of 'central importance' to the statutory scheme, because this requirement gave people who would be affected by the order an opportunity to provide information and their views to the decision-maker.[101] Consequently, although to invalidate the order would cause inconvenience to organisations who had ordered their affairs on the basis that the order was valid, the statutory language was too clear to be overcome by more general considerations of public policy.[102]

The two decisions of the SA Supreme Court in *Epstein v WorkCover Corporation of South Australia*[103] and *Bond*[104] provide an interesting contrast. Each case concerned the facility in s 3(7) of the *Workers Rehabilitation and Compensation Act 1986* (SA) (the *WRC Act*) for making regulations that exclude specified classes of workers from the application of that Act. Section 3(8) of the *WRC Act* imposed a condition on making regulations under s 3(7), although that condition was amended between *Epstein* and *Bond:*

- at the time of *Epstein*, s 3(8) provided that a regulation under s 3(7) 'cannot be made unless the [Board of Management of the WorkCover Corporation] … agrees to the making of the regulation'; and
- at the time of *Bond*, s 3(8) provided that a regulation under s 3(7) 'may only be made after consultation with the [Workers Rehabilitation and Compensation] Advisory Committee'.

In *Epstein*, the Full Court of the SA Supreme Court held that a failure to comply with s 3(8) of the *WRC Act*, as it then stood, meant that the regulation was invalid. Besanko J (with Prior and Bleby JJ agreeing) relied on four factors:[105]

- the wording of s 3(8) (a regulation 'cannot be made unless') is imperative;
- the subject matter of a s 3(7) regulation is significant – excluding workers from the protection of the *WRC Act* is important;
- the body whose agreement is required by s 3(8) (the Board of WorkCover Corporation) represented the different interest groups, and administered that Act; and
- the question of whether the requirements of s 3(8) have been met is capable of being determined relatively easily.

Besanko J was prepared to assume that declaring a regulation invalid may result in expense and inconvenience to persons who have regulated their conduct on the basis that the regulation is valid.[106] However, the four factors referred to outweighed any inconvenience.[107]

In *Bond*, Gray J held that the applicant had not demonstrated that (the amended) s 3(8) of the *WRC Act* had not been complied with,[108] but held further that non-compliance with s 3(8) would not result in invalidity in any event. Gray J referred to the following factors:

- the amended form of s 3(8) ('may only') arguably uses permissive language;[109]
- the requirement for consultation under the amended s 3(8) is less onerous than the previous requirement of agreement and greatly reduced the chance of non-compliance;[110]
- section 3(8) regulates a power to make regulations that is already conferred, rather than imposing essential preliminaries.[111] (Arguably s 3(8) defines the power to make regulations, rather than merely regulating it.);
- to hold a regulation invalid would cause public inconvenience.[112] The relevant regulations had stood unchallenged for many years;[113] and
- if consultation had taken place, there would have been power to make the regulation, even if the Committee had opposed it.[114] (This point gets close to saying that consultation is a mere formality, and the same decision would have been made even if consultation had occurred.[115])

It might be noted that Gray J does not address the points made in the second to fourth factors from *Epstein,* above.[116]

Two additional factors

Apart from the three factors mentioned in *Project Blue Sky*, the cases suggest two additional factors that are relevant.

Other means of giving effect to provision

The first of those additional factors is whether there are any other means of giving effect to a requirement, other than by invalidating a decision that does not comply with that requirement.[117]

A simple example is where a statutory requirement (such as a requirement to provide reasons) can be enforced by mandamus – in that situation, it is not necessary to hold that non-compliance with the requirement invalidates the decision in order to give that requirement some work to do.[118]

A well-known case that relied on this factor is the High Court's decision in *Australian Broadcasting Corporation v Redmore*.[119] The question in that case was the effect of a statutory requirement that the Australian Broadcasting Corporation (the ABC) obtain the approval of the Minister before entering into contracts worth more than $500,000.[120] The High Court held (by majority) that non-compliance with s 70(1) did not invalidate the contract. Relevantly for present purposes, the majority justices pointed out that there were other methods of enforcing the requirement in s 70(1). Specifically, non-compliance might constitute misconduct for the purpose of disciplinary proceedings, and would also lead to an unfavourable report by the Auditor-General.[121] Thus s 70(1) was not reduced to a 'pious admonition'.[122]

Redmore also illustrates the point made earlier about inconvenience – to hold that non-compliance invalidated the contract would prejudice the other party to the contract, who had no way of knowing whether the requirement had been complied with.[123]

Redmore was relied on by the Commonwealth in *Kutlu*. Rares and Katzmann JJ distinguished it on the following bases:

- first, *Redmore* was said to be a case concerned with the private law consequences of a failure by a statutory corporation to comply with a statute.[124] *Redmore* was concerned not to invalidate a contract with an innocent third party. That consideration did not apply to a public law requirement to appoint a person as a Commonwealth officer in accordance with statutory preconditions;[125] and
- secondly, there was no remedy other than invalidity that could apply to the Minister's conduct. In particular, it was not now possible to obtain an injunction to restrain the Committee members from exercising powers.[126]

This reasoning in *Kutlu* is similar to the approach taken by the NSW Court of Appeal in *Correa v Whittingham*.[127] In that case, a person had purported to act as a voluntary administrator of a registered club without being appointed in accordance with s 41 of the *Registered Clubs Act 1976* (NSW). Gleeson JA (with Barrett JA and Tobias AJA agreeing) stated that '[p]rima facie, a statutory requirement that a party not act in a particular capacity unless given approval to so act by a specified body, must be construed as having some legal effect.'[128] The fact that contravention of s 41 was not an offence, and otherwise attracted no remedy, indicated that non-compliance meant that the appointment of a person as administrator of a registered club was invalid.[129]

Another example of this additional factor is the decision of Finkelstein J in *Hall v Minister for Immigration and Multicultural Affairs*.[130] The question in *Hall* was whether a failure to provide documents within the time limit specified in s 500(6C) of the Migration Act prevented the Administrative Appeals Tribunal (the AAT) from determining an application to review a decision. Finkelstein J relied heavily on the fact that there were other means of obtaining the information in question,[131] and that other provisions ensured that the applicant could not prolong the appeals process.[132] Given that there were other means to give effect to the purposes of s 500(6C), it was not necessary to hold that non-compliance with s 500(6C) prevented the AAT from considering the application for review.[133]

Finally, this factor was also considered in *Kirkham v Industrial Relations Commission (SA)*,[134] which held that a failure to notify the SA Industrial Commission of the proposed grounds of termination of employment of a State public servant[135] did not invalidate that termination. Kourakis CJ held that:

- it was neutral that this statutory requirement could be descried as an 'internal quality control mechanism'.[136]
- it was not correct to say that breach of the notification provision 'would attract no consequence' unless the termination was invalidated. Failure to comply would be a breach of the public service legislation (which could be a subject of report to the Minister). Also the breach could make it more likely, as a practical matter, that the termination was harsh, unjust or unreasonable;[137] and
- although it could be said that the objects of s 54(3) would be better served by a finding of invalidity, that observation could be made about every statutory requirement imposed on the exercise of a power.[138]

Extent and consequences of non-compliance

A second additional factor is the extent and consequences of non-compliance. The relevance of this factor is a matter of some continuing debate.[139]

In *Minister for Immigration v SZIZO*,[140] the High Court considered whether the RRT's decision was invalidated by it giving notice of a hearing to an applicant personally, rather than an applicant's representative. Section 441G of the *Migration Act* provided that the RRT 'must give the authorised recipient, instead of the applicant, any document that it would otherwise have given to the applicant'. However, it was common ground that the notice came to the attention of the authorised representative within the prescribed period.

The High Court posed the *Project Blue Sky* question as follows:[141]

> Was it a purpose of the legislation that, despite holding a hearing at which all of the applicants for review, including their authorised recipient, appeared before the tribunal to give evidence and to present arguments relating to the issues arising in relation to the decision under review, the tribunal could not validly decide the review?

It may be noted that this question is very specific to the circumstances of that case.

The Court held that this notification requirement was of a different character to the requirement considered in *SAAP* (to give written particulars of adverse information).[142] Although s 441G (read with s 425A) ensures that an applicant has timely and effective notice of a hearing, the manner of providing timely and effective notice is not an end of itself. The procedural steps dealing with the manner of giving notice are to be distinguished from the other statutory requirements giving effect to the hearing rule.[143] In the case of procedural steps, there was no legislative intention that any departure from those steps would result in invalidity 'without consideration of the extent and consequences of the departure'.[144]

The reasoning in *SZIZO* indicates that the 'extent and consequences of departure' are relevant for mere procedural requirements, but may not be relevant for more substantive requirements (such as notifying a person of the case to be met).

In *Jenkins v Director of Public Prosecutions*,[145] the jury in a criminal trial had separated without an order under s 54(1)(b) of the *Jury Act 1977* (NSW).[146] The applicant contended that the separation of the jury without an order under s 54(1)(b) had the result that the District Court had no jurisdiction thereafter to receive the verdicts from the jury and could not convict him. Gleeson JA stated that non-compliance with a statutory requirement does not necessarily lead to invalidity (quoting *Project Blue Sky*),[147] and stated further that in considering the effect of non-compliance with a statutory requirement or condition, a significant factor will be a 'consideration of the extent and consequences' of such non-compliance (citing *SZIZO*).[148] Gleeson JA found that there was no legislative intention that non-compliance with s 54(1)(b) should lead to the consequences asserted by the applicant.[149] Again, the requirements of s 54(1)(b) can be seen as procedural in nature.[150]

This difference between 'procedural' and other requirements may prove difficult to define. It may become significant how (meaning the level of generality at which) the statutory requirement and the error are described. At one level, describing an error more generally (such as a breach of procedural fairness, rather than the particular conduct) may increase the chance that the court will find that the requirement has not been complied with at all. Consider, for example, the following statement by McHugh J in *SAAP*:[151]

> [t]here can be no 'partial compliance' with a statutory obligation to accord procedural fairness. Either there has been compliance or there has not.

If, however, the relevant obligation was re-framed as an obligation to provide certain information to the applicant *in writing* (which more closely reflects the terms of s 424A of the *Migration Act*), then it could be argued that this is a mere procedure. The extent and consequences of non-compliance are not great if the same information is provided orally.

The reference to extent and consequences of non-compliance seems to raise issues very similar to asking whether there has been 'substantial compliance' with a statutory requirement. It might be noted that the joint judgment in *Project Blue Sky* appeared to reject the relevance of 'substantial compliance' as a useful tool in this context.[152] An interesting issue is whether the factors mentioned in *Marijancevic* in the context of s 138 of the *Evidence Act* (knowledge that there had been non-compliance; whether any advantage obtained from non-compliance)[153] may be relevant to the 'extent and consequences' of non-compliance.[154]

Lack of prejudice to the applicant?

This issue can be posed another way. As noted, it is relevant if holding the decision to be invalid would inconvenience the public, including a person directly affected by the decision. Can the decision-maker argue, conversely, that a decision should not be held to be invalid if there is no prejudice to the applicant?

Again, the answer appears to be that much turns on the nature of the statutory requirement that has been breached, and the court's assessment of the importance of that requirement.

This type of issue often arises in the criminal law, particularly when it comes to the formalities of an instituting document.

In *R v Janceski*,[155] Mr Janceski was convicted of maliciously inflicting grievous bodily harm, after two trials. He argued that his conviction was invalid, because the barrister who signed the indictment for his second trial did not have authority to do so. The barrister had not been authorised by the NSW Director of Public Prosecutions (the DPP), as required by s 126(1)(b)(iii) of the *Criminal Procedure Act 1986* (NSW) (the *NSW Criminal Procedure Act*).[156]

Spigelman CJ acknowledged that the defendant had received a fair trial, and that the non-compliance with s 126(1) was of no practical significance in this case. Accordingly, to invalidate the conviction on the basis of this technical error might adversely affect public confidence in the criminal justice system, by creating the impression that the system is 'just a forensic game'.[157] Even so, his Honour held that the error, technical as it was, invalidated the conviction. Two crucial factors in this conclusion were, first, that the indictment founds the jurisdiction of the court to hear the trial and, secondly, courts have insisted on punctilious compliance with legal formalities in criminal trials, because these trials can result in the state imposing the stigma of a criminal conviction on a person.[158]

In *Ayles v The Queen*,[159] the High Court was divided on whether any information could be amended by the judge, without application from the parties, to correct the statutory provision referred to. The majority held that the information could be amended in this fashion, pursuant to a statutory power of amendment. Gummow and Kirby JJ stated in dissent:[160]

In *Kotsis v Kotsis* [(1970) 122 CLR 69 at 90] Windeyer J emphasised that, with respect to alleged merely formal defects in the court record:

> The observance of forms and the due recording of proceedings are one of the safeguards of justice according to law.

When considering the statutory formalities which under English law attend the preferring of indictments, Lord Bingham of Cornhill recently remarked, in *R v Clarke* [[2008] UKHL 8 at [17]]:

> Technicality is always distasteful when it appears to contradict the merits of a case. But the duty of the court is to apply the law, which is sometimes technical, and it may be thought that if the state exercises its coercive power to put a citizen on trial for serious crime a certain degree of formality is not out of place.
>
> We agree. … It is an approach that expresses the law of Australia, as long understood. It is the foregoing precept stated by Lord Bingham respecting the manner of exercise of the coercive power of the state which we seek to apply in what follows.

A similar debate occurs in England.[161] In *Soneji*,[162] the issue was whether non-compliance with the requirements for postponing a confiscation proceedings invalidated the confiscation order ultimately made by the court.[163] The House of Lords held that the confiscation order was not invalidated.

Lord Steyn referred with approval to the approach in *Project Blue Sky*,[164] and held that the emphasis should be on, first, the consequences of non-compliance with the relevant requirement and, secondly, whether Parliament can fairly be taken to have intended total invalidity.[165] Relevantly for present purposes, his Lordship held that the prejudice to the accused in this case was not significant, and that any prejudice was 'decisively outweighed by the countervailing public interest in not allowing a convicted offender to escape confiscation for what were no more than bona fide errors in the judicial process'.[166]

Some English intermediate courts considered that *Soneji* represented a 'significant departure' from the way that these issues were previously decided.[167]

However, in *R v Clarke*,[168] the House of Lords stated that decisions including *Soneji* 'are valuable and salutary, but the effect of the sea-change which they wrought has been exaggerated and they do not warrant a wholesale jettisoning of all rules affecting procedure irrespective of their legal effect'. In *Clarke*, the House of Lords held that a failure to sign an indictment meant that a conviction must be quashed.

Conclusion

This review suggests that some broad conclusions can be drawn about the manner in which the courts apply the *Project Blue Sky* approach to determining whether non-compliance with a requirement impinges on the effect of a decision.

The most important factor is the court's assessment of the significance of the statutory requirement. Non-compliance is likely to impinge on the effectiveness of a decision if:

- a requirement is an essential element of a statutory scheme; or
- the requirement contains a procedural safeguard for persons affected by the statutory scheme (such as a provision that gives effect to the requirements of procedural fairness), or affects private property rights.

The next important factor is the extent of public inconvenience that would follow from concluding that non-compliance means that a decision is invalid. The potential for public inconvenience will not be determinative, if the requirement that has been breached is central to the statutory scheme. On the other hand, public inconvenience will carry particular weight when the person or people affected by the decision cannot readily identify whether or not the requirement has been complied with.

Another important factor is whether there are other means of giving effect to the purpose of a requirement, other than holding that non-compliance makes the decision invalid. It may be

that, if a requirement is central or otherwise significant, the courts might assess how workable these alternative means of enforcement are.

Project Blue Sky also refers to whether a requirement is an essential preliminary to performing a function, or regulates an existing function. I have suggested, however, that this factor will often only re-state the question of whether non-compliance was intended to deprive a decision of legal effect.

Lastly, there are some indications that it may be relevant to consider the extent and consequences of non-compliance. That may, however, be limited to procedural statutory requirements.

Finally, I want to emphasise that this paper has considered the position when the Parliament has not addressed expressly the consequences of non-compliance with a statutory condition. That is by far the more common situation.

However, from time to time, Parliaments do address the consequences of non-compliance. These provisions may take a number of different forms.

One relatively anodyne provision excuses 'formal defects or irregularities', such as s 306 of the *Bankruptcy Act*. This raises a similar, but not identical, question to that posed by *Project Blue Sky*.[169] Another relatively harmless provision states that 'substantial compliance' with a provision (commonly a form) does not lead to invalidity. Section 25C of the *Acts Interpretation Act 1901* (Cth) is an example.

Section 138 of the *Evidence Act* takes a different tack – evidence may be admissible, despite the fact that it was obtained in breach of an Australian law.[170] In that situation, an administrative law challenge is only helpful or relevant to prevent the evidence from being obtained. This provision also does not raise any difficulties, because a court controls its processes through the exercise of discretion.

A slightly more adventurous provision states that a failure to comply with a certain section 'does not affect the validity of the decision'. In *Palme*,[171] the majority judges in the High Court appeared to treat a provision of this sort as relevant in deciding that a failure to provide reasons for a decision did not affect the validity of that decision.[172]

A more comprehensive provision states that the validity of a decision 'shall not be affected by reason that any of the provisions of this Act have not been complied with'. In *Commissioner of Taxation v Futuris Corp Ltd*,[173] the High Court was largely prepared to treat a provision of this sort[174] as being relevant, in a *Project Blue Sky* sense, to whether a decision could be challenged directly in judicial review proceedings, rather than being challenged in the review proceedings provided for under the relevant legislation.

The issues raised by these 'no invalidity' clauses is a matter of some complexity – particularly if they are not combined with generous review rights.[175]

Endnotes

1 (1998) 194 CLR 355 (*Project Blue Sky*).
2 As with 'nullity', 'invalid' has a number of different legal consequences, so its meaning depends on context: see Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) at [10.30] (discussing 'nullity').
3 *Project Blue Sky* (1998) 194 CLR 355 at [91].
4 *Project Blue Sky* (1998) 194 CLR 355 at [93].
5 (2011) 197 FCR 177 (*Kutlu*).

6 (2011) 33 VR 440 (*Marijancevic*).
7 *Project Blue Sky* (1998) 194 CLR 355 at [91]. See also Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) at [6.280].
8 See *Zheng v Cai* (2009) 239 CLR 446 at [28] (the Court).
9 *R v Soneji* [2006] 1 AC 340 (*Soneji*) at [15] (Lord Steyn).
10 Mark Aronson, 'Nullity' (2003) 40 *AIAL Forum* 19 at 23; *Sumukan Limited v Commonwealth Secretariat* [2007] EWHC 188 (Comm) (*Sumukan*) at [44].
11 *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364 (*Berowra Holdings*) at [28] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). Of particular concern in *Berowra Holdings* was that the relevant statutory provision applied to proceedings in a superior court, as well as proceedings in an inferior court: at [11]-[12].
For a difficult example of the effect of non-compliance with a statutory requirement on the jurisdiction of courts, see *Director of Public Prosecutions v Edwards* [2012] VSCA 293.
12 Now the Australian Communications and Media Authority.
13 *Project Blue Sky* (1998) 194 CLR 355 at [42] (Brennan CJ), [80], [84]-[85] (McHugh, Gummow, Kirby and Hayne JJ).
14 See *Adams v Lambert* (2006) 228 CLR 409 at [14], [29] (the Court), considering s 306 of the *Bankruptcy Act 1966* (Cth) (*Bankruptcy Act*). See also *Lansen v Minister for Environment* (2008) 174 FCR 14 (*Lansen*) at [34] (Moore and Lander JJ): 'the intention of the legislature is not ascertained merely because the legislature has couched the doing of the condition precedent in imperative language.'
15 *Project Blue Sky* (1998) 194 CLR 355 at [94].
16 *Project Blue Sky* (1998) 194 CLR 355 at [95].
17 The other paragraphs of s 160 provided that the Australian Broadcasting Authority was to perform its functions in a manner consistent with 'the objects of [the Broadcasting Services] Act and the regulatory policy described in section 4' (s 160(a)), 'any general policies of the Government notified by the Minister under section 161' (s 160(b)), and 'any directions given by the Minister in accordance with this Act' (s 160(c)).
18 *Project Blue Sky* (1998) 194 CLR 355 at [95].
19 *Project Blue Sky* (1998) 194 CLR 355 at [96].
20 *Project Blue Sky* (1998) 194 CLR 355 at [97]-[98].
21 *Project Blue Sky* (1998) 194 CLR 355 at [100].
22 Aronson and Groves contend that there was a 'complete convergence' in result between the High Court's decision and the decision of Davies J at first instance, who made orders that the Australian content standard was ineffective, but only from 5 months after his Honour's decision: *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) at [10.230].
23 See *Kutlu* (2011) 197 FCR 177 at [5]-[6].
24 *Kutlu* (2011) 197 FCR 177 at [49] (answers to questions 1-3).
25 *Kutlu* (2011) 197 FCR 177 at [18].
26 *Kutlu* (2011) 197 FCR 177 at [19]. Accordingly, a separate reason for invalidity was that the Minister had failed to have regard to a mandatory relevant consideration: at [36]. In *Lee v Napier* (2013) 216 FCR 562, Katzmann J held that the requirement to 'consult' meant that the Minister could not make an appointment without waiting for a response from the AMA.
27 *Kutlu* (2011) 197 FCR 177 at [20].
28 *Kutlu* (2011) 197 FCR 177 at [21]-[23].
29 *Kutlu* (2011) 197 FCR 177 at [25].
30 *Kutlu* (2011) 197 FCR 177 at [27].
31 *Kutlu* (2011) 197 FCR 177 at [28].
32 *Kutlu* (2011) 197 FCR 177 at [32].
33 *Kutlu* (2011) 197 FCR 177 at [74].
34 *Kutlu* (2011) 197 FCR 177 at [77].
35 *Kutlu* (2011) 197 FCR 177 at [79]. Moreover, proceedings under Pt VAA have some of the characteristics of a disciplinary hearing: at [85]-[86].
36 *Kutlu* (2011) 197 FCR 177 at [80].
37 *Kutlu* (2011) 197 FCR 177 at [81].
38 *Kutlu* (2011) 197 FCR 177 at [83].
39 *Kutlu* (2011) 197 FCR 177 at [94].
40 *Kutlu* (2011) 197 FCR 177 at [97].
41 *Kutlu* (2011) 197 FCR 177 at [98].
42 *Commonwealth v Kutlu* [2012] HCA Trans 35.
43 http://www.hcourt.gov.au/cases/case-s50/2012.
44 Section 81(1) of the *Drugs Act* refers to a magistrate issuing a warrant if satisfied of certain matters 'by evidence on oath or by affidavit'.
45 *Marijancevic* (2011) 33 VR 440 at [60].
46 *Marijancevic* (2011) 33 VR 440 at [61].
47 *Marijancevic* (2011) 33 VR 440 at [62]. The Court of Appeal did not find it necessary to consider the trial judge's reasons concerning s 138(3)(h): at [64].
48 *Marijancevic* (2011) 33 VR 440 at [54].

49 *Marijancevic* (2011) 33 VR 440 at [57].
50 *Marijancevic* (2011) 33 VR 440 at [58].
51 *Marijancevic* (2011) 33 VR 440 at [67].
52 *Marijancevic* (2011) 33 VR 440 at [68].
53 *Marijancevic* (2011) 33 VR 440 at [92]. By way of comparison, in *G A v The Queen* [2012] VSCA 44, the Victorian Court of Appeal held that the omission of the words 'by Almighty God' from the oath did not affect the validity of an affidavit: at [36]-[37] (the Court).
54 (2014) 312 ALR 429.
55 (1996) 189 CLR 51.
56 See eg *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47] (Hayne, Heydon, Crennan and Kiefel JJ).
57 *Kutlu* (2011) 197 FCR 177 at [74]. See also *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 (*Chase Oyster Bar*) at [40] (Spigelman CJ): 'The first textual indicator that is always of significance is the mode of expression of the element directly in issue. Substantial, indeed often, but not always, determinative, weight must be given to language which is in mandatory form.'
58 See for example *Waratah Coal Inc v Minister for the Environment* (2008) 173 FCR 557 at [41] (Collier J): 'Such language as 'may only' in legislation is indicative of a need to comply with a set time limit, although not conclusive'; see also *Bond v WorkCover Corporation of South Australia* (2005) 93 SASR 315 (*Bond*), discussed below.
59 (2008) 174 FCR 14.
60 At first instance, Mansfield J held that non-compliance with s 134(4)(a) of the *EPBC Act* did not render the approval decision invalid: *Lansen v Minister for Environment* (2008) 102 ALD 558 at [179].
61 *Lansen* (2008) 174 FCR 14 at [25], [71]-[72].
62 *Lansen* (2008) 174 FCR 14 at [65]-[67].
63 *Lansen* (2008) 174 FCR 14 at [291].
64 *Lansen* (2008) 174 FCR 14 at [298].
65 (2000) 97 FCR 407 (*Fernando*).
66 *Fernando* (2000) 97 FCR 407 at [31]. In addition, the Court referred to the general policy that administrative review should be conducted expeditiously (at [22] (Heerey J), [48] (Finkelstein J)), and noted that the time of lodging an application was within the applicant's control (at [28], [31] (Heerey J), [46] (Finkelstein J)).
67 By way of comparison, in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 (*Palme*) at [44], Gleeson CJ, Gummow and Heydon JJ held that the question of whether a requirement to give reasons for a decision was a condition precedent for the exercise of power (noting that reasons are given after the decision) depended on the construction of the relevant Act, to determine whether it was a purpose of the Act that a failure to give reasons should render the decision invalid.
68 *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707 at [47]-[48] (Spigelman CJ); *Chase Oyster Bar* (2010) 78 NSWLR 393 at [44] (Spigelman CJ). *Woolworths* was a case about jurisdictional fact: see [30] ff.
69 See, by analogy, *Adams v Lambert* (2006) 228 CLR 409 at [29] (the Court), contrasting an essential requirement and a formal defect or irregularity).
70 *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at [37]-[38] (Spigelman CJ); *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* [2015] HCA 7 at [80] (Gageler J). Professor Aronson points out that the characterisation of facts as 'jurisdictional facts' sometimes seems to depend on a court's assessment of how important these facts are in the statutory scheme: see Mark Aronson, 'The Resurgence of Jurisdictional Facts' (2001) 12 *Public Law Review* 17 at 37. Moreover, he points out that even genuinely preliminary matters may only be procedural in nature, and therefore not 'jurisdictional' in the sense that a failure to comply invalidates the decision: at 34.
71 For example, the requirement that a police officer provide a copy of a search warrant to the occupier of land: see the discussion of *Commissioner, Australian Federal Police v Oke* (2007) 159 FCR 441 (*Oke*) below.
72 *Kutlu* (2011) 197 FCR 177 at [35] (Rares and Katzmann JJ). The Court rejected an argument that the Committee members were 'de facto officers': at [47]-[48] (Rares and Katzmann JJ), [121]-[122] (Flick J). Some Acts provide expressly that certain types of non-compliance with the requirements of appointment do not invalidate the decisions of the bodies: see eg *Competition and Consumer Act 2010* (Cth), s 38; *Australian Securities and Investments Commission Act 2001* (Cth), s 245.
73 [2013] VSC 129.
74 *Bare v Small* [2013] VSC 129 at [117].
75 *Bare v Small* [2013] VSC 129 at [118].
76 *Kutlu* (2011) 197 FCR 177 at [28].
77 See also *Oke* (2007) 159 FCR 441 at [34] (Branson and Lindgren JJ, with Besanko J agreeing on this point): 'the obligation imposed by s 3H(1) [of the *Crimes Act 1914* (Cth)] is relatively easily complied with and … it serves an important purpose.'
78 *Sumukan* [2007] EWHC 188 (Comm) at [44].
79 (2005) 228 CLR 294 (*SAAP*).
80 Section 424A(1) of the *Migration Act 1958* (Cth) (*Migration Act*) provided that the RRT must 'give' the applicant clear particulars of any adverse information. The effect of s 424A(2)(b) and reg 5.02 of the

Migration Regulations 1994 (Cth) was that information was only 'given' to a person in immigration detention if given in a document. Section 424AA (added in 2007) now provides that this information may be given orally at the hearing.

81 *SAAP* (2005) 228 CLR 294 at [77] (McHugh J), [208] (Hayne J, with Kirby J agreeing on this point).

82 (2007) 159 FCR 441.

83 *Oke* (2007) 159 FCR 441 at [34].

84 *Oke* (2007) 159 FCR 441 at [36].

85 [2003] NSWCA 322 (*Wyong Shire Council*).

86 *Wyong Shire Council* [2003] NSWCA 322 at [58]-[59], [63] (Spigelman CJ), [168], [181] (Tobias JA, with Sheller JA agreeing on this point).

87 There may sometimes be disagreement as to whether the asserted inconvenience exists: see eg *Wyong Shire Council* [2003] NSWCA 322 at [144] (Tobias JA).

88 That is, expense following from having to repeat a process may not amount to 'inconvenience'. Note, however, that Professor Aronson has argued that it is legitimate to consider regulatory efficacy and efficiency: see Mark Aronson, 'The Resurgence of Jurisdictional Facts' (2001) 12 *Public Law Review* 17 at 27.

89 [1917] AC 170 at 175 (emphasis added), cited in *Project Blue Sky* (1998) 194 CLR 355 at [97]. The issue in *Normandin* was whether a failure to comply with the statutory requirements for constituting a jury invalidated the convictions of persons tried by those juries.

90 *Project Blue Sky* (1998) 194 CLR 355 at [97] also cites *Clayton v Heffron* (1960) 105 CLR 214 at 247 and *TVW Enterprises Ltd v Duffy (No 3)* (1985) 8 FCR 93 (*Duffy (No 3))* at 104-105.
In *Clayton v Heffron*, Dixon CJ, McTiernan, Taylor and Windeyer JJ rejected an argument that a failure to hold a free conference of the managers of the NSW Legislative Council and the NSW Legislative Assembly would invalidate any amendment to the NSW Constitution resulting from the joint sitting of the Houses. Their Honours stated ((1960) 105 CLR 355 at 247): 'Is it possible to imagine a stronger case of inconvenience than the invalidation perhaps at some future time of a constitutional provision possessing all the outward appearances of a valid law on the ground that when it was made managers of the Council had not met managers of the Assembly before the members of the two Houses were required by the Governor to meet?'
In *Duffy (No 3)*, the applicant contended that a notice and inquiry under the *Broadcasting and Television Act 1942* (Cth) was invalid because the Minister had failed to consult it before issuing the notice. Sheppard J stated that the public inconvenience of holding the inquiry invalid was 'manifest', and it 'seems hardly likely' that the legislature would have intended such a consequence: (1985) 8 FCR 93 at 104-105.

91 *Project Blue Sky* (1998) 194 CLR 355 at [98]. Similarly, in *Burwood Council v Ralan Burwood Pty Ltd (No 3)* [2014] NSWCA 404, the NSW Court of Appeal observed that the statutory provisions that had been breached were not directed to (that is, did not impose obligations on) the person who took the benefit of the relevant certificate: at [167] (Sackville AJA, with McColl and Barrett JJA agreeing).

92 *Fernando* (2000) 97 FCR 407 at [28], [31] (Heerey J), [46] (Finkelstein J).

93 *Fernando* (2000) 97 FCR 407 at [22]. For an example of such hardship (albeit involving a time limit on seeking judicial review), see *WAFE of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 70 ALD 57.

94 Non-compliance with an additional condition is not itself an offence (cf the offences in s 139, which relate to a breach of conditions set out in Sch 2). However, the Australian Communications and Media Authority, if satisfied that a licensee is breaching a condition of the licence, may direct the licensee to take action to correct the breach (s 141(1) of the *Broadcasting Services Act*). Failure to comply with a s 141 notice is an offence (s 142).

95 In the absence of legislation to the contrary, an administrative decision will be subject to collateral challenge: *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [36] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). In this example, the defendant could challenge the validity of the decision to impose an extra condition as a defence to a prosecution arising out of a failure to comply with that condition.

96 *Kutlu* (2011) 197 FCR 177 at [96].

97 *Kutlu* (2011) 197 FCR 177 at [98].

98 That said, it is somewhat begs the question to state that considerations of public inconvenience 'do not displace the express words of s 84(3) and s 85(3)': cf *Kutlu* (2011) 197 FCR 177 at [27] (Rares and Katzmann JJ), because the issue is the meaning of those words. It also seems unduly restrictive to say that potential inconvenience is only relevant when there is uncertainty about legislative intention: cf [94] (Flick J). The better view is that potential public inconvenience is part of the context that can be considered from the outset: see *CIC Insurance Ltd v Bankstown Football Club Ltd* (1995) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

99 (1987) 89 ALR 213 (*Sandvik*).

100 The notice requirement was contained in s 269L of the *Customs Act 1901* (Cth) (the *Customs Act*).

101 *Sandvik* (1987) 89 ALR 213 at 227. French J also noted that other provisions of the *Customs Act* (but not s 269L) expressly provided that a failure to provide notice did not affect the validity of a decision.

102 *Sandvik* (1987) 89 ALR 213 at 228.

103 (2003) 85 SASR 561 (*Epstein*).

104 (2005) 93 SASR 315.

105 *Epstein* (2003) 85 SASR 561 at [49].
106 *Epstein* (2003) 85 SASR 561 at [50] (Besanko J, with Prior and Bleby JJ agreeing).
107 *Epstein* (2003) 85 SASR 561 at [52]. The requirement was for the SA workers compensation authority to agree to any regulation that excluded a category of worker from the operation of the SA workers' compensation statute. The Court held that this was an essential requirement, because (1) the mandatory language of the regulation, (2) the importance of workers being excluded from the Act, (3) the fact that the SA workers compensation authority occupies an important position under the Act, and (4) it was relatively easy to determine whether the necessary agreement had been obtained: at [49].
108 *Bond* (2005) 93 SASR 315 at [57]-[58].
109 *Bond* (2005) 93 SASR 315 at [64].
110 *Bond* (2005) 93 SASR 315 at [65].
111 *Bond* (2005) 93 SASR 315 at [69].
112 *Bond* (2005) 93 SASR 315 at [70].
113 *Bond* (2005) 93 SASR 315 at [80].
114 *Bond* (2005) 93 SASR 315 at [80].
115 Cf the approach in *Kutlu*, which held that the fact that the Minister was not bound to accept the advice of the AMA did not make the consultation with the AMA a formality: see footnote 26 above.
116 See footnote 105 above.
117 See *Wyong Shire Council* [2003] NSWCA 322 at [40], [46] (Spigelman CJ).
118 *Palme* (2003) 216 CLR 212 at [41], [48] (Gleeson CJ, Gummow and Heydon JJ), [57] (McHugh J), considering s 501G(4) of the Migration Act. See also *Snedden v Minister for Justice* [2014] FCAFC 156 at [107] (Middleton and Wigney JJ, with Pagone J agreeing on this point): the requirement in s 22 of the *Extradition Act 1988* (Cth) to make a surrender decision 'as soon as is practicable' is enforceable by mandamus, and breach of that requirement does not cause the power to lapse.
119 (1989) 166 CLR 454 (*Redmore*).
120 See s 70(1) of the *Australian Broadcasting Corporation Act 1983* (Cth).
121 *Redmore* (1989) 166 CLR 454 at 459-460 (Mason CJ, Deane and Gaudron JJ).
122 *Redmore* (1989) 166 CLR 454 at 459 (Mason CJ, Deane and Gaudron JJ).
123 *Redmore* (1989) 166 CLR 454 at 457.
124 This difference between public and private law also affects whether an injunction is available to restrain future reliance on an act done in breach of a statutory requirement: cf *Project Blue Sky* (1998) 194 CLR 355 at [100], referred to in footnote 21 above. In *Acquista Investments Pty Ltd v Urban Renewal Authority* [2014] SASC 60, Dart J held that, on the hypothesis that the Authority had entered into a contract in breach of s 11 of the *Public Corporations Act 1993* (SA), but that contract was not void, there was no basis for granting an injunction to restrain future performance of that contract: at [493].
125 *Kutlu* (2011) 197 FCR 177 at [31].
126 *Kutlu* (2011) 197 FCR 177 at [32].
127 [2013] NSWCA 263 (*Correa*).
128 *Correa* [2013] NSWCA 263 at [91].
129 *Correa* [2013] NSWCA 263 at [92].
130 (2000) 97 FCR 387 (*Hall*).
131 The AAT has power to require the Minister to provide documents in the Minister's possession or control (s 500(6K) of the *Migration Act*). The documents that the applicant is required to provide are provided to him or her by the Minister (see s 500(6C)(b) and s 501G(2) of the *Migration Act*), and therefore within the Minister's possession or control. See *Hall* (2000) 97 FCR 387 at [12].
132 If the AAT does not make a decision within 84 days, the decision under review is taken to be affirmed (s 500(6L) of the *Migration Act*). See *Hall* (2000) 97 FCR 387 at [14].
133 *Hall* (2000) 97 FCR 387 at [13], [16].
134 [2015] SASCFC 1 (*Kirkham*).
135 See *Public Sector Act 2009* (SA), s 54(3). It appears that Kourakis CJ did not consider s 54(3) to be an important substantive right (although s 54(2) is): *Kirkham* [2015] SASCFC 1 at [25]. Nonetheless, s 54(3) could be considered a 'procedural safeguard' for an employer: see footnote 78 above. Kourakis CJ held that the consideration that the public sector agency is not bound to follow the Commissioner's advice does not strongly indicate that non-compliance with s 54(3) does not lead to invalidity. The public sector agency is required to consider that advice, as was the case in *Kutlu*: see footnote 26 above.
136 *Kirkham* [2015] SASCFC 1 at [28].
137 *Kirkham* [2015] SASCFC 1 at [32]. To similar effect, a failure to include a statement of environmental effects in an application does not invalidate any consent given, but this failure may make it less likely that the relevant consent will be given. In this sense, the statutory requirement is not 'set at naught', even if non-compliance does not render the consent invalid: see *Cranky Rock Road Action Group Inc v Cowra Shire Council* [2006] NSWCA 339 at [86] (Tobias JA, with Young CJ in Eq and Campbell J agreeing), quoting *MCC Energy Pty Ltd v Wyong Shire Council* [2006] NSWLEC 581 at [67]. This aspect of *Cranky Rock* was criticised, but not overruled, in *McGovern v Ku-ring-gai* Council (2008) 72 NSWLR 504 at [198]-[200] (Basten JA, with Spigelman CJ agreeing); contra [235] (Campbell JA).
138 *Kirkham* [2015] SASCFC 1 at [34].
139 See Justice Nye Perram, 'Project Blue Sky: Invalidity and the Evolution of Consequences for Unlawful Administrative Action' (2014) 21 *Australian Journal of Administrative Law* 62 at 67-69. In *Lansen v Minister*

for Environment (2008) 102 ALD 558 at [170], Mansfield J held (based on *SAAP* (2005) 228 CLR 294 at [77], [209]) that it was irrelevant to the *Project Blue Sky* question whether the breach of the statutory requirement could have caused a material difference to the decision.

140 (2009) 238 CLR 627 (*SZIZO*).

141 *SZIZO* (2009) 238 CLR 627 at [26].

142 *SZIZO* (2009) 238 CLR 627 at [31].

143 *SZIZO* (2009) 238 CLR 627 at [34].

144 *SZIZO* (2009) 238 CLR 627 at [34].

145 [2013] NSWCA 406 (*Jenkins*).

146 Section 54(1)(b) provides 'The jury in criminal proceedings:… may, if the court so orders, be permitted to separate at any time after they retire to consider their verdict.'

147 *Jenkins* [2013] NSWCA 406 at [54]. Cf *Berowra Holdings*, which questioned whether *Project Blue Sky* was applicable to the jurisdiction of courts: see footnote 11 above.

148 *Jenkins* [2013] NSWCA 406 at [55].

149 *Jenkins* [2013] NSWCA 406 at [65].

150 See *Police v Lloyd* [2004] SASC 54 at [48] (Perry J): minor deviations from the prescribed form of warning did not invalidate the results obtained from a breathalyser test, provided that these deviations 'do not alter the sense of what is being conveyed in any significant way'.

151 (2005) 228 CLR 294 at [77].

152 *Project Blue Sky* (1998) 194 CLR 355 at [92]; Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) at 348 [6.240].

153 See footnote 52 above.

154 Cf *Lansen v Minister for Environment* (2008) 102 ALD 558 at [177] (Mansfield J): the Minister's failure to comply with s 134(4)(a) of the *EPBC Act* was not a conscious decision but was inadvertence. As noted, the decision of Mansfield J was overturned on appeal: *Lansen* (2008) 174 FCR 14.

155 (2005) 64 NSWLR 10 (*Janceski*).

156 Section 126(1) of the *NSW Criminal Procedure Act* provides (relevantly) that '[a]n indictment shall be signed … for and on behalf of the Attorney General or the Director of Public Prosecutions by … a person authorised [by the DPP] to sign indictments'.

157 *Janceski* (2005) 64 NSWLR 10 at [98].

158 *Janceski* (2005) 64 NSWLR 10 at [90], [98]. Spigelman CJ also engaged in detailed analysis of s 126 of the *NSW Criminal Procedure Act* and related provisions. However, there were textual considerations in support of either view.

159 (2008) 232 CLR 410 (*Ayles*).

160 *Ayles* (2008) 232 CLR 410 at [10]-[12].

161 There is a helpful summary of cases from England, Canada and New Zealand in *Bond* (2005) 93 SASR 315 at [71]-[78] (Gray J).

162 [2006] 1 AC 340.

163 Section 72A of the *Criminal Justice Act 1988* (UK) provided that a court could not postpone confiscation proceedings for more than 6 months, unless the court was satisfied that there were 'exceptional circumstances'. The court had not made a finding of exceptional circumstances.

164 *Soneji* [2006] 1 AC 340 at [21].

165 *Soneji* [2006] 1 AC 340 at [23].

166 *Soneji* [2006] 1 AC 340 at [24].

167 See *R v Ashton* [2006] EWCA Crim 794 at [68]; *R v Clarke* [2006] EWCA Crim 1196 at [30]-[31].

168 [2008] 1 WLR 338 at [20]. Cf *R v Stocker* [2013] EWCA Crim 1993 at [43]-[45], holding that, despite the warning in *Clarke*, an reference to an incorrect statute in an electronic form of indictment did not invalidate a conviction, in circumstances where the trial and summing up to the jury used the correct statute.

169 See generally *Adams v Lambert* (2006) 228 CLR 409.

170 See also *Telecommunications (Interception and Access) Act 1979* (Cth), s 75(1): a person who has obtained telecommunications information purportedly under a warrant but in breach of s 7(1) may give that information to a court or tribunal if the court or tribunal is satisfied that: (a) but for an irregularity, the interception would not have constituted a contravention of s 7(1); and (b) in all the circumstances, the irregularity should be disregarded. An 'irregularity' does not include a substantial defect or irregularity: s 75(2).
See also *Commonwealth Electoral Act 1918* (Cth), s 360: in the case of some illegal practices, the court of disputed return will only declare an election void if it is satisfied that the result of the election is likely to be affected.

171 (2003) 216 CLR 212, considering s 501G(4) of the *Migration Act*.

172 *Palme* (2003) 216 CLR 212 at [45] (Gleeson CJ, Gummow and Heydon JJ), [55] (McHugh J).

173 (2008) 237 CLR 146 at [23]-[24] (Gummow, Hayne, Heydon and Crennan JJ). However, there are limits beyond which that provision does not reach, such as 'conscious maladministration': at [25].

174 See *Income Tax Assessment Act 1936* (Cth), s 175.

175 See generally Leighton McDonald, 'The Entrenched Minimum Provision of Judicial Review and the Rule of Law' (2010) 21 Public Law Review 14; Charles Noonan, 'Section 75(v), No-invalidity Clauses and the Rule of Law' (2013) 36 *University of New South Wales Law Journal* 437.