Federal Court of Australia

Darnell v Stonehealth Pty Ltd [2022] FCAFC 76

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| Appeal from: | *Darnell v Stonehealth Pty Ltd (No 4)* [2021] FCA 823 |
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| File number: |  |
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| Judgment of: | **MARKOVIC, THOMAS AND STEWART JJ** |
|  |  |
| Date of judgment: | 11 May 2022 |
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| Catchwords: | **ADMINISTRATIVE LAW** – appeal from Federal Court of Australia – where primary judge dismissed an application for judicial review brought under s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s 39B(1A) of the *Judiciary Act 1903* (Cth) – where appellant seeks to quash the decisions of the Australian Community Pharmacy Authority (**Authority**) and the Secretary of the Department of Health to approve the first respondent’s application under the *National Health Act 1953* (Cth)(**Act**) to supply pharmaceutical benefits at certain premises – whether the primary judge erred in finding that the premises occupied by Coles at Flagstone Village Shopping Centre, Flagstone, Queensland (**Coles Flagstone**) was on 20 March 2020 operating as a “supermarket” for the purposes of s 5 and Item 130 of Sch 2 to the *National Health (Australian Community Pharmacy Authority Rules*) *Determination 2018* (**Rules**) – where Coles Flagstone was operating as a supermarket as required by the Rules – where the role played by “primary” in the definition of “supermarket” is only to identify the primary business of the retail store in question, namely selling groceries as opposed to selling other goods or providing services – whether the primary judge erred in failing to hold that the decision of the Authority was affected by materially false or misleading information – whether the primary judge’s finding that the Authority’s decision was not affected by misleading or false statements made by the first respondent was “glaringly improbable” or contrary to compelling inferences to be drawn having regard to the underlying facts – where primary judge’s findings were open on the evidence – whether the opening of Coles Flagstone was a sham – where strategy devised by the first respondent was permitted under s 90 of the Act and did not “cross the line” – whether the primary judge erred in finding that the Authority was entitled to take into account information provided to it on 11 November 2020 (**11 November Letter**), despite the operation of s 9 of the Rules – where it was open to find that the 11 November Letter was provided to the Authority at the request of the first respondent rather than on its behalf or as its agent – appeal dismissed |
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| Legislation: | *Administrative Decisions (Judicial* *Review) Act 1977* (Cth)  *Evidence Act 1995* (Cth)  *Judiciary Act 1903* (Cth)  *National Health Act 1953* (Cth)  *National Health (Australian Community Pharmacy Authority Rules) Determination 2018* (Cth) |
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| Cases cited: | *Darnell v Stonehealth Pty Ltd (No 4)* [2021] FCA 823  *Fox v Percy* (2003) 214 CLR 118  *Hope v Australian Community Pharmacy Authority* (2017) 156 ALD 130  *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123  *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421  *Murray v Australian Community Pharmacy Authority* [2017] FCA 705  *MZAPC v Minister for Immigration* (2021) 95 ALJR 441; [2021] HCA 17  *Slopen Main Pty Ltd v Hope* (2017) 256 FCR 156  *Stambe v Minister for Health* (2019) 270 FCR 173  *Stonehealth Pty Ltd v ZAA Ventures Pty Ltd as Trustee for the ZAA Investment Trust* [2020] 280 FCR 519  *Yu v Minister for Health* (2013) 216 FCR 168 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 151 |
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| Date of hearing: | 10 - 11 February 2022 |
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| Counsel for the Appellant: | Mr R Hall SC  Mr T Flaherty |
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| Solicitor for the Appellant: | Stoddart Legal |
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| Counsel for the First Respondent: | Mr C Gunson SC  Ms J Sawyer |
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| Solicitor for the First Respondent: | Robert James Lawyers |
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| Solicitor for the Second and Third Respondents: | Australian Government Solicitor |

ORDERS

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|  | | QUD 263 of 2021 |
|  | | |
| BETWEEN: | ROSS DARNELL  Appellant | |
| AND: | STONEHEALTH PTY LTD  First Respondent  AUSTRALIAN COMMUNITY PHARMACY AUTHORITY  Second Respondent  SECRETARY, DEPARTMENT OF HEALTH  Third Respondent | |

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| order made by: | MARKOVIC, THOMAS AND STEWART JJ |
| DATE OF ORDER: | 11 May 2022 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. On 20 March 2020 at around 12.14 am the first respondent, **Stonehealth** Pty Ltd, lodged its application (**Stonehealth Application**) under s 90 of the *National Health Act 1953* (Cth) (**NH Act**) for approval to supply pharmaceutical benefits at shops 6 and 7, Flagstone Village Shopping Centre, 6-24 Gates Road, Flagstone, Queensland, 4280 (**Premises**). Relevantly, as further described below, a Coles supermarket was also located in the Flagstone Village Shopping Centre (**Coles** **Flagstone**).
2. On 21 March 2020, the appellant, Ross Darnell, who is the proprietor of a pharmacy which operates from premises which are described as being “over the road” from the Premises lodged an application for approval to supply pharmaceutical benefits from those premises.
3. On 25 March 2020, in accordance with the requirements of the NH Act, the third respondent, the **Secretary**, Department of Health, referred the Stonehealth Application to the second respondent, the Australian Community Pharmacy **Authority** for the purpose of obtaining the Authority’s recommendation as to whether or not the application should be approved.
4. The Authority has a policy of dealing with applications referred to it strictly in the order in which they are received. This approach is not mandated by the NH Act or the rules that govern the Authority’s consideration of an application (as to which see below) but is a matter of its own administration.
5. On 11 December 2020, the Authority made its decision to recommend to the Secretary that the Stonehealth Application be approved on the basis that the requirements specified in the *National Health (Australian Community Pharmacy Authority Rules) Determination 2018* (Cth) (**Rules**) made under s 99L of the NH Act had been met.
6. On 14 December 2020, the Authority notified the Secretary of its recommendation. In accordance with that recommendation, the Secretary then approved the Stonehealth Application.
7. Mr Darnell sought judicial review under s 5 of the *Administrative Decisions (Judicial* *Review) Act 1977* (Cth) (**ADJR Act**) and s 39B of the ***Judiciary Act*** *1903* (Cth) of the Authority’s recommendation decision and the Secretary’s approval decision. On 21 July 2021, orders were made dismissing his application with costs: see *Darnell v Stonehealth Pty Ltd (No 4)* [2021] FCA 823 (***Stonehealth*** ***(No 4)***). Mr Darnell now appeals from those orders.
8. The Authority and the Secretary each filed a submitting notice of appearance, submitting to any order of the Court save as to costs.

# the legislative scheme

1. Before proceeding further it is instructive to set out the relevant legislative scheme.
2. Part VII of the NH Act establishes a scheme for payment by the Commonwealth of benefits in respect of certain drugs or medicinal preparations referred to as pharmaceutical benefits: see s 84 NH Act. In *Stonehealth Pty Ltd v* ***ZAA Ventures*** *Pty Ltd as Trustee for the ZAA Investment Trust* [2020] 280 FCR 519 at [20] Rangiah J (with whom Collier J agreed) observed the following in relation to the background to the scheme:

In *Pharmacy Restructuring Authority v Chatfield* (1993) 43 FCR 418 at 433–434, French J (as his Honour then was) explained that the scheme for approval of pharmacies, introduced by way of amendments to the NH Act in 1990, reflected the terms of an agreement between the Minister and the Pharmacy Guild of Australia. The agreement provided for the restructuring of the pharmacy industry by rationalising the number and distribution of pharmacies in Australia. His Honour held at 434:

It may be concluded from the Minister’s speech that the objects of the legislative scheme established by the 1990 amendments included the reduction of the number of existing pharmacies and the regulation of the approval of new pharmacies. The guidelines determined by the Minister and the terms of cl 8.3 of the agreement with the Pharmacy Guild indicate that new approvals would have to be justified by reference to community needs.

1. The starting point in the approval process is s 90 of the NH Act which empowers the Secretary to approve a pharmacist to supply pharmaceutical benefits. It relevantly provides:

(1) Subject to this section, the Secretary may, upon application by a pharmacist for approval to supply pharmaceutical benefits at particular premises, approve that pharmacist for the purpose of supplying pharmaceutical benefits at those premises.

…

(3A) Subject to subsections (3AA), (3AE) and (13), an application under this section must be referred to the Authority.

(3B) An approval may be granted under this section in respect of an application that has been referred to the Authority under subsection (3A) or (3AF) only if the Authority has recommended the grant of the approval, but the Secretary may refuse to grant an approval even if the grant has been recommended by the Authority.

1. The Authority is established under s 99J of the NH Act. Its functions are to consider applications under s 90 of the NH Act and to make recommendations to the Secretary in relation to those applications as to: whether or not an applicant should be approved in relation to particular premises; and, where approval is recommended, any conditions to which that approval should be subject. In making a recommendation the Authority must comply with the relevant rules determined by the Minister under s 99L of the NH Act: see s 99K NH Act.
2. As set out at [5] above, the Rules are made under s 99L of the NH Act. They “are intended to limit the exercise of power by the Authority in making its recommendations to the Secretary, and to limit the Secretary’s power to approve, or refuse approval, to a pharmacy”: see *Stambe v Minister for Health* (2019) 270 FCR 173 at [41].
3. Section 9 of the Rules provides that:

The Authority may consider information provided by an applicant only if:

(a) the information was given at the time the application was made; or

(b) the Authority requested the information.

1. Section 10 of the Rules sets out the circumstances in which the Authority must recommend the approval of an applicant under s 90 of the NH Act and relevantly includes:

*Applications not involving the cancellation of an existing approval*

(2) For an application that does not involve the cancellation of an existing approval, the Authority must recommend that an applicant be approved under section 90 of the Act in relation to particular premises if:

(a) the application is of a kind mentioned in column 1 of an item in Part 2 of Schedule 1; and

(b) the following requirements are met in relation to the application:

(i) the requirements in column 2 of that item;

(ii) the requirements in subsection (3).

*General requirements*

(3) For the purposes of subparagraphs (1)(b)(ii) and (2)(b)(ii), the requirements are that the Authority is satisfied that:

(a) at all relevant times the proposed premises are not approved premises; and

(b) the applicant has, at all relevant times, a legal right to occupy the proposed premises (whether the right is to occupy the premises on the day the application is made or after that day); and

(c) at all relevant times the proposed premises could be used for the operation of a pharmacy under applicable local government and State or Territory laws relating to land development; and

(d) the proposed premises would be accessible by the public; and

(e) within 6 months after the day on which the Authority makes a recommendation in relation to the application, the applicant will be able to begin operating a pharmacy at the proposed premises; and

(f) the proposed premises will not be directly accessible by the public from within a supermarket.

1. In contrast, s 11 of the Rules sets out when the Authority must recommend that an applicant not be approved and provides:

The Authority must recommend that an applicant not be approved under section 90 of the Act in relation to particular premises if:

(a) a requirement under section 10 of this instrument that applies in relation to the application is not met; or

(b) the application involves the cancellation of an existing approval and that existing approval is subject to a recommendation by the Authority that an applicant be approved under section 90 of the Act.

1. Schedule 1 to the Rules is titled “Application kinds and requirements”. Part 2 of Sch 1 concerns “applications not involving cancellation of existing approval”. For the purposes of the Stonehealth Application the relevant item in Pt 2 of Sch 1 was item 130 which relates to an application for a “new pharmacy (at least 1.5 km)” and requires that:

(a) the proposed premises are at least 1.5 km, in a straight line, from the nearest approved premises; and

(b) the Authority is satisfied that, at all relevant times, there is, within 500 m, in a straight line, from the proposed premises, either:

(i) both the equivalent of at least one full-time prescribing medical practitioner and a supermarket that has a gross leasable area of at least 1,000 m2; or

(ii) a supermarket that has a gross leasable area of at least 2,500 m2

1. The following terms used in item 130 are defined in s 5 of the Rules:
2. “all relevant times” is defined to mean, in relation to an application:

(a) the day on which the application was made; and

(b) the day on which the application is considered by the Authority; and

1. “supermarket” is defined to mean “a retail store the primary business of which is the sale of a range of food, beverages, groceries and other domestic goods”.

# background

1. The Stonehealth Application had the following features:
2. the applicant was Stonehealth as trustee for Stonehealth Pharmacy Trust and as trustee for AndyStone Pharmacy Trust. The authorised person for each of those entities was respectively Mona Bakshi and Tam Minh Nguyen;
3. the contact nominee was Stuart Mihulka of Ann Mihulka & Associates, health industry consultants. An authority for a representative to prepare and submit an application on behalf of the applicant naming Mr Mihulka as authorised representative accompanied the Stonehealth Application;
4. the anticipated opening date of the pharmacy business was 20 April 2020; and
5. it was accompanied by a letter from Ann Mihulka & Associates which, among other things, enclosed:
   1. a copy of a lease for the Premises between Coles Group Property Developments Ltd (**Coles Developments**) as lessor and Stonehealth as trustee for the Stonehealth Pharmacy Trust as lessee;
   2. a distance measurement showing the distance from the Premises to the nearest approved premises;
   3. images of the Premises in relation to which it was said that:

The proposed premises are stocking shelves with a completed fitout, and will be ready for trade on 21 March 2020, the day after the Coles supermarket opening. There is no access to a supermarket.

* 1. a stamped plan of the Flagstone Village Shopping Centre indicating “that the supermarket has a GLA of 3,665 sqm, excluding loading dock”;
  2. images of the Coles supermarket and Flagstone Village Shopping Centre in relation to which it was said that “[t]he supermarket shelves are stocked as of 18 March 2020 and the supermarket is ready for trade”; and
  3. a letter dated 17 March 2020 from John Morgan, senior development manager, Coles Developments, to Ann Mihulka (**17 March Letter**).

1. The 17 March Letter provided (as written):

Coles Group Property Developments Ltd (CGPD) is currently constructing a new shopping centre in Flagstone Qld, known as Flagstone Village Shopping Centre, which includes a Coles supermarket and approximately 10 other specialty tenancies. Works are almost complete.

The Coles supermarket will commence trade on Friday 20 March 2020. This Coles supermarket has a GLA of approximately 3,600m2 excluding loading docks and car parks. The Flagstone Village Shopping Centre will have an opening celebration for the entire shopping centre on Saturday 21 March 2020.

CGPD (Lessor) has leased Shop 6 & 7 to Stonehealth Pty Ltd atf Stonehealth Pharmacy Trust (Lessee). Coles has also consented to a sublease from the Stonehealth Pty Ltd atf Stonehealth Pharmacy Trust (Lessee) to Stonehealth Pty Ltd atf Stonehealth Pharmacy Trust and Andystone Pharmacy Trust (Sublessee).

Development Approval for the Flagstone Village Shopping Centre indicates the street address of the shopping centre as “New Beith Road and Homestead Drive Undullah”. The street address of the shopping centre is now “6-24 Gates Road, Flagstone QLD 4280”.

1. We pause to observe that Coles Developments is the owner/developer of the Flagstone Village Shopping Centre and the lessor of the various premises in it. Coles Flagstone is among the tenants at the shopping centre. It is operated by **Coles Supermarkets** Australia Pty Ltd.
2. On 11 November 2020, Mr Morgan, who at that time was the state development manager QLD, Coles Developments, wrote to the Authority (**11 November Letter**) stating:

I have been made aware that the [Authority] will consider an application for PBS approval on 13 November 2020 for pharmacy premises in Flagstone Village Shopping Centre. I believe the application was submitted in March 2020.

As you would no doubt be aware, there was much concern within the supermarket industry due to panic buying and other COVID-19 related issues including large crowds congregating. Whilst public advertising indicated that the Coles supermarket in Flagstone Village would open on 21 March 2020, a decision was made to open the supermarket for trade the day prior.

Further to my letter dated 17 March 2020 I confirm that the Coles supermarket in Flagstone Village Shopping Centre opened to the public on Friday 20 March 2020. Sales of supermarket items to members of the general public were made on that day. The supermarket has opened for trade every day since.

I have included some photographs taken on Friday 20 March 2020 confirming that the supermarket was open and trading at that date.

1. On 12 November 2020, Steven Stoddart of Stoddart Legal, the solicitors for Mr Darnell, sent a letter by email to the Authority in relation to the application for approval to supply pharmaceutical benefits at the Premises to be considered by the Authority the following day, 13 November 2020.
2. On 13 November 2020, there was a meeting of the Authority at which the Stonehealth Application was considered. The minutes of the meeting relevantly record (as written):

**5.2.4 QA2667 Stonehealth Pty Ltd atf Stonehealth Pharmacy Trust & atf AndyStone Pharmacy Trust (Bakshi & Nguyen) - Flagstone: Item 130**

**Item 130(b)(ii)**

Item 130(b)(ii) requires that on the day of the application and on the day the Authority considers the application, there is, within 500 m in a straight line from the proposed premises, one supermarket with a total gross leasable area (GLA) of at least 2,500 m2 (excluding loading docks and car parks).

The Authority considered the supporting evidence including the letters dated 17 March 2020 and 11 November 2020, from John Morgan, State Development Manager QLD, Coles Group Property Development P/L, die first of which advised that the Coles Supermarket in Flagstone will commence trading on Friday 20 Mach 2020, and the second which stated that “the Coles Supermarket in Flagstone Village Shopping Centre opened to the public on Friday 20 March 2020. Sales of supermarket items to members of the general public were made on that day. The supermarket has opened for trade every day since.”

The Authority considered information received from a third party, which suggested that the Coles Supermarket in Flagstone did not open to the public until Saturday 21 March 2020, and referred to the recent Federal Court proceedings, stating that ‘it was conunon ground in both proceedings that the Coles supermarket within Flagstone Village Shopping Centre opened to the public for the first time and commenced trading on 21 March 2020’.

The Authority invited the Applicant to respond to the third party comments, and requested that the Applicant provide further evidence to demonstrate whether or not the Coles supermarket in Flagstone opened to the public on 20 March 2020, for example, a statutory declaration from Coles management.

1. On 23 November 2020, the Authority sent an email to Ann Mihulka & Associates in relation to the Stonehealth Application which included:

At its meeting on 13 November 2020, the Authority considered this application against the provisions of Item 130 of the Rules and deferred making a recommendation to allow further information to be sought from you.

**Item 130(b)(ii)**

Item 130(b)(ii) requires that on the day of the application and on the day the Authority considers the application, there is, within 500 metres in a straight line from the proposed premises, one supermarket with a total GLA of at least 2,500 m2 (excluding loading docks and car parks).

The Authority considered the supporting evidence including the letters dated 17 March 2020 and 11 November 2020, from John Morgan, State Development Manager QLD, Coles Group Property Development P/L, the first of which advised that the Coles Supermarket in Flagstone will commence trading on Friday 20 Mach 2020, and the second which stated that “the Coles Supermarket in Flagstone Village Shopping Centre opened to the public on Friday 20 March 2020. Sales of supermarket items to members of the general public were made on that day. The supermarket has opened for trade every day since.”

The Authority considered information received from a third party, which suggested that the Coles Supermarket in Flagstone did not open to the public until Saturday 21 March 2020, and referred to the recent Federal Court proceedings, stating that ‘it was common ground in both proceedings that the Coles supermarket within Flagstone Village Shopping Centre opened to the public for the first time and commenced trading on 21 March 2020’.

The Authority invited you to respond to the third party comments and requested that you provide further evidence to demonstrate whether or not the Coles supermarket in Flagstone opened to the public on 20 March 2020, for example, a statutory declaration from Coles management.

The requested information should be provided by email to acpamail@health.gov.au.

1. By letter dated 30 November 2020 Stoddart Legal provided the Authority with “further evidence” to support Mr Darnell’s submission that Coles Flagstone opened on 21 March 2020. The further evidence comprised two articles taken from the internet dated 21 and 23 March 2020 respectively.
2. By letter dated 9 December 2020 Ann Mihulka & Associates responded to the Authority’s email dated 23 November 2020, relevantly including that:

The information that the Authority received from a third party is factually incorrect. Quite simply, at no stage whatsoever has [Stonehealth] (being a party to recent Federal Court proceedings) agreed, stated, or even insinuated that the opening date of the Coles supermarket was 21 March 2020.

…

The issue dealt with by the Federal Court both at first instance and on appeal was whether the Coles supermarket was a ‘supermarket’ for the purposes of the *National Health (Australian Community Pharmacy Authority Rules) Determination 2018* on **19 March 2020**. It was never “common ground” that the Coles supermarket opened on 21 March 2020. The date on which the Coles supermarket actually opened was not an issue requiring the Court’s determination in either case.

These Federal Court decisions indicate that the unsuccessful party made an application to the [Authority] on 19 March 2020 where it was claimed, in reference to the Coles supermarket “the confirmed opening date of 21 March 2020…”. There was never any confirmation of the Coles supermarket opening date during proceedings, and that claim was made prior to the actual supermarket opening date of 20 March 2020. The date of 21 March 2020 appears to be an assumption made by the unsuccessful party.

Attached is a statutory declaration from John Morgan, State Development Manager QLD, Coles Group Property Developments Pty Ltd confirming the opening date of the Coles supermarket at Flagstone as being Friday 20 March 2020. Mr Morgan references the advertising material which most likely led the third party to its erroneous belief. He also references some of the reasons which caused the Coles supermarket to open a day earlier than public advertising indicated. (appendix 1)

Also attached are scans of four receipts of purchases made at the Coles supermarket Flagstone on 20 March 2020. (appendix 2)

For completion, a number of photographs taken at the Coles supermarket in Flagstone on Friday 20 March 2020 are included. Screen grabs of the ‘file information’ of the photos confirm the date that the photos were taken. These photos clearly demonstrate that on Friday 20 March 2020 the Coles supermarket commenced trading. The images are also provided as individual JPG files. (appendix 3)

The Coles supermarket was open to the public to sell a range of food, beverages, groceries and other domestic goods on Friday 20 March 2020.

…

(Emphasis in original.)

1. Mr Morgan’s statutory declaration referred to and enclosed in Ann Mihulka & Associates’ letter dated 9 December 2020 stated (as written):

1. I am an employee of Coles Group Property Developments Pty Ltd, the owner and operator of the Coles supermarket located at Flagstone Village Shopping Centre, 6-24 Gates Road, Flagstone QLD 4280 ("Coles supermarket”).

2. My role with Coles Group Property Developments Pty Ltd has given me factual knowledge to make this statement.

3. On 17 June 2020 I provided a letter to Ann Mihulka of Ann Mihulka & Associates. That letter stated, amongst other things, the opening date of the Coles supermarket was Friday 20 March 2020.

4. On Wednesday 11 November 2020 I provided a letter to The Secretary of the [Authority] confirming that the Coles supermarket did in fact open for trade to the general public on Friday 20 March 2020. I also provided photographs taken on 20 March 2020 which showed the supermarket open to the public. The content of that letter is true and correct.

5. Public advertising indicated that the Coles supermarket would open on Saturday 21 March 2020. In reality the Coles supermarket opened the day prior, on Friday 20 March 2020. COVID-19 issues concerning panic buying and large crowds congregating were considerations in the decision to open the supermarket to the public on Friday 20 March 2020.

6. Sales of supermarket items to members of the general public were made on Friday 20 March 2020.

7. I confirm in this declaration that the Coles supermarket located at Flagstone Village Shopping Centre, 6-24 Gates Road, Flagstone QLD 4280 opened for trade to the general public on Friday, 20 March 2020. The Coles supermarket has opened for trade every day since.

1. In turn, the letter dated 17 June 2020 from Mr Morgan to Ann Mihulka & Associates (**17 June** **Letter**) referred to by Mr Morgan in his statutory declaration provided (as written):

Coles Group Property Developments (CGPD) is the developer and owner of the Flagstone Village Shopping Centre (“the Centre") at 6-24 Gates Road Flagstone 4280. The Centre has a Coles supermarket and a number of other retail tenants including Watsons Chemist Flagstone.

The opening date for the Centre was originally intended to be Saturday 21 March 2020.

In the lead up to the opening of the Centre there was nationwide "panic buying" in supermarkets which led to restrictions on purchasing of certain products and limits on opening hours of Coles stores. Social distancing requirements were also coming into effect. The executive decision was taken to open the Coles supermarket a day earlier than originally intended, on Friday 20 March 2020, in order to alleviate any potential issues that may have arisen with the expected influx of customers at the grand opening of the Centre.

Due to availabilities of managers and a full complement of staff at short notice, the supermarket began trade during Friday 20 March 2020. It has continued to trade its regular hours since the doors first opened on that Friday.

1. As noted at [5] above, on 11 December 2020 the Authority made its decision to recommend approval of the Stonehealth Application to the Secretary.

# the Authority’s decision

1. On 28 January 2021, in response to a request from Mr Darnell under s 13 of the ADJR Act, the Authority provided its reasons for making its approval recommendation decision to the Secretary (**Statement of Reasons**).
2. Commencing at [17] of the Statement of Reasons the Authority set out its findings on the material questions of fact.
3. The Authority was satisfied that the Premises were at least 1.5 km in a straight line from the nearest approved premises as required by item 130(a) of Pt 2 of Sch 1 to the Rules. The Authority then considered the requirements in item 130(b)(ii) of Pt 2 of Sch 1 to the Rules that there is within 500 m, in a straight line, a supermarket that has a gross leasable area of at least 2,500 m2. At [23]-[24] of the Statement of Reasons the Authority set out the material it considered in relation to that requirement (as written):

23. The Authority considered:

(a) the Application;

(b) the letter from the Applicant’s representative summarising supporting evidence referring to: a plan of the Coles supermarket in the Centre which confirms that the Coles supermarket has a gross leasable area of 3,665 nr excluding loading dock; advising that the Coles Supermarket is a straight line distance of approximately 10 m from the proposed premises; and advising that the Coles supermarket would commence trade on 20 March 2020;

(c) the letter dated 17 March 2020 from a representative of Coles Group Property Developments Ltd to the Applicant’s Representative. The Authority found that the representative of Coles Group Property Developments Ltd advised that ‘*the Coles supermarket will commence trade on Friday 20 March 2020 and that the Centre will have an opening celebration for the entire Centre on Saturday 21 March 2020’*;

(d) correspondence received from the third party dated 12 November 2020, which stated that the Coles Supermarket in Flagstone did not open to the public until Saturday 21 March 2020;

(e) the email dated 9 December 2020 from the Applicant’s representative responding to the Authority’s request for additional information, including annexures: Federal Court judgment dated 25 August 2020; Full Federal Court of Australia judgment dated 9 November 2020; Statutory Declaration made on 4 December 2020 by a representative of Coles Group Property Developments Pty Ltd, scans of four receipts of purchases made at the Coles supermarket Flagstone on 20 March 2020 and photographs taken at the Coles supermarket in Flagstone on 20 March 2020;

(f) further correspondence from the third party dated 30 November 2020 including local news extracts.

24. The Authority took into account the correspondence provided by the third party dated 12 November 2020 and further correspondence dated 30 November 2020 which:

(a) Referred to the judicial review proceedings in the Federal Court and Full Federal Court, and an affidavit made by a party to the proceedings, and stated that ‘*it was common ground in both proceedings that the Coles supermarket in the Centre opened to the public for the first time and commenced trading on 21 March 2020*’;

(b) Submitted that as the Applicant’s application was made on 20 March 2020, being one day before the Coles supermarket opened to the public for the first time and commenced trading on 21 March 2021, the Authority should conclude that Item 130(b) was not met because there was not at all relevant times, a supermarket;

(c) Claimed that the local news extracts further supported the submissions made that the supermarket opened to the public on 21 March 2020.

(Emphasis in original.)

The “third party” referred to by the Authority was Mr Darnell.

1. At [27]-[28] the Authority made the following findings:

27. The Authority found that, based on the information before it, it was satisfied that the Coles supermarket in the Centre had a gross leasable area of at least 2,500 m2 and was within 500 m by straight line of the proposed premises.

28. The Authority considered the evidence from the third party outlined above that the Coles supermarket opened 21 March 2020. On balance, the Authority preferred the evidence of the representative of Coles Group Property Developments Pty Ltd, being the owner and operator, that the Coles supermarket opened on 20 March 2020. The representative’s evidence was that public advertising indicated the Coles supermarket would open on 21 March 2020, however that it opened one day prior due to COVID-19 issues. The Authority was satisfied that the Coles supermarket opened to the public on 20 March 2020.

1. At [29] of the Statement of Reasons the Authority concluded that it was satisfied that, at all relevant times, there was, within 500 m in a straight line from the Premises, a supermarket with a gross leasable area of at least 2,500 m2.

# the primary judge’s reasons

1. Mr Darnell raised seven grounds in his application for judicial review of the Authority’s recommendation decision and the Secretary’s subsequent approval decision. Only three of those grounds are relevant to the appeal, namely grounds 2, 6 and 7 which were in the following terms:

GROUND 2

S 5(1)(e) and s 5(2)(b) ADJR Act - the decision was an improper exercise of the power conferred - failure to take into account a relevant consideration

2. Further, or in the alternative, the Authority failed to take into account a relevant consideration, namely the primary business of the Coles, being the day before the official opening of the Coles, was not that of a “supermarket” as defined.

…

GROUND 6

S 5(1)(b) – that procedures were required by law to be observed in connection with the making of the decision were not observed

6. The Authority in considering the Application on 13 November and making a decision to defer the Application and request further information, took into consideration information provided by Stonehealth to the Authority which was neither given to the Authority at the time of the Application, nor was it requested by the Authority.

Particulars

The letter dated 11 November 2020 referred to as Annexure MAJ-8 in the affidavit of Melinda Anne Jackson affirmed 25 March 2021. (the Information)

The consideration of the Information by the Authority on 13 November 2020 was not permitted by law, due to Clause 9 of the Rules and by operation of s 99K of the NH Act.

GROUND 7

S (5)(1)(g) – that the decision was induced or affected by fraud

7. On 23 November 2020, the Authority wrote to Stonehealth requesting further evidence to demonstrate whether the Coles opened to the public on 20 March 2020.

(a) On 9 December 2020 Stonehealth provided further evidence, which included a statutory declaration made on 4 December 2020 by a representative of Coles Property Group (the “Third Party”), which annexed correspondence dated 17 June 2020 and 11 November 2020. The further evidence also included scans of four receipts and photographs taken at the Coles (the Further Evidence).

(b) The Further Evidence represented to the Authority:

(i) The reason for, and the considerations in, opening the Coles Supermarket on 20 March 2020 were issues related to COVID19;

(ii) The Coles began trading on 20 March 2020 with managers and a full complement of staff;

(iii) The Coles traded on 20 March 2020 in accordance with its regular hours;

(iv) The Coles opened for trade to the general public on 20 March 2020; and

(v) The Coles was open and trading on 20 March 2020 in its usual course of business (the “Representations”).

(c) The Representations were false and untrue in that:

(i) The alleged opening of the Coles was staged for the sole reason of providing evidence of the existence of a ‘supermarket’ on 20 March 2020, as defined under the Rules, in support of Stonehealth’s premature application to the Authority;

(ii) The Coles was not fully staffed;

(iii) The Coles did not commence trading on 20 March 2020 at its regular opening time or conclude trading at its regular closing time;

(iv) The Shopping Centre was closed to the general public on 20 March 2020, preventing the Coles from trading to the general public;

(v) The only alleged transactions which occurred on 20 March 2020 took place between the hours of 6pm and 7pm, involving 7 alleged customers.

(d) At the time of making the Representations, Stonehealth, its agents, and the Third Party knew that the Representations were false, or, in the alternative, made the Representations recklessly without caring whether they were true or false.

(e) The Representations were materially misleading and made with the intention of obtaining a recommendation for approval for Stonehealth’s Application to the Authority made on 20 March 2020, being a date prior to the existence of a “supermarket” as defined under the Rules.

(f) The alleged opening of the Coles on 20 March 2020 was a sham, orchestrated to materially mislead the Authority as to the existence of a “supermarket” as defined under the Rules on that date. The Representations resulted in Stonehealth’s Application, made to the Authority on 20 March 2020, being determined prior to any competing application lodged on 21 March 2020, being the first date the Coles was a “supermarket” as defined under the Rules.

(g) Relying upon and induced by the Representations, which were false and materially misleading, the Authority was satisfied of the existence of a Supermarket as defined on 20 March 2020, due to “COVID19 issues” and proceeded to recommend Stonehealth’s Application for approval.

1. The primary judge considered grounds 1 to 5 together.
2. After referring to the Authority’s findings at [28] and [29] of the Statement of Reasons, the primary judge noted that Mr Darnell’s submissions in relation to grounds 1 to 5 were premised upon his acceptance that the phrase “the Authority is satisfied” in item 130(b) of Sch 1 to the Rules had the consequence that the jurisdictional fact to which item 130(b) was directed was a state of administrative satisfaction with respect to the specified subject, an approach with which Stonehealth agreed. His Honour considered that the parties’ position on that issue was correct and gave his reasons for that view. At [26] the primary judge concluded that the effect of the relevant authorities, which he had earlier set out, was that:

…if, in reaching the state of satisfaction, the administrative decision-maker misconstrues the statute concerned, takes into account an irrelevant consideration, fails to take into account a relevant consideration, does so on the basis of material not reasonably capable of supporting that satisfaction or reaches that satisfaction illogically or irrationally or unreasonably, then the administrative decision concerned may be quashed.

1. Mr Darnell submitted that the Authority had failed to direct attention to whether Coles Flagstone had “commenced trading in its normal course of business” or “ordinary course of business”. The primary judge considered that submission put “a gloss on the language of the definition of ‘supermarket’ as construed by the Full Court in *ZAA*”*.* His Honour said that it is “necessary and sufficient that the material before the Authority is reasonably capable of engendering satisfaction that a supermarket has commenced trading on, presently relevantly, the date of that application”: at [27] of *Stonehealth (No 4)*. His Honour went on to say, at [28], that the focus of grounds 1 to 5 must be on the material before the Authority and the question of whether that material was reasonably capable of engendering such satisfaction.
2. Mr Darnell also submitted that the Authority had before it four receipts from, and photos of Coles Flagstone with, a handful of customers and that this material could not rationally support a finding that the sales were in fact representative of the primary business of the supermarket on 20 March 2020. He said that the Authority had “failed to make the necessary inquiry as to whether this alleged reason altered the nature of the business of [Coles Flagstone] on 20 March 2020”: at [29] of *Stonehealth (No 4)*. The primary judge rejected these submissions. While his Honour was of the opinion that the last of the submissions was outside the pleaded grounds of review, he addressed it substantively. In doing so his Honour referred to s 9 of the Rules (see [14] above) and the relevant authorities. At [34] his Honour said:

None of this requires further examination in the circumstances of the present case. It may be assumed that either a ground of review as particularised in s 5(2)(g) of the ADJR Act or an analogous jurisdictional error could be grounded in particular circumstances by a failure to make an obvious inquiry. Insofar as there was any obvious inquiry to be made as to when the relevant supermarket, a Coles supermarket in the shopping centre in which the Flagstone premises were located, commenced trading, as a sequel to the information Stonehealth provided with its application, which suggested trading commenced on 20 March 2020 and to other material by then before the Authority, which suggested that trading commenced on 21 March 2020 (which date had been publicised in advance by Coles), the Authority made such an inquiry.

1. The primary judge then turned to consider the material that was before the Authority. At [39] the primary judge found that the Authority had considered all of the further material submitted both by Stonehealth and Mr Darnell. His Honour referred to the 11 November Letter, noting that there was a dispute as to whether the Authority was entitled to rely on it, but on the assumption that it was said that “all that the Authority’s decision evidences is that, for the reasons given … it chose to act on the material which indicated that the Coles supermarket had commenced trading on 20 March 2020” which “was reasonably capable of supporting such a conclusion”.
2. At [42] the primary judge considered a submission by Mr Darnell that the definition of “supermarket” for the purposes of the Rules also carried with it the element of “open to the public”, an element which his Honour observed was not evident from the text of the definition in the Rules or the decision in *ZAA*. Putting that to one side, the primary judge found that the Statement of Reasons at [28] disclosed that the Authority expressly addressed that alleged additional element and that the material before the Authority was reasonably capable of supporting the additional element that the supermarket was open to the public, referring by way of example, to Mr Morgan’s statutory declaration.
3. As to the contest between Mr Darnell and Stonehealth about whether the definition of “supermarket” included that additional element, the primary judge observed that the course adopted by the Authority lent “an academic quality” to it but made the following additional observations: first, having regard to the principles of statutory construction, textually the definition of “supermarket” makes no explicit reference to the public or the general public; secondly, the definition of supermarket mentions “a retail store” which, inferentially, carries with it the feature of a store that sells the items mentioned in the definition by retail, to end consumers; and thirdly, the feature of sale to consumers does not necessarily carry with it “openness for sale to members of the public generally”. His Honour concluded (at [46]) that read in context, the retail store with which item 130(b) is concerned must “generally trade and be open for trading with at least the class of persons entitled to the supply of pharmaceutical benefits” and that “a supermarket [which opened] for trade to the public for the retail sale of the goods mentioned in item 130(b) would meet this requirement”. His Honour thus observed that Mr Darnell may well have a point regarding the potential additional element of the definition of a “supermarket”, but that, if so, it was a point expressly addressed by the Authority when making its decision. Accordingly, it was unnecessary for his Honour to express any concluded view on this aspect of the construction of item 130(b) of Sch 1 to the Rules.
4. The primary judge then turned to consider ground 6 which concerned the effect of s 9 of the Rules and the extent to which the Authority could receive further information.
5. Mr Darnell submitted that the effect of s 9 of the Rules was that Stonehealth was confined to the information it provided at the time it submitted the Stonehealth Application which disclosed that the supermarket was anticipated to open on 20 March 2020 and that it was unable to provide any evidence that the supermarket in the shopping centre commenced trading on that day. Mr Darnell also submitted that the Authority was not entitled, in reaching its expressed state of satisfaction, to consider the 11 November Letter. He contended that it followed from s 9 of the Rules that the Authority had violated its mandate in making its decision to request further information such that its approval recommendation decision was attended with jurisdictional error or, in terms of s 5(1)(b) of the ADJR Act, the procedures required by law to be observed by it had not been observed.
6. At [55] the primary judge accepted Stonehealth’s submission that the inhibition in s 9 of the Rules applied only to an applicant and that Coles Developments was not an applicant. His Honour found that Coles Developments had its own legitimate commercial interest in there being premises approved under s 90 of the NH Act in the shopping centre in which it had its supermarket. Coles Developments was also the lessor of the Premises. Despite the tenancy relationship and the “synergistic commercial benefit arising from colocation”, the primary judge did not find that Coles Developments was acting as Stonehealth’s agent or on its behalf when Mr Morgan communicated to the Authority on 11 November 2020. His Honour found that the 11 November Letter was sent on behalf of Coles Developments and that it was permissibly considered by the Authority.
7. His Honour referred to a further submission made by Stonehealth that, even if it were impermissible for the Authority to consider the 11 November Letter because of the operation of s 9 of the Rules, any impermissible communication was not material and thus not jurisdictional. The primary judge observed at [58] that the difficulty with any materiality submission may be that, if the Authority’s request was tainted, so too would be the material provided in response to it. His Honour determined that the issue was academic and did not express any concluded view in relation to it.
8. Finally, the primary judge considered ground 7 by which Mr Darnell alleged that the Authority's decision was induced or affected by fraud.
9. At [61] the primary judge observed that in considering ground 7 the Court was not confined to a consideration of the material which was before the Authority. Additional oral and documentary evidence was tendered in relation to events concerning an opening of Coles Flagstone on the early evening of 20 March 2020. The primary judge also observed (at [62]) that the fraud alleged by Mr Darnell was that of Stonehealth and Coles Developments in relation to the opening of Coles Flagstone and in the making of representations about that to the Authority which, if proved, would mean that the Authority’s recommendation decision was induced or affected by any such fraud.
10. The primary judge noted that the onus of proving the alleged fraud was upon Mr Darnell and that the allegations were to be proved on the balance of probabilities, referring to s 140(1) of the *Evidence Act 1995* (Cth).
11. At [80] the primary judge identified the matters which Mr Darnell would need to prove in order to be successful on this ground saying:

Taken in conjunction with what was said in *Stonehealth v ZAA* of the definition in the Rules of “supermarket”, it is therefore necessary and sufficient for Mr Darnell to prove that:

(a) Stonehealth itself or in conjunction with Coles or Ann Mihulka & Associates knowingly furnished to the Authority false or misleading information as alleged in ground 7; and

(b) the information furnished was material in the sense that it induced or affected the Authority’s recommendation decision.

Further or alternatively, for reasons discussed above, it would also be a sufficient basis for quashing each decision if in any sense the existence of a supermarket which had commenced trading on 20 March 2020 was a sham. This latter basis would overlap with but not be exhaustive of the circumstances which occasioned the former basis.

1. His Honour then undertook a review of the evidence relied on by Mr Darnell to establish that the Authority’s recommendation decision was induced or affected by fraud. It is not necessary to set that evidence out in any detail here. Much of it is referred to below in the context of our consideration of ground 2 of the appeal. The primary judge made the following observations:
2. if Mr Bakshi’s plan as originally formulated had ever been implemented and then represented to the Authority as indicating that Coles Flagstone had commenced trading at the shopping centre on 20 March 2020 the case might have “reached the point and crossed the line” referred to in ***Hope*** *v Australian Community Pharmacy Authority* (2017) 156 ALD 130; [2017] FCA 669. However, that plan was never implemented: at [94];
3. Mr Morgan, who was called by Mr Darnell to give evidence, candidly admitted that he was trying to help Stonehealth in relation to its s 90 application and that he was aware that there was a subsisting application for approval in respect of premises outside the shopping centre (i.e. Mr Darnell’s application). Mr Morgan acknowledged the involvement of Mr Mihulka in the drafting of various letters he signed concerning the opening of the supermarket. At [115] his Honour said the following about Mr Morgan’s evidence:

… When taken to his letter of 17 March 2020, he made the observation that, after this letter, COVID-19 had happened. He agreed that everything had been on track anyway at that time for an opening on the evening of Friday, 20 March 2020. However, he stated this this had always been subject to confirmation or change. He was adamant that the managerial impact of COVID-19, or at least his understanding, and that of others in the management structure of Coles as communicated to him, of the threat presented by COVID-19 and its ramifications for the operation of the supermarket and the shopping centre had changed what had been planned for the evening of 20 March 2020. He related, quite spontaneously I thought, how no-one at the time understood what was entailed in dealing with the COVID-19 pandemic. He stated that the opening on 20 March 2020 was ultimately dictated by a desire to check out procedures to deal with the impact of COVID-19. He stated that much had evolved since then.

1. Mr Morgan was at the Flagstone Village Shopping Centre on 20 March 2020 and consulted with the store manager of Coles Flagstone about the opening that evening and preparations for the following day. He described the days leading up to and on 20 and 21 March 2020 as consisting of rapidly changing advice from “Coles management” as to how to deal with the COVID-19 pandemic. At [117]-[120] the primary judge made the following observations about Mr Morgan’s evidence:

117 Mr Morgan observed the supermarket to open at about 6:00 pm and to close about 8:00 pm (to prepare for the next day’s trading) on 20 March 2020. He said that the doors (shutters, as I understood it and photographic evidence confirmed) to the supermarket were up and the doors to the shopping centre were open. He observed the supermarket was stocked with a full range of goods. He was not present throughout the opening period that evening as he had other duties to undertake around the shopping centre in preparation for trading the following day.

118 Mr Morgan stated that goods were sold on the evening of 20 March 2020 and that there had been neither any “reversing transactions” that evening nor any plan with Mr Mihulka for there to be any such transactions. By this I understood him to mean that there had been no transactions which purported to record a sale but which were later cancelled. The accuracy of this evidence is not contradicted by the supermarket sales transactional records of Coles for the supermarket for the evening of 20 March 2020, which were in evidence.

119 Mr Morgan denied that any of the letters which he had signed was false. He said that he had read each draft before signing and was satisfied that they were correct.

120 At one stage in the course of his evidence and based on a preliminary perusal of the contents of the court book tendered containing emails on and from 19 September 2019 (as related above), I considered that I ought to draw Mr Morgan’s attention to his right to claim privilege against self-incrimination. I also explained to him the operation of s 128 of the Evidence Act. Later yet, I gave Mr Flaherty limited leave to cross-examine Mr Morgan. Through all of this Mr Morgan continued to respond to questions in what I thought was a considered, matter of fact way.

1. The primary judge accepted all of Mr Morgan’s evidence. His Honour found that it was consistent with contemporaneous documents and noted that it was, in important respects, also consistent with the evidence of the other witnesses who gave evidence: Rohan Howard; Sarah Devlin; Tam Nguyen and Mr Mihulka. At [122] the primary judge made the following findings about the opening of Coles Flagstone based on Mr Morgan’s evidence:

Mr Morgan’s letter of 17 March 2020 contained none of the falsities alleged. Neither did his subsequent letters, nor his statutory declaration verifying them. By 20 March 2020, a perceived managerial need, in light of the recent pandemic phenomenon, to prepare for the following day had occasioned a need to open the supermarket at the shopping centre on the evening of 20 March 2020. That opening was not advertised but then events were rapidly evolving and, as Mr Morgan stated, Coles did not want a lot of people about that evening. Given that they were preparing for an expected large influx the following day, that, too, had the ring of truth about it. I find that, by the time of the opening of the supermarket on the early evening of 20 March 2020, events associated with the recent onset of the COVID-19 pandemic had overtaken an earlier plan to open the supermarket that evening. The opening conducted by Coles at its supermarket on that evening had preparatory dimensions in terms of the morrow to come and was not inconsistent with still fulfilling the earlier plan but that plan was no longer Coles reason for opening the supermarket that evening. Based on Mr Morgan’s evidence, it seems inherently likely that, in light of the pandemic and the need to prepare for the following day, Coles would have opened the supermarket in any event for early evening trading and preparation, even in the absence of any application by Stonehealth for s 90 approval in respect of the Flagstone premises.

1. There followed a summary of the evidence given by Mr Howard, Ms Devlin, Mr Nguyen and Mr Mihulka.
2. The primary judge concluded (at [135]) that Mr Darnell had not proved that the opening of Coles Flagstone on 20 March 2020 was “staged for the sole reason of providing evidence of the existence of a ‘supermarket’…as defined under the Rules, in support of Stonehealth’s premature application to the authority”. His Honour held that Mr Darnell had not proved what “fully staffed” meant in relation to the supermarket but, even if he had, there was nothing in item 130(b) of Sch 1 to the Rules as construed in *ZAA* which required that Coles Flagstone be anything other than a supermarket which had commenced trading. His Honour further concluded (at [138]) that, on the whole of the evidence, Coles Flagstone was, for the purposes of the Rules, a supermarket which commenced trading on 20 March 2020 and was open to and accessible by the public.

# Grounds of appeal

1. Mr Darnell raises three grounds of appeal. They are:

1. The primary Judge erred in finding that the premises occupied by Coles at Flagstone Village Shopping Centre, Flagstone, Queensland, were, on 20 March 2020, operating as a “supermarket” for the purposes of Section 5 and Item 130 of Schedule 2 of the National Health (*Australian Community Pharmacy Authority Rules) Determination 2018* (**Rules**).

Particulars

(a) Section 5 of the Rules defines ‘supermarket’ to mean a retail store the primary business of which is the sale of a range of food, beverages, groceries and other domestic goods.

(b) On 20 March 2020 the manner and scope of the limited trading conducted at the Coles premises did not have, and could not reasonably support a conclusion that this was the primary business of the Coles premises on that day.

(c) Alternatively, the primary purpose of those limited trading activities was to provide evidence to support the First Respondent’s application and not to make sales of goods.

2. The primary Judge erred in failing to hold that the decision of the Second Respondent (the “Authority”) was affected by materially false or misleading information including:

(i) A false claim that a Coles supermarket was open at the Flagstone Village Shopping Centre on 20 March 2020 with the primary purpose of selling a range of goods to the public.

(ii) False information that the reason for the limited trading activities being conducted at Flagstone Village Shopping Centre on 20 March 2020 was related to Covid-19.

(iii) A false statement that the opening of the Coles premises for limited trading activities on 20 March 2020 was a decision that arose at short notice and/or because of the sudden availability of a full complement of managers and staff;

when in fact those limited trading activities were part of a “strategy” devised and directed by the First Respondent from at least September 2019.

3. The primary Judge erred in finding that the Authority was entitled to take into account information provided to it on 11 November 2020, despite the operation of Clause 9 of the Rules.

1. We address each ground in turn below.

## Ground 1: misconstruction of “supermarket”

1. Ground 1 of the appeal challenges the primary judge’s finding that Coles Flagstone was a “supermarket” for the purposes of s 5 and item 130 of Sch 1 to the Rules. It corresponds with review ground 2 before the primary judge and relies on s 5(1)(e) and s 5(2)(b) of the ADJR Act, i.e., it asserts that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made by the Authority and that it failed to take a relevant consideration into account in the exercise of the power.

### Mr Darnell’s submissions

1. In support of ground 1, Mr Darnell submitted that the primary judge erred at [135] where his Honour stated that “there is nothing in item 130(b) as construed by the Full Court in [*ZAA*] which requires that the supermarket be other than one which has commenced trading”.  Mr Darnell submitted that “primary” in the definition of supermarket performs two roles: first, the goods that are sold as part of the commercial activity of the retail store must primarily be “a range of food, beverages, groceries and other domestic goods” and, secondly, the commercial activity of selling those goods must be what the retail store is primarily undertaking at the relevant times.
2. Mr Darnell submitted that on 20 March 2020, Coles Flagstone may have made some sales of the relevant goods, but that was not its primary business on that day: its primary business activity or function on that day was preparatory in nature for the following day when its primary business of a supermarket commenced. Mr Darnell also submitted that the activities on 20 March 2020 were primarily intended to advance a strategy between Coles Flagstone and Stonehealth of furnishing evidence to support the Stonehealth Application, and that the selling of goods was merely an aspect of that strategy.

### Consideration

1. This ground of appeal fails for the following reasons.
2. In the Rules, “supermarket” is defined as “a retail store the primary business of which is the sale of a range of food, beverages, groceries and other domestic goods”.
3. In *ZAA*, Rangiah J (at [59]) identified that there are three requirements in that definition. First, there must be a retail store. Secondly, the retail store must have business. Thirdly, the primary business must be the sale of a range of food, beverages, groceries and other domestic goods.
4. In respect of the second requirement, namely that the retail store have business, it was held in *ZAA* (at [62]) that the retail store must have commercial activity. It was then said (at [64]) that that requires:

the existence of business, which must consist primarily of the sale of a range of food, beverages, groceries and other domestic goods. A retail store cannot have business (let alone primary business) until it has commenced trading.

1. Mr Darnell focused on those statements in support of his submission that the preparatory business of Coles Flagstone on the day in question, which he says was its primary business on that day, does not meet the requirement of the definition because the sale of goods was not the primary business on that day.
2. Mr Darnell’s submissions conflate the notions of “business”, in the sense of the presence of commercial activity, and the activities that constitute a business. Given the short opening time late in the day on 20 March 2020, it may be accepted that the principal (or primary, to use the word Mr Darnell insists on) *activities* of Coles Flagstone on that day were preparatory in nature – they were activities directed at preparing the store for its grand opening to the public the following day. Indeed, the limited opening on 20 March 2020 may itself be characterised as preparatory in as much as it was said to be for the testing of systems, queueing, security and the like for the grand opening the following day. All those *activities* were undoubtedly part of the business of the supermarket, but none of them constituted a *business* themselves.
3. The business of the supermarket was to sell groceries (to use a compendious term) to the public for profit. That involved a range of activities including sourcing goods, buying them, warehousing them, packing them as required on the shelves, maintaining an inventory of them, price tagging them, providing baskets and trolleys for the convenience of shoppers, installing and maintaining systems for checking-out the goods against the payment of money, and so on. All those activities were aimed at the ultimate commercial activity of the business, namely selling the goods for profit.
4. The role played by “primary” in the definition of “supermarket” is only to identify the primary business of the retail store in question, namely selling groceries as opposed to selling other goods or providing services. There is nothing in the definition, whether by way of the text or its contextual purpose, which requires that the primary *activities* on the day in question were the acts of selling the goods.
5. *ZAA* required no more, insofar as the requirement that the store have “business” is concerned, than that it had commenced trading. That is because, on the reasoning in that case, there is no business until then. Activities prior to the commencement of trading are merely preparatory to the business commencing and do not themselves constitute the retail store having “business”.
6. Mr Darnell is thus wrong in submitting that the primary activities on the day in question must be the selling of groceries, and his first ground of appeal, which is based on that contention, must fail.

## Ground 2: fraud

1. By ground 2 Mr Darnell contends that the primary judge erred in failing to hold that the Authority’s decision was affected by materially false or misleading information (manifest in the three representations set out at [56] above) when in fact the limited trading activities undertaken at Coles Flagstone on 20 March 2020 were part of a strategy devised by Stonehealth from at least September 2019. The three representations alleged to constitute the materially false or misleading information arise, as to the first, by Stonehealth’s silence and, as to the second and third, primarily from the 17 June Letter. This ground of appeal coincides with review ground 7 and relies on s 5(1)(g) of the ADJR Act, i.e., that the decision was induced or affected by fraud.

### Mr Darnell’s submissions

1. Mr Darnell submitted, relying on *Fox v Percy* (2003) 214 CLR 118 at [24]-[25] and [29], that an appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge’s reasons. In an appeal on findings of fact, an appellate court must not shirk from its responsibility of giving effect to its own conclusions where the decision reached at trial was “glaringly improbable” or “contrary to compelling inferences” in the case.
2. Mr Darnell observed that the primary judge made a finding that the Authority’s decision was not affected by the provision of false and materially misleading information in the Stonehealth Application in respect of the operation of Coles Flagstone on 20 March 2020. He submitted that this finding cannot be sustained in circumstances where:
3. the primary judge found the opening conducted by Coles Flagstone on 20 March 2020 “had preparatory dimensions in terms of the morrow to come”;
4. whilst Coles Flagstone was open on 20 March 2020 there were staff in the store still preparing for the “larger opening” the next day;
5. Coles Flagstone was accessible only for a period of two hours, between 6 pm and 8 pm;
6. the opening on 20 March 2020 was not advertised;
7. the decision to open on 20 March 2020 was apparently made two hours prior;
8. there were eight transactions at Coles Flagstone during the course of 45 minutes, all of which were made by people known to Stonehealth and who worked in the shopping centre;
9. there was only one staff member working at the checkout;
10. receipts from transactions made on 20 March 2020 were retained by Coles Flagstone and photos were taken of the customers to be used as evidence in the Stonehealth Application; and
11. Coles Flagstone was not expecting many sales on 20 March 2020.
12. Mr Darnell also submitted that the primary judge’s finding that “on the early evening of 20 March 2020, events associated with the recent onset of the COVID-19 pandemic had overtaken an earlier plan to open the supermarket that evening” was glaringly improbable. He contended that all of the documentary evidence suggested the existence of a longstanding plan to open Coles Flagstone for the purpose of securing the success of the Stonehealth Application, referring to the evidence which he said established that purpose. Mr Darnell submitted that, despite the evidence revealing that the strategy for a “soft highly confidential opening” had been in place since 19 September 2019 and the opening date of 20 March 2020 agreed two months prior on 21 January 2020, the primary judge found a verbal discussion between Mr Morgan and the Coles Flagstone store manager two hours prior was the basis of the opening on 20 March 2020. Mr Darnell submitted that this finding is glaringly improbable in circumstances where:
13. Mr Morgan gave evidence that the opening of Coles Flagstone was not his decision, he had no operational responsibility for the retailing process and was instead involved in project management and property development and that there were other people dealing with the supermarket aspect of the centre including the store manager, the regional manager, the state manager and operations people;
14. there was no explanation as to how the limited trading activities on 20 March 2020 could reduce “panic buying” in circumstances where the trading was not advertised in any manner;
15. there was no cogent reasoning as to how the limited trading activities on 20 March 2020 could assist Coles Flagstone in preparing for trade in light of the COVID-19 pandemic. Mr Morgan gave evidence that the decision to open the store would assist him to determine where to place barricades for queues outside Coles Flagstone but there was no evidence of queuing on 20 March 2020;
16. inconsistent evidence was given in relation to staffing numbers by Mr Morgan;
17. there is no written or digital record communicating the decision made by Mr Morgan and the store manager to open Coles Flagstone and, in fact, Mr Morgan gave evidence that he “didn’t really tell anyone” about the decision to open which was made two hours prior to when the doors to Coles Flagstone opened on 20 March 2020; and
18. the Stonehealth Application was lodged 14 hours earlier in anticipation of the opening occurring that day.

### Consideration

1. Mr Darnell accepted the primary judge’s approach set out at [80] of *Stonehealth (No 4)* (see [51] above). That is he accepted that in order to succeed before the primary judge he had to prove either that:
2. Stonehealth itself or in conjunction with Coles Developments or Stonehealth’s consultants, Ann Mihulka & Associates, knowingly furnished the Authority with false or misleading information and that the information so furnished was material in the sense that it induced or affected the Authority’s decision; or
3. alternatively, that those matters would also be a sufficient basis for quashing the Authority’s decision if the existence of a supermarket which had commenced trading on 20 March 2020 was a sham.

Mr Darnell also accepted that he bore the onus of proving the alleged fraud on the balance of probabilities. However, Mr Darnell contended that the primary judge erred in his application of the facts to the questions he identified.

1. The question of whether the Authority (or other relevant decision maker for the purposes of approval in relation to pharmaceutical benefits) had been misled such that the relevant decision was vitiated by fraud has been considered previously.
2. In ***Yu*** *v Minister for Health* (2013) 216 FCR 168 Jessup J considered whether there had been bad faith on the part of the applicant in relation to the transaction based on which the Minister for Health came to exercise his power under s 90A of the NH Act. That section empowers the Minister to substitute a decision of the Secretary under s 90 rejecting an application for approval to supply pharmaceutical benefits at particular premises. The relevant facts, which are somewhat complicated, were helpfully summarised in *Stonehealth (No 4)* at [72] as follows:

*Yu* was a case where a pharmacist, faced with the prospect, as a result of a forthcoming change in the then applicable rules made by the Minister under the [NH Act] applicable to recommendations for the approval of premises, of a second approval permitting a competitor pharmacy being established in the small country town where he had hitherto enjoyed a monopoly, devised, in conjunction with his solicitor, a blocking strategy. He signified to the Secretary an intention to cancel his existing approval in respect of particular premises in that country town and applied for approval under s 90 in respect of other premises, in effect a relocation application. He then later separately applied under s 90 for the second approval, and cancelled the relocation application.

1. At [49] Jessup J summarised the evidence given by Mr Yu:

The applicant was cross-examined about his intentions with respect to the relocation application of 17 October 2011, and he frankly said that it was his attempt, devised with the assistance of his solicitor, to navigate his way through the regulatory issues associated with the introduction of the 2011 Rules. The point to which he was navigating, of course, was the achievement of a second pharmacy approval for himself in Kilmore, and the exclusion, to the extent possible, of other pharmacists from securing that approval. The effect of his evidence was that the 2006 Rules and the 2011 Rules, and the transitional provisions associated with the commencement of the latter, gave him the legal right to act as he did, and he proceeded in what he perceived to be his own best interests. In submissions made on his behalf, his counsel accepted that there was a sense in which the course followed by the applicant might be regarded as a sharp practice, but it would be going too far, he submitted, to describe it as involving bad faith.

1. At [51] of *Yu* Jessup J made the following findings:

Central to the fourth respondents’ bad faith point was the proposition that the applicant never intended to cease carrying on business as a pharmacist at 20 Sydney Street, and that his request for cancellation of the approval with respect to those premises was, therefore, a sham. In the light of the evidence given by the applicant himself, the first part of this proposition must be accepted, but the application for cancellation of the approval at 20 Sydney Street was a valid act done under the 2006 Rules, and in that sense, could not be described as a sham. It was a stratagem and, perhaps, a clever tactic. But it is not at all clear how the notion of “bad faith” imposed upon the applicant an obligation, unstated in the NH Act and the 2006 Rules, to refrain from making such applications as were in his own best interests. It must be remembered that it was not he who was exercising a statutory power or making a decision under an enactment. Neither is it suggested that he had any direct dealings with the fourth respondents in the context of which good faith might have been required. In the circumstances, and although I have considerable sympathy for the position occupied by the fourth respondents, I do not think that the notion of bad faith is apposite to circumstances in which a pharmacist requests a cancellation under s 98 of the NH Act with the unrevealed intention of withdrawing that request at a later, convenient, date.

1. In *Hope* the applicants sought judicial review of the decision to recommend approval for the third respondent to supply pharmaceutical benefits from certain premises on the basis that the approval recommendation decision was vitiated by the third respondent’s fraud. The applicant alleged that the third respondent had misled the Authority by omitting to disclose certain facts or to make reference to its strategy. In considering whether that was so at [64]-[66] Kerr J said:

[64] Given the significance of the Rules in providing not only for the public interest in the availability of pharmaceutical benefits to the public but also for a limited and bounded protection of the commercial interests of existing providers, there must be some point at which the entitlement of an applicant to pursue his or her own interests will pass beyond what was, in Yu, accepted to be permissible sharp practice.

[65] In my opinion that point is reached and the dividing line is crossed if an applicant knowingly provides information in support of their application that is materially false or misleading with respect to any of the criteria mandated by the Rules relevantly required to exist if the Authority is to recommend approval — and the Authority is disabled because of its reliance thereon from fulfilling its function.

[66] It is implicit in the Rules that an applicant must provide factually accurate information to the Secretary and the Authority.

1. On appeal from the decision in *Hope* a Full Court of this Court (Griffiths, Mortimer and Bromwich JJ) found that the appellant had been denied procedural fairness in the conduct of the proceeding before the primary judge because the case had been determined on a basis that was not pleaded or argued. Despite that, the Full Court declined to exercise its discretion to grant relief and set aside the primary judge’s orders because it would be futile to do so: see *Slopen Main Pty Ltd v Hope* (2017) 256 FCR 156 at [54]-[57]. In considering the issue for resolution before them, their Honours set out the primary judge’s process of reasoning in reaching his conclusion which, they noted, was not challenged and on which no appellate adjudication was called for. At [34] and [36] their Honours relevantly said:

34. … His Honour:

(1) set out what was considered to be the overarching purpose of the Determination, which should prevail over the interests of an applicant for approval;

(2) concluded that the provision of false or materially misleading information may be found to disable the Authority from fulfilling its statutory duty, considering and distinguishing *Yu v Minister for Health (No 2)* (2013) 216 FCR 188 (*Yu*) upon the basis that Jessup J’s reasoning and conclusion in that case did not preclude a different outcome if false information was provided, rather than only the omission of information that could have been, but was not, provided; and

(3) observed that there was an obligation to provide factually accurate information in an application for approval.

…

36. The primary judge’s reasoning above may be accepted, at least for present purposes.

1. The primary judge also had regard to these authorities. Neither them nor his Honour’s application of them is challenged by Mr Darnell. Rather, Mr Darnell challenges the findings of fact made by the primary judge and inferences drawn from those facts.
2. Turning to the facts, we start with the evidence relied on by Mr Darnell to establish that there was a plan in place from at least January 2020 for Coles Flagstone to open on 20 March 2020 for the purpose of assisting Stonehealth with its application pursuant to s 90 of the NH Act.
3. The first contact between Mr Bakshi on behalf of Stonehealth and Mr Morgan was by email dated 18 September 2019. Mr Bakshi introduced himself noting that he would be in charge of the pharmacy approval process at the Flagstone Village Shopping Centre. He continued:

It would be great if we could discuss certain matters around the PBS approval strategy. First week or second week of October would be ideal but happy to work around your schedule.

1. By email of the same date Mr Morgan agreed to meet with Mr Bakshi the following day, among other things, “to discuss the PBS license strategy”.
2. On 19 September 2019 Mr Bakshi sent an email to Mr Morgan, among others, with the subject “Notes for Today” (**19 September Email**) which provided (as written):

We will discuss more in person but below is a basic run down.

1. We will Apply under rule 130 for a new approval number.

What is the basic principles of this rule?

- No PBS approved Pharmacy for 1,5km - Which we have.

- Supermarket with Gross leasable area of 2500m2 (which means we dont need a doctor ) We will need floor plans from Coles - showing docks etc - but we should easily have 2500m2 for the Coles Supermarket.

- The Supermarket is within 500m of the Pharmacy site. This is the tricky part - there is a non pbs Pharmacy across the road - who is also waiting for Coles to be built and is aiming to apply under the same rule - as they also within 500m of the Coles. Who get **the** **approval in first..gets in. Many applications are lodged at 12.01am!!**

How do we overcome this hurdle?

1. We need a “soft highly confidential opening” a few days before the real opening.

2. We need access into the Coles - a few days before the opening - to show stock on the shelves and counter photos etc .

3. We need a docket., eg just chewing gum invoice ..showing the store was trading.

4. A Stat dec from the Coles Manager stating the Coles was open on “this” date would also greatly help.

5. Details Plans of the Coles - showing Leasable area and council plans etc. see below.

We have hired a specialist to undertake this approval as it is a complicated one. The specialist has over 20 years experience and her sole role is Pharmacy Approvals.

You must be reading this and thinking - are these crazy Pharmacists for real???

Sadly yes - this is what we do each day to get our approvals!

(Emphasis in original).

By email of the same date Mr Morgan responded to Mr Bakshi saying:

Navin, no you are not crazy and the pharmacy in the Coles centre does benefit from having a pharmacy possibly as much as you want to be in a centre with a supermarket. We can run through your list today, these are all what we were expecting and firm up the strategy further.

Coles plan attached as a start.

1. Mr Morgan was subpoenaed by Mr Darnell to give evidence at the trial and examined by counsel for Mr Darnell, Mr Flaherty. He gave the following evidence about the 19 September Email:

Mr Flaherty: And you’ve read all of this email?

Mr Morgan: Yes. Yes.

Mr Flaherty: Do you think there was anything particular about this that stood out?

Mr Morgan: Not really. It was just, as I say – that’s what I would sort of class as being the strategy from their part was what was needed to – to achieve a licence, so they were just saying what they believed they needed to do to achieve a licence, so - -

Mr Flaherty: And when you say “achieve a licence”, you say – what do you mean by strategy? What did you consider the strategy to be?

Mr Morgan: Well, strategy as in what the steps were needed for them to – to be able to get a licence, so…

Mr Flaherty: And what were those steps?

Mr Morgan: Well, my understanding of those steps that he had set out, a lot of those things around the supermarket – he needed a supermarket of 2500 square metres; the supermarket needed to be within 500 metres of the – the pharmacy. So he was asking if we could look at doing a soft opening the days before. And then what they would need to provide to the pharmacy board or whoever it was that issues – issues the licence.

Mr Flaherty: Did that concern you, that this was what was required?

Mr Morgan: No. We – I help tenants with licencing (sic) – well, like, you know, I’ve got one in Andergrove at the moment, which is a relocation, and they’ve asked whether they could open on the Friday. They’ve – we’ve agreed to open on the Friday for the pharmacy, but the supermarket won’t open. So it’s just, again, trying to help a tenant achieve a licence.

1. As foreshadowed in the 19 September Email, Mr Morgan and Mr Bakshi met. Mr Morgan gave the following evidence about that meeting:

Mr Flaherty: And would you say that at the meeting, you were in agreement with this plan?

Mr Morgan: When you say “in agreement” – we would help where we could help. It was made quite clear that – and just to understand, too – so I work on the shopping centre side of things, so I deal with the shopping centre. Coles Supermarkets and the operations of Coles Supermarkets are a tenant for ourselves, so I would rely on supermarkets agreeing to an earlier opening or a soft opening. So yeah, look, I had no problems working with Navin on trying to see if the supermarket would open earlier, so - - -

Mr Flaherty: And did you have any problems with it being highly confidential?

Mr Morgan: Sorry?

Mr Flaherty: Did you have any problems with it being highly confidential, as described by Mr Bakshi?

Mr Morgan: No, not really. They’re a tenant of ourselves and if that’s what they were asking, then that’s what they were looking to do to try and achieve their licence, I – yeah, we’re happy to work – I was happy to work with them.

1. Between 7 and 9 December 2019, Mr Bakshi exchanged emails with Samantha Berry in relation to a proposed meeting to take place at the Flagstone Village Shopping Centre. Although not clear, given her email address, Ms Berry did not appear to work for either Coles Developments or Coles Supermarkets. In response to an inquiry from Mr Bakshi, Ms Berry confirmed that Mr Morgan would be at the meeting. In the same email, Ms Berry queried whether the meeting should take place in a meeting room or a nearby coffee shop. Mr Bakshi informed Ms Berry that he, Mr Morgan and, it seems, Ms Berry, would need to “discuss the approval process in private”, and that “a room would be best”.
2. On 21 January 2020, Mr Morgan sent an email to Mr Bakshi in which he wrote:

Navin, as per your wishes we are trying to pull the opening forward a week, if you can work towards the night before the 21st March to have your tenancy ready. We will confirm the date in the near future.

1. On 24 January 2020 at 7.18 am, Mr Bakshi sent Mr Morgan a list of what he described as the “PBS meeting dates” which was a list of the dates on which the Authority was to hold its meetings and the dates by which to lodge applications in order to be considered at a particular meeting. Mr Bakshi queried with Mr Morgan whether they “could look at a coles *opening* slightly sooner then expected” (sic) and whether they could make the “March 10 Cut-off” so that any application lodged by Stonehealth could be considered at the Authority’s meeting scheduled to take place on 17 April 2020. Mr Bakshi said (as written):

If we Miss March 9 - then we get pushed out to May 22 to get PBS. Each day without PBS would cost us vital customers which we could have locked in to our Pharmacy before the other complex opens.

We really wish to action this PBS approval aggressively and leave nothing to chance.

1. In response, by email sent on 24 January at 8.16 am, Mr Morgan first queried whether Mr Bakshi was asking if they would need to open on the night of 9 March, a matter which he said he could discuss internally but which he did not believe they could achieve. He then noted that the change to 20 March 2020, which he described as a “soft opening the night prior”, had just been approved and “recruitment, marketing etc” had started. It does not appear, based on the evidence, that any steps were taken to open Coles Flagstone on the proposed earlier date.
2. By email sent on 24 January 2020 at 8.30 am, Mr Bakshi then made the following inquiry:

How many days before opening do the IT systems go in? Lets say a store was going to open Tomorrow 25/01/2020 - 1 am guessing all the stock (groceries) - and computer systems are in a week or 2 prior and tested?

Tills etc and docket printers?

1. By email dated 24 January 2020 also timed at 8.30 am Mr Morgan responded to Mr Bakshi’s inquiry in the following terms (as written):

Navin, the IT and registers should be in mid Feb but I am not sure if they can put sales through the system as it more about setting up all of the system including pricing etc which I would think is not loaded into the system until the store is ready to open. I can ask but I would think they can't print a ticket until about a week from opening.

Kenneth, at Flagstone we are trying to help the pharmacy in our centre get a pharmacy licence before the pharmacy across the road. This is triggered by the supermarket trading. How early could we put a sale through the registers?

Kenneth Clark, who we assume is the Kenneth referred to in Mr Morgan’s email, was also an addressee of Mr Morgan’s email.

1. Once again there was no evidence that this inquiry went any further. However, when examined, Mr Morgan was asked questions about Mr Bakshi’s request. He gave the following evidence:

Mr Flaherty: Did you know why he wanted a ticket?

Mr Morgan: No. Well, I would – no. I don’t, really. I would say – I don’t – again, based off the information from our first meeting and those various bits and pieces that he was asking for, that he was looking to see whether it was possible to print a ticket before the opening. But – so – but - - -

Mr Flaherty: And why – and did it cross your mind why he would want a ticket before the opening?

Mr Morgan: Well, I would say he was trying to look to see whether he could include that in his application. Again, no. I don’t know. That’s not – it wasn’t - - -

Mr Flaherty: And did you know why he would want to include a ticket before the opening in his application? There had – did Mr Bakshi discuss that with you?

Mr Morgan: No. As I say, the list of criteria for what he needed was pretty much – I don’t set what’s required and what’s not required, and I don’t really know what’s required and not required apart from what he had asked us – what we could do.

…

Mr Flaherty: I will take you to the email that you sent at page 59. As a matter of fairness, you say this is triggered by the supermarket trading?

Mr Morgan: Yes. And that was my mistake, yes.

Mr Flaherty: And how early can we put a sale through the registers?

Mr Morgan: Yes.

Mr Flaherty: So you were aware that it was to generate a fake sale that could be relied upon to demonstrate trading?

Mr Morgan: No. I wouldn’t say it’s a fake sale. It’s how soon you could print a ticket of which my understanding is you can print a ticket a week or so out. I don’t – like, I can’t tell you what he needed it for. I don’t - -

Mr Flaherty: You say in your answer, don’t you, Mr Morgan? It’s to help the pharmacy out?

Mr Morgan: I’m saying we’re trying to help the pharmacy in our centre to get a pharmacy license before the pharmacy across the road. This is triggered by the supermarket trading, how could we put a sale through the register. And it’s just a question mark. It’s not – I’m not asking them to do it, I’m just asking what’s possible. All I’m doing in there from what I was doing is just asking what Navin had asked of me, what’s possible and what’s not possible.

1. On 24 February 2020, Mr Bakshi emailed a photograph of shelving which had been installed that day, we assume in the pharmacy, to, among others, Mr Morgan and noted “[a]ll on track”. Mr Morgan responded informing Mr Bakshi, among other things, that the Coles Flagstone store manager was on site that week and that he would “run through with him in more detail the requirements [they] spoke of for opening”.
2. By email dated 1 March 2020, which appears to have been sent in anticipation of a meeting planned to take place the following Wednesday and in response to an express request on the part of Mr Bakshi to have the Coles Flagstone store manager present at that meeting, Mr Morgan wrote:

Navin, I can introduce you to the store manager if he is out there and we can try to speak with him if he does not have other meetings. He is aware of what is required and will work with us on the requirements on the Friday.

1. On Thursday, 5 March 2020, Mr Bakshi sent an email to Ann Mihulka and Mr Morgan suggesting a change to an advertisement for the “opening celebration weekend” on 21 and 22 March for the Flagstone Village Shopping Centre. In response Ms Mihulka informed Mr Bakshi that she believed that “Coles know what they are doing”. On 6 March 2020, Mr Morgan then sent an email addressed only to Ms Mihulka in which he wrote:

Ann, thanks, he is all over the place but we will get there. For info all on track to open the doors on the Friday night 6pm to 9pm.

1. On 17 March 2020, Mr Mihulka sent Mr Morgan a “word doc” for him “to put on letterhead and sign”. The attached document was a draft of what became the 17 March Letter included in the Stonehealth Application. It seems that on 18 March 2020 Mr Mihulka sent Mr Morgan a further copy of the document that became the 17 March Letter together with an alternate version of the draft to be used in the event that the sublease to Stonehealth was not finalised in time. On 19 March 2020, copies of the two versions of the draft provided by Mr Mihulka both bearing the date 17 March 2020 (which was the date included in the drafts) on Coles Developments’ letterhead signed by Mr Morgan were returned to Mr Mihulka.
2. As we have already observed, the Stonehealth Application was lodged on 20 March 2020 at approximately 12.14 am. We pause to note that based on the evidence as recited to this point the primary judge found ([at 94]) that if Mr Bakshi’s plan as formulated in the 19 September Email had been implemented it might “have crossed the line” in the way described in *Hope* at [65]. However, his Honour went on to find (at [104]–[106]) that the planned opening for Friday, 20 March 2020 was not “cosmetic”; that a site meeting took place at Flagstone Village Shopping Centre on 18 March 2020 to discuss aspects of the planned opening on 20 March 2020; and that, at the time Mr Morgan signed it, the contents of the 17 March Letter were accurate. His Honour found that it accorded with the day of opening that Mr Morgan, and therefore Coles Developments, had in mind as at 6 March 2020 as evidenced by his email of that date, and which remained as at 17 and 18 March 2020.
3. These findings were open on the evidence and are not the subject of challenge save insofar as Mr Darnell contends that the plan evidences that the opening of Coles Flagstone was a sham, a matter which we address below.
4. As set out at [22]-[28] above, on 11 November 2020 Mr Morgan provided the November Letter to the Authority and on 9 December 2020, Ann Mihulka & Associates, in response to a request from the Authority, provided further material to it.
5. In the 17 June Letter which was included in Ann Mihulka & Associates’ letter dated 9 December 2020 (see [28] above) Mr Morgan noted that the reason for opening Coles Flagstone on 20 March 2020 was because of the rapidly evolving situation brought on by the COVID-19 pandemic. Mr Darnell submitted that this was the first time the COVID-19 pandemic had been stated to be the reason for the early opening and that it was inconsistent with the settled plan which emerged from the documentary evidence set out above.
6. In his examination in chief Mr Morgan was asked about the stated reason in the 17 June Letter for opening Coles Flagstone on 20 March 2020. He gave the following evidence:

Mr Flaherty: You would consider that that document would have conveyed to somebody that – the ordinary reader that the decision to open on 20 March was because of COVID?

Mr Morgan: Related to COVID, yes.

Mr Flaherty: And is that your evidence: that you believe that the decision to open on 20 March was due to COVID-19?

Mr Morgan: Managing COVID-19, yes.

…

Mr Flaherty: An acceptance that there was a requirement for the soft opening – that you say in your evidence before the court today – is that the reason that this store opened on 20 March was because of COVID-19?

Mr Morgan: In managing COVID-19, yes, how we would operate the centre. Yes.

…

Mr Flaherty: And when you say the executive decision, was that your decision or somebody else’s?

Mr Morgan: No. So that’s my decision with the store manager on the day around how we were going to deal with COVID, which was just – yes, causing a huge amount of worry and concern and grief. Yes.

Mr Flaherty: On 20 March, it was?

Mr Morgan: Yes, it was. Yes. Yes.

Mr Flaherty: Okay. And so what was the decision? It was between you and who?

Mr Morgan: And the store manager. So the store manager had the okay from a regional manager. It was back to him to make the decision whether he would open or not open, and as for the centre, that sat with me, and, again, were just trying to manage how we were going to queue people, how we were going to do quite a few things in that centre when – when it actually opened. And the fear was on the Monday that – and we had the police – we had all sorts of people lined up for - - -

Mr Flaherty: Sorry. On the Monday? I didn’t catch - - -?

Mr Morgan: For – for the – for the Saturday opening.

...

Mr Flaherty: You accept that, yes, but just on this point, just so I can get some clarification, it was your decision with the store manager, was it?

Mr Morgan: Yes.

Mr Flaherty: And what was that decision?

Mr Morgan: The decision was to try and look at opening at – for a couple of hours to basically see how things would – how we would manage COVID, like, things that we looked at during the day – whether they would work or not work. At the time there were things such as, you know, people talking about a 1.5 metre rule, a two-metre rule, did we have the corralling side by side and where we’re going to have people touching side by side or – you know, was the queue going to end up that long that it was – we weren’t going to manage that, how do people get to the toilets. How do people access other tenancies within the tenancy so - - -

…

Mr Flaherty: And when do you say was the executive decision made?

Mr Morgan: Within a few hours of when – like they had the ability to open so I asked the question probably a few hours prior to that – so on that day.

Mr Flaherty: On the 20th a decision - - -?

Mr Morgan: Yes, yes.

Mr Flaherty: The executive decision was made on - - -?

Mr Morgan: Yes.

Mr Flaherty: - - - the 20th?

Mr Morgan: Yes, yes.

Mr Flaherty: Okay. And it was a decision between yourself and the store manager?

Mr Morgan: Yes, understanding that I looked after the centre. The store manager is responsible as a tenant, like if he was in agreeance to open then, yes, he would open, but yes, with myself and the store manager.

Mr Flaherty: And so it was unrelated to anything to do with Mr Bakshi – the decision?

Mr Morgan: That decision, yes. So I will say – so part of the decision with the COVID was that Coles were looking, actually, and that put a bit of quash on that opening on the Friday, again, because of the concerns of, you know, things not being set up. We also said on the Friday, if we did open – or the proviso was put on the operators is if we did open – if the store managers – if they did open and it got onto Facebook and it got out of control so we had the ability to shut the doors. So – so really all we were looking to do was try and test how things would work on that night.

1. Mr Morgan did not agree that the draft of the 17 June Letter provided to him by Mr Mihulka was the first mention of COVID-19 and did not agree that he “went along” with the suggestion that the opening was associated with COVID-19. While Mr Morgan agreed that there had been a plan for some time to open on 20 March 2020, he said that ultimately the decision to open was made by him together with the Coles Flagstone store manager. Mr Morgan had authority to make the decision to open the shopping centre while the store manager was authorised to make the decision to open Coles Flagstone.
2. Mr Morgan gave some further evidence about the 17 June Letter and the decision to open on 20 March 2020:

Mr Flaherty: Two hours beforehand is the basis for you to provide the letter dated 17 June 2020?

Mr Morgan: There was a lot that went on during the days, the day, and the days before that with Coles and, again, going backwards and forwards as to whether they would open, whether the issue would be that opening the night before would cause problems with, more problems with panic buying and so on. So at one point in time in those few days, they were looking at not opening to then getting back to a point where I asked if they could open, to help - - -

Mr Flaherty: And Mr Morgan, was that by email communication?

Mr Morgan: No. It wasn’t via email communication.

Mr Flaherty: But not a single email to a single staff member altering (sic) them to the potential that they may have to be in the store?

Mr Morgan: No. There, there was no communication except for discussion?

Mr Flaherty: Not even asking for someone to work as a – on the till, someone to work as a customer service officer and take the sales?

Mr Morgan: Yes. So there was discussion around it. No communications as far as, it was just verbal talking about it - - -

1. Mr Morgan did not accept that the 17 June Letter and any subsequent material provided in support of the Stonehealth Application that referred to COVID-19 was false. Nor did he agree that he simply signed material provided to him for the purpose of the Stonehealth Application without considering it. He said “I read it all, understood it all and even amended it at times”.
2. Mr Morgan was also asked about the 11 November Letter. The following exchange took place:

Mr Flaherty: As a matter of fairness – do you recall sending an email directly to the Australian Community Pharmacy Authority?

Mr Morgan: Yes. At the request of Ann and Stuart, or Stuart.

Mr Flaherty: Stuart asked you to send that?

Mr Morgan: He asked if I could – if I would be willing to do that, and I said yes, if you provide the address and pretty much tell me what you would like me to say, I’m happy to do that, and I did.

Mr Flaherty: And you had no previous dealings with the Australian Community Pharmacy Authority, had you?

Mr Morgan: No. No.

Mr Flaherty: So it’s a matter of you just doing what you were asked?

Mr Morgan: Doing what I was asked, but I was willing to do that. Again, in helping Navin as a tenant to achieve a pharmacy licence. So – but I didn’t just blindly take it, sign it, send it, so. And I think – you know, there’s a few where I did actually edit them.

1. The primary judge’s observations and findings about Mr Morgan’s evidence are set out at [53] above. As we have already observed the primary judge noted Mr Morgan’s evidence that after the 17 March Letter “COVID-19 had happened” effectively putting the plan that had been in place up to that point in a state of flux.
2. The primary judge accepted Mr Morgan’s evidence because, among other things, it was consistent with the contemporaneous documents and the evidence of other witnesses. Mr Darnell submitted that was not so and that Mr Morgan’s evidence ought not to have been accepted.
3. As a general matter of approach to Mr Morgan’s evidence Mr Darnell said that because he, rather than Stonehealth, was left to call Mr Morgan to give evidence, his counsel, Mr Flaherty, was not able to cross-examine Mr Morgan, save on a very limited basis. While senior counsel for Stonehealth cross-examined Mr Morgan he did not do so with the purpose of demonstrating the falsity of any of the material put to the Authority. Mr Darnell said that accordingly, save for the very narrow ground upon which he was permitted to cross-examine, Mr Morgan’s evidence was not tested by way of a “head on challenge to its veracity”. For that reason Mr Darnell was critical of the primary judge’s approach to Mr Morgan’s evidence and submitted that his Honour did not, in his consideration of that evidence, acknowledge that to be so and made no adjustment for the fact that Mr Morgan’s evidence had not gone through the “usual testing process” that would be expected in a contested trial.
4. The primary judge was under no obligation to make any adjustment in the approach to Mr Morgan’s evidence. Mr Darnell bore the onus of proving his case and acknowledged as much. It was not for Stonehealth to call witnesses to assist Mr Darnell. Mr Darnell made a forensic decision to call Mr Morgan to give evidence and to examine him. Stonehealth was then given the opportunity to cross-examine Mr Morgan, as is usual. Given the decision to call Mr Morgan and the process that was followed, there is no reason why the primary judge should treat Mr Morgan’s evidence any differently or discount it in any way.
5. The primary judge provided a detailed summary of Mr Morgan’s evidence and made observations about his demeanour as a witness and the nature of the evidence all of which led to and were provided by way of explanation for his Honour’s acceptance of that evidence (see [52]-[53] above).
6. Mr Darnell contended that the contemporaneous documents set out above establish that from at least January 2020 there was a covert plan to open Coles Flagstone on 20 March 2020 which was put into place for the sole purpose of assisting Stonehealth in its Pharmaceutical Benefits Scheme (**PBS**) application. The documentary trail relied on by Mr Darnell establishes a number of things: the importance to Stonehealth of being first in time to lodge its application under s 90 of the NH Act; that success of its application depended upon its ability to establish to the Authority’s satisfaction the requirements in the Rules; central to those requirements was the requirement that Coles Flagstone be open for business on the day the application was lodged; and that Mr Morgan, as the person responsible for the development and opening of the Flagstone Village Shopping Centre, was prepared to assist Stonehealth to make its application and achieve its goal of approval by the Secretary. Indeed, as the primary judge found to be the case, until 17 March 2020 there was a plan in place for Coles Flagstone to open on 20 March 2020.
7. The false information provided to the Authority is alleged to be the 17 June Letter which states that the advent of the COVID-19 pandemic and concern about potential issues with the expected influx of customers at the grand opening of the Flagstone Village Shopping Centre was the reason for the early opening of Coles Flagstone. It is said to be false because the contemporaneous documents tell a different story about a long planned early opening for the purpose of assisting Stonehealth in its PBS application. But, having heard Mr Morgan’s evidence, the primary judge found that the stated reason for the early opening in the 17 June Letter was not false.
8. As we have already observed, his Honour accepted Mr Morgan’s evidence that everything had been on track for a 20 March 2020 opening, albeit subject to confirmation and change, and the managerial impact of the threat presented by COVID-19 and its ramifications changed the landscape and what had otherwise been planned for Coles Flagstone and the Flagstone Village Shopping Centre. The former is supported by the contemporaneous documents on which Mr Darnell relies; they show that the relevant stakeholders were working towards a soft opening of Coles Flagstone on the evening of 20 March 2020. The latter is based on a combination of the primary judge’s assessment of Mr Morgan’s oral evidence and the stage of the COVID-19 pandemic, as it was understood at the time. These findings are not glaringly improbable as Mr Darnell contends. They were available findings based on the evidence before the primary judge.
9. Mr Darnell also relied on the lack of crowds on 20 March 2020 and a failure to explain how the limited trading activities which took place on that day could reduce panic buying or assist in preparing for trade in light of the pandemic. But, the lack of explanation of these matters does not make the primary judge’s acceptance of Mr Morgan’s evidence and his Honour’s findings glaringly improbable. Mr Morgan was simply not asked to explain the detail of how the opening would assist. The examination was limited to the purpose of the opening and how the decision to open was made.
10. In accepting Mr Morgan’s evidence, the primary judge also drew comfort from the fact that it was consistent with the evidence of other witnesses: see *Stonehealth (No 4)* at [123]. Mr Darnell submitted that there was no such consistency because the evidence of those other witnesses did not go to the reason why Coles Flagstone was open. That is so. The witnesses in question, Messrs Howard and Nguyen and Ms Devlin, gave evidence of their attendance at Coles Flagstone on the evening of 20 March 2020 and their purchase of goods at that time. Their evidence goes to the fact that Coles Flagstone was open.
11. Neither Mr Howard nor Ms Devlin are related to Stonehealth. Mr Howard is a construction worker who at the time was working at the shopping centre and Ms Devlin is a pharmacy group manager for Pharmacy Alliance who happened to be working back late assisting at Stonehealth’s pharmacy (which was to trade as a “Watson’s Pharmacy”). Mr Nguyen is one of the two pharmacists who was to be licensed to dispense drugs at the pharmacy in issue. The primary judge summarised Mr Howard’s evidence at [124]-[125], Ms Devlin’s evidence at [126] and Mr Nguyen’s evidence at [127]-[129] of *Stonehealth (No 4)*.
12. Given their respective roles, it is not surprising that these witnesses did not address the purpose for which Coles Flagstone was open on 20 March 2020. But that does not make the primary judge’s statement about consistency with Mr Morgan’s evidence incorrect. Mr Morgan also gave evidence about the fact that Coles Flagstone was open on the evening of 20 March 2020 (see [117]-[118] of *Stonehealth (No 4)*). To the extent Mr Morgan did so, his evidence was consistent with that given by Mr Howard, Ms Devlin and Mr Nguyen.
13. The primary judge’s findings were not glaringly improbable. His Honour assessed Mr Morgan’s evidence and found him to be a reliable witness whose evidence should be accepted. We can see no basis upon which his Honour’s findings in that regard should be disturbed. It follows that the contention that false or misleading information was provided to the Authority either by silence or in the 17 June Letter could not be made out and the primary judge’s finding that Mr Darnell had not established that to be so should not be disturbed.
14. The next question to address is the alternative basis on which Mr Darnell puts this ground of appeal, namely whether the primary judge erred in not finding that the limited trading activities on 20 March 2020 were a sham.
15. That Stonehealth and Coles Developments worked together on a strategy to open Coles Flagstone on the day before the official opening of the shopping centre in order to support the Stonehealth Application, i.e., by assisting Stonehealth to gain the advantage of first lodgement ahead of any application by a competitor, is not of itself improper or fraudulent. Whether the conception and implementation of the strategy and ultimately the opening was a sham will depend on the circumstances.
16. Mr Darnell relies on the strategy devised by Stonehealth and Coles Developments for an early soft opening on the evening of 20 March 2020, coupled with the number and nature of the members of the public who attended the store that evening, to contend that the primary judge’s finding that the strategy to open the store was not a sham cannot be sustained.
17. The primary judge was satisfied that the attendance by Mr Howard and Ms Devlin and their purchases were in no way a sham and, although, Mr Nguyen was a director of Stonehealth, accepted his evidence and found that the purchases he made were not a sham despite him having some advance knowledge that Coles Flagstone would be open.
18. For present purposes, it is instructive to set out Mr Howard’s evidence:

Mr Flaherty: How – do you know the pharmacy at Flagstone?

Mr Howard: I was the site manager who built that project so I knew those tenants previously, like, when they were working there.

Mr Flaherty: The – when you say project, the whole of the - - -? The whole - - -shopping centre?

Mr Howard: The whole shopping centre, yes.

Mr Flaherty: So you became – you got to know the pharmacists, did you, or - - -?

Mr Howard: I don’t know them personally at all, no, but I know who they are, so I had dealings with them as part of their tenancy.

Mr Flaherty: So in terms of the contact that you had from the – was it from the legal representatives for - - -?

Mr Howard: Yes.

Mr Flaherty: - - - the pharmacists?

Mr Howard: Yes.

Mr Flaherty: And did you have any understanding of how they would know who you were?

Mr Howard: Only – I would – yes, I would imagine that they would have found out, perhaps, from Coles.

Mr Flaherty: So you had no discussions with the pharmacy - - -?

Mr Howard: No.

Mr Flaherty: prior to – in relation to being there on 20 June, were you talking to the - - -?

Mr Howard: No.

Mr Flaherty: to the pharmacists? Sorry, 20 March. I withdraw?

Mr Howard: That’s right.

Mr Flaherty: So you hadn’t – had any discussions with anybody else there in the – at the store - - -?

Mr Howard: No.

Mr Flaherty: That night?-

Mr Howard: That night.

Mr Flaherty: Yes?

Mr Howard: Of 20 March?

Mr Flaherty: Yes?

Mr Howard: Yes.

…

Mr Flaherty: And how did you become aware of the whole supermarket, well, being opened?

Mr Howard: I recall – I don’t know exactly which day I was told but I knew at least two or three days prior to them opening up on that evening that they were going to open on that evening. You know, it’s quite typical for a supermarket to open up for a soft opening.

Mr Flaherty: And you don’t recall who said that to you?

Mr Howard: I’m pretty sure it was John Morgan who would have told me that.

Mr Flaherty: And he informed you that, on Friday night, the store was going to be opened?

Mr Howard: That’s right, for anyone who walked in, yes.

Mr Flaherty: And you availed yourself of that opportunity and were you finishing for the day then?

Mr Howard: I was finishing for the day and, yes, I had to be out there early the following morning as well. But, yes, I was finishing that day and when I was aware that it was open, so I walked around and admittedly got a packet of toilet paper at that time and some stuff for dinner that night.

Mr Flaherty: Did you notice anything – was anybody taking photos of you or did you notice that?

Mr Howard: I didn’t notice that, no.

Mr Flaherty: Did you notice anything in relation to the other people that were shopping there that was unusual?

Mr Howard: No, not particularly. I do remember seeing maybe half a dozen other people around the store who were just quietly shopping.

Mr Flaherty: But you didn’t - - -?

Mr Howard: I don’t know who they were.

…

Mr Flaherty: And how did you – do you recall how you paid for the items that you purchased that night?

Mr Howard: I paid for – by cash and it was normal for me at that time. I normally used to just keep $100 cash on me and that’s what I would buy groceries and stuff with.

Mr Flaherty: You just, as a habit, just kept $100 cash?

Mr Howard: Yes.

…

Mr Flaherty: Generally. For grocery shopping?

Mr Howard: Yes.

…

Mr Flaherty: Were you asked for your docket by anybody?

Mr Howard: I was, yes.

Mr Flaherty: And who asked for your docket?

Mr Howard: The legal team for the pharmacy.

Mr Flaherty: And when was that requested?

Mr Howard: Probably after the – prior to the 18th.

Mr Flaherty: Prior to 18 - - -?

Mr Howard: Of June just gone.

Mr Flaherty: And you had it?

Mr Howard: No, I couldn’t find any – like, I never – I rarely keep receipts from shopping at all.

Mr Flaherty: No. And nor do I. But on the date of 20 March, no one asked for your docket?

Mr Howard: No.

1. Mr Howard’s evidence quite clearly supports the primary judge’s findings. He was unconnected to the pharmacy, had learnt Coles Flagstone would be open on the evening of 20 March 2020 (prior to its official opening) and, upon seeing that it was, entered the supermarket and did some shopping. Ms Devlin’s evidence is to like effect. It is not necessary to set it out.
2. That there may not have been significant numbers of customers and thus significant sales volume does not support a finding that the plan to open and the opening on 20 March 2020 was a sham. The strategy which was devised as between Stonehealth, its advisors, Ann Mihulka & Associates, and Coles Developments was permitted under s 90 of the NH Act. It did not “cross the line”. Coles Developments was prepared to assist its tenant to achieve its objective; it did so by working towards a soft opening of Coles Flagstone on 20 March 2020. Ultimately it was a decision for Coles Supermarkets as to whether that opening would proceed. It did and the evidence before the primary judge established that Coles Flagstone was open to the public and that members of the public took advantage of that, entered the store and purchased groceries.
3. Mr Darnell has not established the alleged error in the primary judge’s reasons. The findings made by his Honour were open on the evidence. They were not glaringly improbable. That being so ground 2 must fail.

## Ground 3: mandatory procedures not observed

1. By this ground Mr Darnell challenges the primary judge’s finding that the Authority was entitled to take into account the 11 November Letter, contrary to the operation of s 9 of the Rules. This ground coincides with review ground 6 and relies on s 5(1)(b) of the ADJR Act, i.e. it contends that procedures that were required by law to be observed in connection with the making of the decision were not observed.

### Mr Darnell’s submissions

1. Mr Darnell submitted that in recommending an application for approval the Authority is required to comply with the Rules and that s 9 of the Rules places a mandatory restriction on the Authority as to the information it can consider. As set out at [14] above, s 9 provides that the Authority may consider information “provided by” an applicant only if it was given at the time the application was made or the Authority requested it.
2. Mr Darnell observed that the information in the 11 November Letter was not provided at the time Stonehealth made its application nor at the request of the Authority but that it informed the Authority’s decision to defer making a substantive decision in respect of Stonehealth’s application and, instead, to request further information. That is, the complaint concerns the Authority’s consideration of the 11 November Letter shortly after it was first received, and not its consideration of the letter after it was received again as an annexure to Mr Morgan’s statutory declaration in response to the Authority’s invitation on 23 November 2020 (see [22], [24] – [25] above).
3. Mr Darnell submitted that the primary judge erred in finding that the Authority’s consideration of the 11 November Letter did not breach s 9 of the Rules as Coles Developments was not acting as Stonehealth’s agent or on its behalf in that communication to the Authority. He contended that both Mr Morgan’s and Mr Mihulka’s evidence was to the contrary. Mr Darnell also submitted that the primary judge erred by concluding that the 11 November Letter was “no more ‘out of the blue’ than correspondence from Mr Stoddart” in circumstances where Mr Stoddart was responding to a request to provide correspondence.
4. Mr Darnell contended that s 9 of the Rules should be construed in a manner which upholds the integrity of the Authority’s policy of chronological preferment and that any interpretation which allows applicants to lodge applications prematurely and without sufficient information but thereafter to direct a third party to send material supportive of its application to the Authority on its behalf should not be maintained. Mr Darnell submitted that there is no lawful basis in the NH Act for the Authority to consider third party interests as relevant to its decision making power to recommend an application for approval.
5. Mr Darnell submitted that the primary judge erred by failing to construct s 9 of the Rules in accordance with its purpose and by constructing “provided by an applicant”, as appears in s 9, to mean “provided in support of” an application.

### Consideration

1. The primary judge found that in sending the 11 November Letter, Mr Morgan was not Stonehealth’s agent. Mr Darnell seeks to impugn that finding by reference to:
2. the following correspondence which was exchanged on 11 November 2020:
   1. an email sent at 2.05 pm by Mr Mihulka to Mr Morgan which attached a draft letter addressed to the Authority. The cover email provided:

Please see attached. If you are happy with the content, please put on letterhead, date and sign.

I will call to discuss.

* 1. an email sent at 2.30 pm by Mr Morgan to the Authority attaching the 11 November Letter. There were some differences between the text of the draft provided by Mr Mihulka and the text of the 11 November Letter; and

1. the following evidence given by Mr Mihulka in cross examination:

Mr Flaherty: You’re familiar, obviously, with the rules; section 9 being part of the rules, as it’s colloquially referred to?

Mr Mihulka: Yes.

Mr Flaherty: And you’re familiar with that?

Mr Mihulka: Yes.

Mr Flaherty: And do you recall any material being submitted by Stonehealth that was not requested?

Mr Mihulka: Yes.

Mr Flaherty: And at whose direction was that material - - -? That was - - -- - - submitted?

Mr Mihulka: That was, yes, a request from my client.

Mr Flaherty: So Mr Bakshi, is that your client - - -?

Mr Mihulka: Yes.

…

Mr Flaherty: So Mr Bakshi asked you to prepare a draft document on the 11th – dated 11 November?

Mr Mihulka: 11 November, it – I assume, yes. Well, I - - -? If it was submitted prior – if it was submitted without request from the Authority, then that would have been on instructions from my client.

Mr Flaherty: So on instructions from your client, were you requested to draft a letter for Mr Morgan?

Mr Mihulka: I believe so.

Mr Flaherty: And did you have any dealings with Mr Morgan, or was it just provided to Mr Bakshi?

Mr Mihulka: I had conversations and emails with Mr Morgan, yes.

Mr Flaherty: And do you recall who you provided the draft to?

Mr Mihulka: Obviously, Mr Morgan, if he was to sign it.

Mr Flaherty: And – but Mr Bakshi told you what to say in the draft. Is that accurate?

Mr Mihulka: No. Not what to say, no.

Mr Flaherty: So where did you get the information to prepare the draft letter?

Mr Mihulka: From discussions with Mr Morgan.

Mr Flaherty: And it was Mr – and correct me if I’m wrong. It was Mr Bakshi that directed you to ask Mr Morgan to send that to the Authority?

Mr Mihulka: Yes, to the best of my recollection.

Mr Flaherty: And why was that?

Mr Mihulka: To – in the hope that the Authority wouldn’t defer the application. Particularly with the delay since the application had been submitted, I think Mr Bakshi was quite anxious to have the approval activated as soon as possible.

1. There are a number of observations to be made about the 11 November Letter.
2. First, on its face the 11 November Letter was signed by Mr Morgan as state development manager of Coles Developments and, it follows, provided by that company. In so far as the Authority was concerned, there was no impediment to the Authority having regard to it as it knew nothing about what caused Mr Morgan to send the letter.
3. Secondly, based on the evidence relied on by Mr Darnell it is open to find that the 11 November Letter was provided by Mr Morgan to the Authority at the request of Stonehealth rather than on its behalf or as its agent. That he would do so is not surprising given that Coles Developments as the developer of the Flagstone Village Shopping Centre had an interest in assisting Stonehealth, which was to operate the pharmacy in its shopping centre, to obtain PBS approval and Coles Supermarkets, the operator of Coles Flagstone, had information which could assist the Authority in its deliberations as to whether Coles Flagstone had traded on 20 March 2020. Mr Morgan’s evidence supports such a finding. He readily accepted that in signing the 11 November Letter he was assisting Stonehealth to obtain its recommendation for approval as a PBS provider. Mr Morgan gave the following evidence about his willingness to assist Stonehealth:

Mr Flaherty: And your earlier evidence was that you would do whatever you could to assist Mr Faci with his application or on – Mr Faci on behalf of Stonehealth with their application; is that correct?

Mr Morgan: Yes, yes.

Mr Flaherty: And that included signing any document that they had provided to you in draft; is that correct?

Mr Morgan: If that’s what I – if that helped them obtain a licence, I will sign documents for any tenant in their applications for anything that they sort of need. Again, not blindly, I read them and I understand them and he was trying to obtain a licence.

We assume that the reference to “Mr Faci” is an error and that Mr Flaherty in fact referred to “Mr Bakshi”.

1. Mr Morgan’s evidence supports a finding that in acting to assist Stonehealth to obtain PBS approval he had regard to Coles Developments’ commercial imperatives and exercised his own judgment. He did not simply act at the behest of Stonehealth. While Mr Morgan may have acted *at the request* of Stonehealth, as the primary judge found to be the case, the evidence does not support a finding that he acted as Stonehealth’s agent. There was no error in that finding by the primary judge and no error in his Honour’s conclusion that the Authority was thus permitted to consider the 11 November Letter. For those reasons ground 3 fails.
2. Stonehealth raised two further bases on which it said this ground must fail. While it is not necessary for us to consider them, for completeness we set them out and address them briefly below.
3. First, Stonehealth submitted that the Authority did not consider the 11 November Letter (as originally received, unsolicited) when determining the Stonehealth Application. It said that it can be inferred that the letter and the further information received from Mr Darnell’s solicitor prompted the Authority to seek further information from Stonehealth about the date on which Coles Flagstone opened. Stonehealth contended that in circumstances where the question of whether Coles Flagstone opened on 20 March 2020 was a live issue, the Authority was obliged, as a matter of procedural fairness, to seek the further information from Stonehealth, which it then provided. It was that latter information which the Authority then considered when determining the Stonehealth Application, which it was entitled to do under s 9(b) of the Rules.
4. As Mr Darnell accepted, procedural fairness applies to the Authority: see *Murray v Australian Community Pharmacy Authority* [2017] FCA 705 at [34]-[35]. However, Mr Darnell submitted that the Authority’s request for further information arose after it impermissibly considered the 11 November Letter and it was thus tainted. The flaw in this submission is that it fails to recognise that the Authority also had before it the material provided by Mr Darnell’s solicitor, Mr Stoddart. Mr Darnell accepted that the despatch of the latter material was not connected to the 11 November Letter.
5. Secondly and relatedly, Stonehealth submitted that if this Court formed the view that the Authority was not permitted to take the 11 November Letter into account and impermissibly did so, the Court should nevertheless dismiss this ground. That is because it could not be satisfied that such a failure was anything more than a procedural irregularity which was not material to the Authority’s ultimate decision that the Secretary should approve the Stonehealth Application. Stonehealth submitted that if the Authority disregarded the 11 November Letter, the letter from Mr Darnell’s solicitor would have, as a matter of procedural fairness, required the Authority to seek the further information from Stonehealth that it in fact sought. In turn, Stonehealth would have provided the information that it in fact did provide. Thus, Stonehealth submitted that it could not be said that not taking the 11 November Letter into consideration could have resulted in a different outcome or that compliance with s 9 of the Rules could have realistically resulted in a different outcome, referring to ***Hossain*** *v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at [30]-[31]; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at [45]; and ***MZAPC*** *v Minister for Immigration* (2021) 95 ALJR 441at [51]; [2021] HCA 17.
6. At least at a factual level, this submission has force. It is plain from the minutes of the Authority’s meeting which took place on 13 November 2020 that on 12 November 2020 the Authority received material from Mr Stoddart on behalf of Mr Darnell, which as we have already observed was unrelated to the 11 November Letter. At the meeting on 13 November 2020 both the 11 November Letter and the material provided by Mr Stoddart was before the Authority. Contrary to Mr Darnell’s submission it is not evident and it is not open to us to infer that, absent the 11 November Letter, the Authority, armed only with the Stonehealth Application and Mr Darnell’s material, would have rejected the Stonehealth Application at that time.
7. Faced with the material from Mr Darnell alone, the Authority would have been required to bring the content of that material to the attention of Stonehealth and to afford it an opportunity to respond to the assertions made by Mr Darnell about the day on which Coles Flagstone commenced trading. To do otherwise would have caused the Authority to fall foul of its procedural fairness obligations. It is tolerably clear that once that occurred Stonehealth would very likely have provided the Authority with the same material that it submitted in response to the Authority’s invitation in its 23 November 2020 email (see [25] above).
8. Stonehealth’s submission implicitly accepts that the implied statutory test of materiality applies to the ground of review in s 5(1)(b) of the ADJR Act. However, while the test of materiality has been held to apply to other parts of s 5 of the ADJR Act, for example subs 5(1)(e) and (f) of the ADJR Act (as to which see *Mohamed trading as Billan Family Day Care v Secretary, Department of Education, Skills & Employment (No 2)* [2020] FCA 1749 at [38]), the question of whether it applies to s 5(1)(b) is unresolved.
9. That said, in our view we do not need to resolve whether it is a necessary element of the statutory review ground in s 5(1)(b) of the ADJR Act that any failure to observe procedures that were required by law to be observed in connection with the making of the decision in question be shown to be material to the outcome of the decision in the sense described in relation to establishing jurisdictional error in cases such as *Hossain* and *MZAPC*. That is because if materiality is not an element of establishing the review ground, it is certainly a relevant matter when it comes to exercising the discretion to grant relief under s 16 of the ADJR Act. In the circumstances of this case, where any breach of s 9 of the Rules by the Authority in considering the 11 November Letter at its meeting on 13 November 2020 could not have made any difference to the ultimate decision, we would not grant any relief even if the review ground was otherwise made out.
10. For completeness we note that in his amended originating application Mr Darnell also sought review of the Authority’s recommendation decision and the Secretary’s approval decision under s 39B(1A) of the Judiciary Act. However, the grounds of review relied only on s 5 of the ADJR Act and no ground was pressed nor, it seems, submissions made before the primary judge or on appeal relying on that alternative basis for relief. Had Mr Darnell expressly raised a ground of review on the same basis leading to relief under s 39B of the Judiciary Act, in the context of considering whether the alleged failure to observe the procedure set out in the Rules, if made out, was a jurisdictional error, the question of materiality would arise for consideration and the same result would follow.

# conclusion

1. As Mr Darnell has not made out any of his grounds of appeal, the appeal should be dismissed with costs.
2. We will make orders accordingly.

|  |
| --- |
| I certify that the preceding one hundred and fifty-one (151) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Markovic, Thomas and Stewart. |

Associate:

Dated: 11 May 2022