HALTING THE RIPPLES OF AFFECTION: A PRACTICAL APPROACH TO PRESERVING 'THRESHOLD DECISIONS' OF DOUBTFUL VALIDITY

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'Across the pool of sundry interests, the ripples of affection may widely extend'[1]

Much of Australian administrative law is underpinned by the principle of legality — the idea that action taken by the executive arm of government 'affecting the rights of the citizen, whether adversely or beneficially',[2] should have some basis in law. This is undeniably an important principle and one that serves as a practical embodiment of the rule of law.

There are, however, practical difficulties that may arise where the exercise of statutory power miscarries, particularly in the case of beneficial statutory schemes.[3] Many of the advantages that flow from the existence of government come about as a result of administrative decisions, including an array of welfare payments, medical and pharmaceutical benefits and by regulatory regimes. The impacts of an invalid decision will not always conveniently be quarantined to the person that is its subject. An entitlement to a particular benefit may rest on one or more previous administrative actions — for example, the approval of a private health insurer[4] or of a pharmacist to supply pharmaceutical benefits from particular premises.[5]

In cases such as these, third parties may have their interests affected by the invalidity of a decision to which they are not directly subject and in which they had no involvement. The validity of claims granted to them may be contingent on the legal effectiveness of the prior approval or registration. I will refer to these decisions on which other decisions rely as 'threshold decisions' for ease of reference.

A decision-maker that is given cause to doubt the legality of a threshold decision, but remains convinced of its merits, understandably may wish to preserve it. This will be true especially where the decision is favourable to both the relevant applicant and members of the wider community. The analysis that follows will often be confined to these 'uncontroversial' decisions — decisions that both the decision-maker and the applicant support and that, by virtue of their status as threshold decisions, have the potential to cause harm to a range of third parties if inoperative.

I have chosen to focus on these threshold decisions, as they provide a clear example of the way in which administrative law — in particular, its breach by a decision-maker — is capable of impacting widely upon the community. There will be greater impetus to argue for

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validity when doubt is cast upon them. These higher stakes give cause for a decision-maker thoroughly to consider all of the options that the law affords them for preserving the effect of their threshold decision, although there is no reason that much of what is set out in this essay could not be applied to other decisions as well.

This essay will argue that there are a range of options that may be available to a decision-maker to preserve the effect of a threshold decision in particular circumstances that will merit consideration, although these options are situational and cannot be applied universally. It will also consider the effect of what might be considered a form of validity, for all intents and purposes, arising from the particular circumstances of an uncontroversial threshold decision. Particular attention will be given in this regard to the presumption of regularity, the decision in *Comptroller-General of Customs v Kawasaki Motors Pty* Ltd[6] (*Kawasaki*) and comments from the joint judgment in *State of NSW v Kable*.[7]

Threshold decisions

The desirability of preserving the effect of a threshold decision is best illustrated by way of example.

At a general level, the payment of Medicare benefits for diagnostic imaging services is limited by s 16D of the *Health Insurance Act 1973* (Cth) to locations that are registered on the Diagnostic Imaging Register enacted by pt IIB of the Act. Where there is a purported registration in accordance with s 23DZQ of the Act which provides for professional services rendered using diagnostic imaging equipment at those premises, s 16D will not provide a barrier to eligibility. The registration decision is a threshold decision for the subsequent payment of Medicare benefits. Say then that some error is uncovered in the decision — the official that made the decision did not hold the appropriate delegation or the application was not 'properly made' as required by the provision.[8] The registration decision, if invalid, falls away and Medicare benefits were not payable by force of s 16D.

After *Williams v Commonwealth of Australia*,[9] without a general spending power and no apparent appropriation, the amounts paid will be recoverable as a debt to the Commonwealth.[10] On one view, the Commonwealth would then be obliged to go about informing the patients that had received professional services at the particular premises during the relevant time that in fact they were not eligible for the Medicare benefits they had received and would need to repay the debts that they had incurred through no fault of their own.[11]

This position is unsatisfactory. There is no real perversion of the statute's purpose. Far from an unacceptable overreach by the Commonwealth, it is difficult to see how a person could be aggrieved were the decision to stand. The Minister or official is satisfied with the merits of their decision; the diagnostic imaging practice is, presumably, quite happy its customers are now eligible to receive Medicare benefits, as are the customers themselves. In *Kawasaki* Beaumont J observed that 'where it appears to a decision-maker that his or her decision has proceeded upon a wrong factual basis or has acted in excess of power, it is appropriate, proper and necessary that the decision-maker withdraw his or her decision'.[12] There are dangers in accepting invalidity too readily in the case of threshold decisions and embracing uncritically the administrative consequences that would follow. It is quite proper for the decision-maker to come to the view that their decision was unlawful only after an appropriate consideration of whether there is any reasonably arguable basis for the decision's validity.

Other than the fact that there is more at stake, there will not typically be any legal distinction between decisions that are a precondition for future administrative action and any other decision. A threshold decision will be susceptible to invalidity in the same way as any other executive action. It will also occasionally be the case that the nature of the decision as one that supports others will inform the construction of the power in ways that can either assist the decision-maker or undermine their position. The cause of invalidity will often impact upon the possible mechanisms for preservation of the decision — most of the options considered are available only in particular circumstances. It is beyond the scope of this essay to undertake a complete evaluation of the various means by which a threshold decision may be invalid, so I have limited my observations to some of the more common issues that can arise.

Remaking the decision

One approach to curing a deficiency in a threshold decision would be to remake the decision afresh without falling into error. The question of when a decision-maker may revisit a decision has been the subject of much judicial and extra-judicial analysis, including a report by the Commonwealth Ombudsman,[13] which criticised the lack of a generally available mechanism to remake a decision, even in cases where a decision-maker accepts that there is a problem. At present, the ability to re-exercise a statutory power is only available in certain circumstances.

Jurisdictional error

Where a decision-maker determines that their decision may have been attended by jurisdictional error, on one view the power is unexercised and it will be open to the decision-maker to exercise their power as if there had been no previous attempt. In the words used in the joint judgment of Gaudron and Gummow JJ in *Minister for Immigration and Multicultural Affairs v Bhardwaj*[14] (*Bhardwaj*), 'a decision involving jurisdictional error has no legal foundation and is properly to be regarded, in law, as no decision at all'.[15]

Central to this discussion is the difference between what has been called the 'absolute invalidity approach' and the 'relative invalidity approach'.[16] The implications of these competing views will be discussed in greater detail below. For present purposes, the decision in *Bhardwaj* makes it reasonably clear that, where there is jurisdictional error there will generally not be any issue in the nature of *functus officio* where a power that has been exercised is spent and no further action can be taken. Of course, consideration will need to be given in every case to whether the doubts around validity have a reasonable basis and would justify treating the decision as never having been made.

It is worth noting that there are statutory mechanisms in the *Acts Interpretation Act 1901* (Cth) that are on occasion applicable where a decision-maker seeks to revisit a decision. The difficulty with the provisions of s 33 of that Act for present purposes is that they have limited relevance in the case of a decision of doubtful validity. While s 33(1) makes it clear that a power or function may be exercised from time to time as the occasion requires, and may support an argument that a decision-maker is not *functus officio* for the purposes of varying the decision, if the threshold decision is of doubtful validity then in principle a decision-maker is just as well placed to rely on the reasoning in *Bhardwaj* to exercise the power afresh.

Similarly, while s 33(3) of the Act relates to the revocation or variation of 'an instrument', if the exercise of the power miscarried in the first instance, there is no instrument to vary or revoke. There may also be difficulty around the requirement for 'an instrument' to have

been made, particularly as many threshold decisions involve a registration or approval that is not easily characterised this way.

Even where a decision can be remade, the decision-maker may not be able practically to preserve the effect of the first purported decision. Where threshold decisions are concerned, this is problematic, as subsequent action will likely have been taken in reliance on the validity of the threshold decision in the time that passes between the first purported exercise and the true exercise of the power. It may be difficult to maintain the validity of that subsequent action where the remade decision is not able to operate retrospectively.

There may also be practical difficulties in complying with the procedural requirements of the statute in relation to a threshold decision. Often, decisions must be made within a certain time frame after receiving an application, or there are procedural preconditions to the exercise of the power. There is a risk that, due to the passage of time, the decision-maker will not be able lawfully to reach the desired decision. Whether there are options to preserve the effect of the first purported decision in part or in its entirety will involve construing the enabling statute, and each case is likely to turn on its particular facts.

Review mechanisms

Decisions are often susceptible to a range of review mechanisms, including before courts and tribunals. However, in the present scenario, involving a threshold decision of questionable validity, these avenues will be of little use to a decision-maker. This is particularly the case where the error goes to jurisdiction.

For obvious reasons, judicial review is unlikely to be of much assistance. In the case of a purported threshold decision that is uncontroversial, neither party will have an interest in bringing proceedings over the decision. In any event, where the decision-maker is concerned about the validity of the purported decision, there is little advantage in a court making a declaration of invalidity. The decision-maker is in the same position as if they had simply determined the matter for themselves and proceeded in accordance with the reasoning in *Bhardwaj* to re-exercise their power.

A review in the Administrative Appeals Tribunal (AAT) is just as unlikely to occur in cases involving no real dispute between the parties. One potential advantage of this approach, on the off-chance that a review is sought, is that an AAT decision is deemed to operate from the date on which the original decision took effect, subject to a contrary order[17] (although there is some question about whether a decision that was in law a nullity ever took effect at all). As a right of review by the AAT is generally established on an *ad hoc* basis by enactments providing for review,[18] it will not necessarily be available for all threshold decisions.

Another common means of altering an administrative decision is through an internal review process. Certain statutes provide for the review of administrative decisions made by officials by some other, usually more senior, official.[19] These kinds of provisions may be useful for revisiting decisions more broadly. In circumstances of jurisdictional error affecting a decision sought to be preserved internal review is as useful as judicial review or review before the AAT. Where there is jurisdictional error, and the exercise of the power is thereby a nullity, it may be difficult to apply provisions that allow for the review of 'a decision'.

Other options under the particular statute

The example given above involved a decision under s 23DZQ of the *Health Insurance Act 1973* (Cth). Subsection (2) of that provision provides that registration takes effect on the day on which the application is properly made or the day specified by the applicant in the

application, whichever is later. In some circumstances, this backdating mechanism may operate to mitigate some of the potential harm of an invalid registration. Where the decision was made by an officer who lacked the relevant delegation, and as a result the registration was beyond power, it may be open to the Minister or an officer holding the relevant delegation to make the decision afresh. In such a scenario, the difficulties that would have arisen if the registration had not been effective from the date of the application will be avoided.

Another means available may be the discretion available to the Minister under s 16D, which commences 'unless the Minister otherwise directs'.[20] In order to preserve at least one consequence of the decision, the payment of Medicare benefits in respect of the diagnostic imaging service, it may be open to the Minister to direct that Medicare benefits are payable in a scenario where there is some deficiency with the registration decision. Although this would not preserve the decision itself, it would cut across some of the consequences for third parties relying on the registration until a proper registration could be made.

Options such as backdating will not be available for every kind of threshold decision. An answer to invalidity may present itself on the facts of a particular decision or in the provisions of the statutory scheme. However, there will not always be a convenient means available for a decision to be preserved in such a way that the new decision will relieve against all possible consequences of invalidity.

Preserving the initial decision or its effect

Where remaking the decision is impractical, impossible or would not bring about the desired outcome, there are other options that can be considered where the circumstances are appropriate.

Availability of the* Carltona *principle

Where a decision-maker considers that they may have acted *ultra vires* for the reason that they lacked an effective delegation of the relevant power, the principle derived from *Carltona Ltd v Commissioners of Works*[21] (*Carltona*) may be of some assistance. It may be possible in limited circumstances to characterise the official as an authorised agent of the repository of the power, and to take the view that the power was exercised effectively on the repository's behalf. Where the *Carltona* principle applies, the acts of the agent are taken to be the acts of the principal, the statutory repository of the power.[22]

The limits to *Carltona* are well established. Where the statute manifests an intention that the power is to be exercised by the repository personally, the principle will not apply.[23] Where the context 'points to the nature, scope and purpose of the power being of central or strategic importance, or where the exercise will have significant consequences'[24] the principle will be less readily applied. Conversely, where the power is largely administrative or managerial, or its consequences are confined to a limited framework, the principle may be urged more easily.[25] Importantly, the principle is not excluded where there is an express power of delegation.[26]

Threshold decisions will often have consequences that could be described as significant. However, it is also the case that many take the form of an approval that has the effect of bringing a given person into the context of a particular statutory framework. These threshold decisions comprise an important foundational step for a program, but will not always involve immediate legal consequences, militating in favour of applying *Carltona*.

The benefits of successfully applying the *Carltona* principle are clear. The original decision stands, despite the lack of an effective express delegation of power. All of its consequences are preserved, including subsequent decisions that rely on the validity of the threshold decision. The difficulty is in getting there. Once again, the availability of this approach will turn on the facts in each case and applying the considerations set out above.

An interesting extension of the *Carltona* principle may be found s 16 of the *Human Services (Centrelink) Act 1997* (Cth) and s 8B of the *Human Services (Medicare) Act 1973* (Cth). Each provision is to the effect that 'a Departmental employee may assist' the Chief Executive Centrelink or Chief Executive Medicare, as the case may be, 'in the performance of any of the functions' of the relevant office holder.[27] In *Chief Executive Centrelink v Aboriginal Community Benefit Fund Pty Ltd*[28] Mortimer J appeared quite readily to accept the relevant provision as 'a statutory embodiment of the *Carltona* principle'.[29] An important concomitant to this observation is s 3 of the *Human Services (Centrelink) Act 1997* (Cth), which provides that the word 'function' includes 'power'.

Given the myriad of functions conferred on the Chief Executive Centrelink under the Act itself[30] (including any functions delegated to the Chief Executive Centrelink by other office holders) and the accompanying regulations,[31] the scope for applying this statutory equivalent of *Carltona* is considerable. Similar observations could presumably be applied to functions conferred on the Chief Executive Medicare, and provide a clear statutory basis on which to mount an argument that officials acted as authorised agents of the relevant Chief Executive.

Statutory requirement was not a precondition for validity

Often a decision-maker will be required to follow certain steps or to accept applications in a particular form. Where the concern about validity centres on a failure to meet an associated statutory requirement, there will be a need carefully to consider whether compliance with the requirement was a condition of validity.

The question of what consequence will follow from a breach of a statutory requirement was considered by the High Court in the oft-cited *Project Blue Sky Inc v Australian Broadcasting Authority*[32] (*Project Blue Sky*). The majority held that the appropriate question was 'whether it was a purpose of the legislation that an act done in breach of the provisions was invalid'[33] and that regard must be had to 'the language of the relevant provision and the scope and object of the whole statute'.[34] In the context of a threshold decision, it will be important to consider the place of that decision in its wider statutory scheme. By their nature, threshold decisions form an important preliminary step in the achievement of the purposes of the statute.

There is earlier case law in *Montreal Street Railway Co v Normandin*[35] (*Montreal Street Railway*) that where the invalidation of administrative acts on the basis of a statutory requirement would 'work serious general inconvenience'[36] to people having no control over the decision-maker, and where this invalidation would at the same time not promote 'the main object of the Legislature',[37] it was the practice to regard such provisions as 'directory only'.[38] While *Project Blue Sky* disapproved of the distinction between 'permissive' and 'directory' requirements in favour of the test set out above, the observations made in *Montreal Street Railway* are nonetheless instructive in the application of that test.

The case for the validity of a threshold decision upon which other decisions in the statutory scheme will depend, despite non-compliance with some required statutory step, will arguably be more easily made out than in the case of decision without such a broad effect. It would seem objectively unlikely that Parliament intended for significant number

of payments under a beneficial scheme to be entirely dependent on a single application being in the approved form, particularly where those payments are to third parties with no control over the application or the decision.

There will certainly still be circumstances in which a threshold decision would be invalidated for a failure to follow certain procedures required by law. *Kutlu v Director of Professional Services Review*[39] concerned a power to make appointments to the Professional Services Review Committee under the *Health Insurance Act 1973* (Cth). In effect, the appointments were a threshold decision in that, as Rares and Katzmann JJ observed, 'if the Minister's failure to consult … resulted in the appointment being invalid, then it is possible that several or many decisions or reviews in which the appointee participated would be invalid'.[40] Despite acknowledgement that significant 'public inconvenience'[41] would be likely to result from a finding that the appointments in question were invalid, the joint judgment nevertheless concluded that the magnitude of those consequences was merely because of the 'scale of both ministers' failures to obey simple legislative commands'[42] in circumstances where, if the appointments were treated as valid, the unlawfulness of their conduct would not be susceptible to a remedy. A clear statutory intention that a given step is an essential precondition to a decision will still operate to invalidate a threshold decision in accordance with the test in *Project Blue Sky*.[43]

Another power was available

Where a decision-maker purports to proceed on a particular basis but discovers some error in the exercise of the power, it may nevertheless be possible for the decision-maker to call upon an alternative source of power for the action taken — invalidity will not automatically result merely because of a mistake about the source of a power.[44]

The practical usefulness of this principle is limited in the case of threshold decisions. There is unlikely to be, and I am unaware of any example of, a threshold decision being perfectly replicated under an alternative provision, as threshold decisions generally take the form of some approval, appointment or registration for the purposes of a particular statutory framework. It may be more likely that a decision made in reliance on the threshold decision could be supported by reference to an alternative power. There may be a range of provisions available in a given statute under which the Commonwealth may make particular payments, some of which do not require the threshold decision to have been made.

There are cogent reasons to be cautious in attempting to support a decision on this basis. As discussed under the previous heading, and subject to the considerations set out there, decisions made under a statute often have certain conditions precedent to their exercise.[45] Considerations that are relevant to one decision may be irrelevant to another and facts that decision-makers must satisfy themselves of prior to the exercise of the power will naturally differ from decision to decision. In my view, for the reasons above, the principle is likely to be useful only in exceptional circumstances.

Waiver of debts

Another potential safety net for the preservation of at least the effect of decisions that have resulted in payments is the Finance Minister's power under s 63 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act), which provides that the Finance Minister may, on behalf of the Commonwealth, authorise the waiver of a debt owing to the Commonwealth. Where a payment has been made in purported reliance on a decision that is later determined to be invalid and a debt results, the person in receipt of the payment may be allowed to retain that money where the waiver power is exercised.

The exercise of the power in s 63 of the PGPA Act is discretionary. Guidelines issued by the Department of Finance indicate that the waiver mechanism is generally treated as a last resort.[46] There is no guarantee that the power will be exercised, even where the threshold decision-maker's agency is in agreement with an applicant for waiver that it would be appropriate in the circumstances. The discretion lies with the Finance Minister and the delegated officials in the Department of Finance, and each case will turn on its facts. Notably, this mechanism will not be helpful where the outcome sought to be preserved is not a payment, for example in the case of an appointment decision such as in *Kutlu v Director of Professional Services Review*[47] where it is the acts of an entity empowered by the threshold decision that are sought to be preserved.

Accepting invalidity — what follows?

It may be that even after consideration of all that is set out above, and any other options that may be available, the decision-maker is forced to accept that on balance their decision is likely not sustainable. This determination does not conclude our inquiry. In the case of a threshold decision, the decision-maker, or the responsible agency, will need to address the question of the consequences for subsequent action taken in reliance on the threshold decision.

At this stage, no finding of invalidity has been made by a court. Although it is clear from *Bhardwaj* that a decision-maker does not need to await such a determination in order to treat a decision as invalid, it is difficult to say that there is invalidity in an absolute sense (that is, invalidity as against the world as opposed to invalidity as between the decision-maker and the subject of the decision).

The presumption of regularity

The presumption of regularity stands in slight tension with the principle of legality, holding that an exercise of power will be legally valid and effective until successfully impugned.[48] Where the decision is found by a court to be bad in law it will be ineffective as from the date upon which it was made. In the case of a threshold decision that is uncontroversial, it seems unlikely that a judicial determination will eventuate.

At the same time, and consistent with observations made in *Kawasaki*,[49] the principle of legality would not on its face appear to tolerate a decision-maker standing by an exercise of power that he or she accepts was *ultra vires*. It is difficult to reconcile observations that a decision made in excess of power is no decision at all and yet, at the same time, have that decision 'bear no brand of invalidity upon its forehead'.[50]

Kawasaki concerned a decision of the Comptroller-General of Customs (the Comptroller), by his delegate Mr Hand, to revoke a tariff concession order (TCO). The Court was called upon to consider whether the Comptroller or his delegate, where there was a clear power to both make and revoke a TCO, had an incidental implied power to revoke a TCO of doubtful validity.[51] In the result the decision, affected by an error of law, was able to be set aside by the decision-maker without the order of a court on the basis that the parties agreed it was invalid and the decision-maker did not intend to uphold its validity. In reaching this conclusion, the court had regard to the 'long recognised rule of policy' that the avoidance of litigation was in the public interest.[52] That the Court adverted to this principle rather than the principle of legality is interesting in itself — the conduct of the parties served to inform the practical and legal outcome.

The Commonwealth Ombudsman referred in its issues paper to an agency 'turning a blind eye'[53] to the legal obstacle in varying or remaking an earlier decision and that the

'administrative reality is that a decision varying or made in substitution for an earlier decision will, in law, be presumed to be regular and effective until set aside by a court'.[54] The Ombudsman remarked, in a footnote to an observation that such a decision would be effective for all purposes, that this was a 'variant of the *Kawasaki* principle'.[55] In this scenario, however, distinct from *Kawasaki*, executive action achieves validity (rather than invalidity) through the willingness of the parties to agree to it.

This view is supported by a closer consideration of the nature of invalidity. The High Court has urged great care using words like 'void' and 'voidable', as well as 'irregularity' and 'nullity',[56] saying that:

> None [of the words] is used in a way which admits (or readily appears to admit) of the possibility that the legal effect to be given to an act affected by some want of power may require a more elaborate description which takes account not only of who may complain about the want of power, but also of what remedy may be given in response to the complaint.[57]

This analysis places emphasis not so much on the character of the decision but on the practical steps to be taken in relation to it. If there is no available remedy to cure some defect in a decision, it will remain legally effective for most if not all purposes — for example, if a limitation period has elapsed and no action can lawfully be maintained against it. The discretionary nature of certain remedies is also relevant to threshold decisions. It is open to a court to recognise an error and yet decline a remedy.[58] Reluctance to quash a threshold decision would be understandable where third parties with no control over the process have placed some reliance upon it. Whether it is of any legal significance that a challenge to the threshold decision is unlikely is not clear and perhaps unnecessary to consider in great detail. However, it would certainly be a factor in an assessment of whether a limitation period is likely to render the decision unassailable.

As a final point, it is unclear whether an order resulting in the invalidity of a threshold decision would operate to render subsequent decisions invalid as between the decision-maker and any person subject to those decisions. The observation in *Wattmaster* was that a finding of invalidity binds the decision-maker only as against the applicant in those proceedings.[59] That case concerned a determination by a Minister of broad application, and the joint judgment noted that the decision of the Court setting it aside would not necessarily result in the determination being of no effect as against other parties, going so far as to suggest that the decision-maker could again assert the validity of the determination in proceedings taken by other parties.[60] If a finding of invalidity will not displace the presumption of regularity in relation to the same decision as it affects other parties, there is no reason to think it will not apply to decisions made in reliance on an invalid threshold decision.

Rather than characterising the agency as turning a blind eye to legal impediments, the better view is that the agency considers on a sound basis that the decision, or at least the subsequent decisions, are legally effective by operation of the presumption of regularity and the '*Kawasaki* principle'. Alternatively, even if the decision-maker and potentially the affected parties stubbornly insist on the validity of a decision that is quite probably invalid and do in effect avert their gaze from any legal problem, the result is the same. That characterisation is less consistent with the principle of legality and unappealing for that reason.

A stop-gap solution

The presumption of regularity does not actually cure invalidity. It is a procedural mechanism, not a substantive source of power to be called upon where a decision is not

resisted. But it is the practical effect of the mechanism that may be of use in the circumstances.

However, even where the parties agree, there is no guarantee that a popular and apparently uncontroversial decision will not be impugned. There may be a third party with sufficient interest in the decision, such as a business competitor for a pharmacist granted approval under s 90 of the *National Health Act 1953.* Alternatively, the decision may, for whatever reason, be the subject of a collateral attack on one of the decisions that are contingent upon it. Even where a subsequent decision is nothing more than the payment of a benefit, it is not necessarily safe to assume that the recipient will not assert its invalidity.[61]

Further, nothing in the foregoing is intended to suggest that there is no limit on the ability of a decision-maker to regard their decision as valid where jurisdictional error is manifestly clear. Cases of 'flagrant invalidity',[62] where a decision-maker purported to exercise some power completely unknown to the statute, could probably not be rationalised in the way described.

Conclusion

The invalidity of a threshold decision or purported decision can have wide-ranging consequences. If not adequately sustained it may result in the invalidity of actions taken by improperly appointed decision-makers or a community being without pharmaceutical benefits. Third parties who do not participate in the making of the threshold decision are in the unsatisfactory position of having merely to hope that the decision-maker will get it right.

In particular, threshold decisions made under beneficial schemes can play an integral role in the functioning of many aspects of society. It will be noted that many of the examples given in this essay occur in relation to various health programs that reach into the lives of millions of people in the Australian community. Decision-makers tasked with making sure that these schemes operate effectively are the repositories not just of statutory power but also of the public trust.

This essay has attempted to canvass a variety of options that a decision-maker may consider when given reason to doubt the lawfulness of their decision. These options can range from remaking a decision to using more novel approaches to preserve its effect. It may also be open to a decision-maker to determine, having considered the arguments for invalidity closely, that they are not to be preferred. Finally, even when a threshold decision is likely to be set aside if challenged, it may be open to a decision-maker to regard it as practically valid in limited circumstances on the basis of the principle of regularity and the outcome in *Kawasaki*.

To avoid too serious a conflict with the principle of legality, it may be appropriate to limit the scope of any assumption by a decision-maker that a decision may be relied upon despite invalidity. Uncontroversial threshold decisions under beneficial statutes are suitable candidates for this approach. In such cases it is necessary in order to preserve the effectiveness of subsequent decisions conferring benefits on innocent third parties, and to achieve the purpose of the enabling statute. The approach represents a step towards ensuring what might be thought of as a 'just' outcome (if not necessarily a correct outcome in the strict legal sense).

Decisions such as those in *Carltona* and *Kawasaki*, in my view, represent an approach that allows for a measure of pragmatism in the face of principles that would not ordinarily admit of convenient exceptions. They are, to use a phrase more often associated with the law of duress and provocation, a concession to human frailty and an acknowledgement of the

difficulties that exist in the effective exercise of statutory power. The path of administrative law is littered with decisions made on their facts and with regard to the potential consequences.

It goes without saying that no amount of merely arguable bases for validity will be preferable to a clear and unambiguously valid decision. Officials that are tasked with exercising statutory power in relation to threshold decisions should take care to ensure that their decisions are lawfully made. Even in the case of decisions that are objectively unlikely to be impugned, there will always be some element of risk when a decision is made otherwise than in accordance with its enabling statute, or where it trespasses against some other principle of decision-making.

Public officials, like anyone, are liable to make mistakes. Accordingly, it is fitting that there is a wide array of potential arguments (some admittedly more tenuous than others) that may be drawn upon where a decision-maker falls into error. Statutory decisions matter and the community legitimately expects that it will not be disadvantaged by avoidable mistakes in the bureaucracy. Where such a mistake is made, it will be important for a decision-maker carefully to consider their position in order to determine whether there is a legally defensible means of preserving their decision.

Endnotes

1 *Re McHattan and Collector of Customs* (1977) 1 ALD 67, 70 (Brennan J).
2 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 417 (Lord Roskill).
3 'Beneficial' is used here and throughout this essay in the sense of the class of statute.
4 *Private Health Insurance Act 2007* (Cth) s 279-5.
5 *National Health Act 1953* (Cth) s 90.
6 (1991) 32 FCR 219.
7 (2013) 252 CLR 118.
8 *Health Insurance Act 1973* (Cth) s 23DZQ(1).
9 *Williams v Commonwealth of Australia* (2012) 248 CLR 156.
10 Generally on the basis of the principle in *Auckland Harbour Board v The King* [1924] AC 318.
11 Section 11 of the *Public Governance, Performance and Accountability Rule 2014* requires the accountable authority of a non-corporate Commonwealth entity to recover debts for which the accountable authority is responsible, save for in limited circumstances.
12 (1991) 32 FCR 219, 225.
13 Commonwealth Ombudsman, *Mistakes and unintended consequences — a safety net approach*, issues paper, 2009.
14 (2002) 209 CLR 597.
15 Ibid 616 (Gaudron and Gummow JJ).
16 Australian Government Solicitor, *Don't Think Twice — When Can Administrative Decision Makers Change Their Mind?* Legal Briefing No 67 (2003).
17 *Administrative Appeals Tribunal Act 1975* (Cth) s 43(6).
18 Ibid s 25.
19 See, for example, *Social Security (Administration) Act 1999* s 126.
20 *Health Insurance Act 1973* (Cth) s 16D.
21 *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560.
22 *Rail Signalling Services Pty Ltd v Victorian Rail Track* [2012] VSC 452, [85].
23 Ibid [89].
24 Ibid.
25 Ibid [90].
26 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 36–7 (Mason J).
27 *Human Services (Centrelink) Act 1997* (Cth) s 16; *Human Services (Medicare) Act 1973* (Cth) s 8B.
28 [2016] FCAFC 153.
29 Ibid [115].
30 See *Human Services (Centrelink) Act 1997* (Cth) s 8.
31 *Human Services (Centrelink) Regulations 2011.*
32 (1998) 194 CLR 355.
33 Ibid 390 (McHugh, Gummow, Kirby and Hayne JJ).
34 Ibid 391, quoting *Tasker v Fullwood* [1978] 1 NSLWR 20, 24.
35 [1917] AC 170.
36 Ibid 175.
37 Ibid.

38 Ibid.
39 (2011) 197 FCR 177.
40 Ibid 187.
41 Ibid 190.
42 Ibid.
43 Ibid 188.
44 *Johns v Australian Securities Commission* (1993) 178 CLR 408, [18] (Brennan J) citing *Moore v Attorney-General (Irish Free State)* [1935] AC 484, 498; *R v Bevan; Ex parte Elias and Gordon* 66 CLR 452, 487 and *Brown v West* 169 CLR 195, 203.
45 Caution in this regard was urged in *Mercantile Mutual Life Insurance v Australian Securities Commission* (1993) 40 FCR 409 at 412 (Black CJ).
46 Department of Finance, *Requests for discretionary financial assistance under the Public Governance, Performance and Accountability Act 2013*, Resource Management Guide No 401, 10.
47 (2011) 197 FCR 177.
48 *Wattmaster Alco Pty Ltd v Button* (1986) 13 FCR 253, 258 (Sheppard and Wilcox JJ).
49 (1991) 32 FCR 219, 225.
50 *Smith v East Elloe Rural District Council* [1956] AC 736 at 769 (Lord Radcliffe).
51 Ibid 224 (Beaumont J).
52 (1991) 32 FCR 219, 230–1.
53 Commonwealth Ombudsman, *Mistakes and unintended consequences — a safety net approach*, Issues Paper (2009), 5.
54 Ibid.
55 Ibid.
56 (2013) 252 CLR 118, [21] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
57 Ibid.
58 See *R v Secretary of State for Social Services; Ex parte Association of Metropolitan Authorities* [1986] 1 WLR 1.
59 (1986) 13 FCR 253, 259 (Sheppard and Wilcox JJ).
60 Ibid 259.
61 See *Pape v Commissioner of Taxation* (2009) 238 CLR 1.
62 *AJ Burr Ltd v Blenheim Borough* [1980] 2 NZLR 1, 4 (Cooke J).